This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

BL
BL
GW

CASES

ON

CIVIL PROCEDURE

SELECTED AND ANNOTATED

By

WILLIAM H. LOYD

Of the Philadelphia Bar
Assistant Professor of Law in the University of Pennsylvania

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

COPYRIGHT 1916
BY
THE BOBBS-MERRILL COMPANY

INTRODUCTORY NOTE

The purpose of this volume is to point out through selected cases, the principal problems of civil procedure, to explain how they were approached at common law and to indicate how they are commonly dealt with in modern courts. Such a course it is believed will not only prepare the student for the more intelligent study of the procedure of the state in which he expects to practice, but will also assist him in those branches of substantive law that are rooted in procedure. It is hoped, too, that in schools where the local practice alone is taught and in the office, preceptor and student may find here material useful for comparative study. Indeed, as the practice of the law tends in this country to extend beyond state boundaries, it becomes increasingly dangerous to restrict one's information to the methods of a single locality. While one can hardly expect to become expert in the daily routine of courts other than those in which his life's work is centered, a broad comprehensive view of the more important points upon which a diversity of practice may be anticipated is an equipment not to be despised.

There is another reason why the ground-work of procedure should be studied more attentively than in the past. Procedure is, today, perhaps the weakest spot in our system of jurisprudence. Developed to meet the needs of a state of society that has long since ceased to exist, amended often by careless legislation, it is a forlorn patchwork that any one can attack and few defend. Change is inevitable and it is most important that reform when it comes should be intelligently directed; that the problems of comparatively easy solution should not be confused with those that are fundamentally difficult; and that the subject be treated as a whole, with a view to the development of an orderly, practical system, as simple as is compatible with the complexity of modern civilization. In approaching the subject no theoretical notions, no doctrinal discussion can equal the study of cases in which the very points have arisen. In fact, there is no better test for determining whether any doubt or difficulty is real or purely imaginary than the crude experience of life itself.

The first part of the book deals with parties to actions, and the forms of and proceedings in actions, leading up to pleading; but with the exception of a few cases on the plaintiff's statement of claim and brief mention of the motions based on the pleadings after verdict, pleading has been omitted. This is not because it is not an important part—perhaps the most important part—of procedure, but because

excellent case books on that subject are available and it was thought best that the instructor be given the opportunity to choose between common law and code pleading. The cases leading up to that subject are adapted to either course. The remainder of the book deals with trials, judgments, executions, and appeals, topics greatly neglected in law courses although it is difficult to see why, since they include many stimulating problems. Perhaps the size of the subject is a deterrent. In fact, in spite of a real effort at condensation it is not probable that all the cases printed can be read in course in the number of hours that can be spared in an already crowded curriculum. The instructor, therefore, should select those best suited to his own needs, using the others for occasional reference. Even so, many points worthy of full discussion have been forced into the notes.

When this course was first offered in the Law School of the University of Pennsylvania, in the fall of 1910, it was in the nature of an experiment. That it has commended itself to the Faculty who have observed the results, would indicate that a real gap in the curriculum has been filled.

TABLE OF CONTENTS

CHAPTER I

The Court 1

CHAPTER II

Parties 35
Section I—In General 35
II—Remedial Interest 47
III—Joinder of Parties 57
(a) Plaintiffs 57
(b) Defendants 80
IV—Personal Disability 104
(a) Infants 104
(b) Married Women 111
(c) Insane Persons 124
(d) Aliens 133

CHAPTER III

Actions 143
Section I—Actions 143
(a) Ejectment 146
(b) Forcible Entry and Detainer 164
(c) Dower 170
(d) Waste 175
(e) Account 179
(f) Covenant 186
(g) Debt 189
(h) Assumpsit 197
(i) Trespass 213
(j) Case 221
(k) Detinue 225
(l) Trover 234
(m) Replevin 238
II—Abolition and Consolidation of Forms of Actions 243
III—Public Civil Actions 253
(a) Quo Warranto 253
(b) Mandamus 259
(c) Prohibition 266
IV—Venue of Actions 269
V—Commencement of Actions 281
(a) Process 281
(b) Appearance 301
(c) Statement of Plaintiff's Claim 309

CHAPTER IV

Trial 331
Section I—Modes of Trial 331
II—The Jury 342
(a) Jury Process 342
(b) Challenges 345

III—Process for Witnesses 370
IV—Right to Open and Close 384
V—Demurrer to Evidence 388
VI—Nonsuit 393
VII—Direction of Verdict 410
VIII—Arguments of Counsel 419
IX—Charge of the Court 426
X—Custody and Conduct of Jury 438
XI—Verdict 458
XII—Motions After Verdict 470
(a) New Trial 472
(b) Judgment non Obstante Veredicto 486
(c) Arrest of Judgment 488

CHAPTER V

Judgment 495
Section I—Rendition and Entry 495
II—Judgment by Confession 509
III—Judgment by Default 522
IV—Amendment of Judgments 531
V—Opening and Vacating Judgments 540
VI—Collateral Attack 546
(a) Personal Actions 546
(b) Proceedings in Rem 563
(c) Probate and Administration 572
VII—Res Judicata 577
(a) Merger 577
(b) Estoppel 594
VIII—Lien of Judgments 621
IX—Actions on Judgments 638

CHAPTER VI

Execution 647
Section I—Issuing of the Writ 647
II—Property and Interests Subject to Execution 658
III—Lien of Execution 694
IV—The Levy 704
V—Exemptions 718
VI—Claims by Strangers to the Writ 728
VII—The Sale and Return 736
VIII—Title of the Purchaser 760
IX—Audita Querela 773
X—Satisfaction of Executions 776
XI—Supplementary Proceedings 781
XII—Execution Against the Person 788
XIII—Executions to Recover Specific Property 802
(a) Personalty 803
(b) Realty 809

CHAPTER VII

Appeal and Error 817
Section I—Nature of the Remedy 817
II—Parties 828
III—Supersedeas 840
IV—Exceptions and Record 850
V—Assignments of Error 863
VI—Briefs and Argument 871
VII—Review by the Court 877
VIII—Judgment 907
IX—Remittitur 933
Appendix 937

TABLE OF CASES REPORTED

A. B. Farquhar Co., Ltd. v. DeHaven, 70 W. Va. 738	510
Adams v. Hemmenway, 1 Mass. 145	221
Aexander v. Jameson, 5 Bin. (Pa.) 238	443
Ames v. Hoy, 12 Cal. 11	640
Anonymous, Y. B. 4 Edw. II No. 74	455
Anonymous, 6 Cow. (N. Y.) 390	542
Anonymous, Lib. A. 38 Edw. III 21	546
Anonymous, Y. B. 21 Edw. III, 9 pl. 25	822
Ashby v. Ashby, 39 La. Ann. 105	35
Atkinson v. Allen, 12 Vt. 619	558
Atkinson v. People's Nat. Bank, 85 Maine 368	860
Bangor Bank v. Treat, 6 Maine 207	87
Bank &c. Kentucky v. Ashley, 2 Pet. (U. S.) 327	907
Barnier v. Barnier, 23 Ont. Rep. 280	65
Barrus v. Phaneuf, 166 Mass. 123	375
Bayer v. Doscher, 139 App. Div. (N. Y.) 324	663
Bell v. Germain, 12 Cal. App. 375	871
Bell v. Otts, 101 Ala. 186	499
Bigham v. Dover, 86 Ark. 323	769
Birch v. Philips, 6 Term Rep. 597	330
Bishop of L. v. Earl of K., 2 Brooke's Abr. 309, pl. 19	438
Black v. Kirgan, 15 N. J. L. 45	828
Blessing v. McLinden, 81 N. J. L. 379	83
Boone v. Holder, 87 Ark. 461	424
Boston & M. Railroad v. State, 75 N. H. 513	378
Boulter v. Ford, Siderfin 76	524
Bozson v. Altrincham &c. Council, L. R. (1903) 1 K. B. 547	823
Brady v. Brady, 161 N. Car. 324	272
Bragg v. Wetzel, 5 Blackf. (Ind.) 95	82
Brannenburg v. Indianapolis P. & C. R. Co., 13 Ind. 103	580
Bronson v. Graham, 2 Yeates (Pa.) 166	446
Bronson v. Schulten, 104 U. S. 410	531
Brooks v. Scott, 2 Munf. (Va.) 344	197
Browder v. Phinney, 30 Wash. 74	243
Brown v. First Nat. Bank, 132 Fed. 450	584
Bindbental v. St. Ry. Co., 43 Mo. App. 463	890
Bull v. Mathews, 20 R. I. 100	320
Bunn v. Hoyt, 3 Johns. (N. Y.) 255	458
Buntin v. Danville, 93 Va. 200	456
Burton v. Kershaw, 81 L. T. Rep. 531	476
Butcher v. Metts, 1 Miles (Pa.) 233	493
Butler v. Frontier Tel. Co., 186 N. Y. 486	159
Calvart v. Horsfall, 4 Esp. 167	809
Candee v. Lord, 2 N. Y. 269	560
Caperton v. Schmidt, 26 Cal. 479	153
Cassidy v. Leitch, 2 Abb. N. Cas. (N. Y.) 315	287
Cayuga Bldg. & L. Assn. v. Mac Mullen, 46 Pa. Super. Ct. 94	866
Chadsey v. Lewis, 6 Ill. 153	47
Chamberlaine v. Willmore, Palmer's Rep. 313	91
Chambers v. Philadelphia P. Co., 82 N. J. L. 1	933

Champney v. Smith, 81 Mass. 512 764
Charter v. Peeter, Cro. Eliz. 597 843
Chenery v. Stevens, 97 Mass. 77 716
Chicago & N. R. Co. v. Dunleavy, 129 Ill. 132 465
Childers v. Lahann, 18 N. Mex. 487 301
Chipman v. Palmer, 77 N. Y. 51 96
Chism v. Smith, 138 App. Div. (N. Y.) 715 882
Clark v. Morey, 10 Johns. (N. Y.) 69 137
Clark v. Parkinson, 92 Mass. 133 811
Clarksons v. Doddridge, 14 Grat. (Va.) 42 49
Clay v. Oxford, L. R. (1866) 2 Exch. 53 43
Climax Specialty Co. v. Seneca Button Co., 54 Misc. (N. Y.) 152 77
Coad v. Cowhick, 9 Wyo. 316 621
College Street, In re, 11 R. I. 472 544
Copeland v. New England Ins. Co., 39 Mass. 135 388
Copleston v. Piper, 1 Ld. Raym. 191 325
Cooper v. May, 1 Harr. (Del.) 18 653
Corwith v. State Bank, 15 Wis. 289 931
Courtney v. Baker, 3 Denio (N. Y.) 27 371
Cromwell v. Sac County, 94 U. S. 351 600
Crouse v. McVicar, 207 N. Y. 213 552
Crow v. Williams, 104 Mo. App. 451 912

Dalzell v. Lynch, 4 Watts & S. (Pa.) 255 679
Dame v. Dame, 43 N. H. 37 225
Davis v. Barnard, 60 N. H. 550 690
Davis v. Graniss, 5 Blackf. (Ind.) 79 523
Davis v. Hurt, 114 Ala. 146 234
De Chastellux v. Fairchild, 15 Pa. St. 18 9
De Coppett v. Barnett, 17 T. L. Rep. 273 734
Deering v. Quivey, 26 Ore. 556 540
Denny v. Booker, 2 Bibb (Ky.) 427 387
Denton v. Livingston, 2 Johns. (N. Y.) 96 669
Diehl v. Evans, 1 Serg. & R. (Pa.) 367 460
Dillingham v. Skein, Hempstead (U. S.) 181 192
Ditson Co. v. Testa, 213 Mass. 109 822
Doe ex dem. Cooper v. Cutshall, 1 Ind. 246 630
Dowd v. Seawell, 3 Dev. L. (N. Car.) 185 194
Downey v. Finucane, 205 N. Y. 251 349
Duncan v. M'Cumber, 10 Watts (Pa.) 212 694
Duncan's Appeal, 37 Pa. St. 500 710
Dunlap v. Cody, 31 Iowa 260 293
Dunlap v. Glidden, 31 Maine 435 555
Dunning v. Crofutt, 81 Conn. 101 483
Duvall v. Waters, 1 Bland Ch. (Md.) 569 175

Earl v. Brown, 1 Wils. 302 652
Earp v. Minton, 138 N. Car. 202 550
Easton Bank v. Coryell, 9 Watts & S. (Pa.) 153 396
Edward Thompson Co. v. Kollmeyer, 46 Ind. App. 400 200
Ellis v. Culver, 2 Harr. (Del.) 129 490
Empire State C. Co. v. Atchison, T. & S. F. R. Co., 210 U. S. 1 415
Ervin v. State ex rel. Walley, 150 Ind. 332 56
Erwin v. Dundas, 4 How. (U. S.) 58 655
Exchange Mut. L. Ins. Co. v. Warsaw-Wilkinson Co., 185 Fed. 487 934

Fairfield v. Southport Nat. Bank, 77 Conn. 423 101
Falls City v. Sperry, 68 Nebr. 420 446
Farmers' &c. Nat. Bank v. Crane, 15 Abb. Pr. (N. S.) (N. Y.) 434 650
Farni v. Tesson, 66 U. S. 309 57
Feldenheimer v. Tressel, 6 Dak. 265 784
Feneff v. Boston & M. Railroad, 196 Mass. 575 93
Ferrand v. Bingley Tp. &c. Board, 8 T. L. Rep. 70 481

Fidelity Mut. L. Ins. Co. v. Beck, 84 Ark. 57 923
Fink v. Fraenkle, 20 N. Y. Civ. Proc. 402 718
First Nat. Bank of Rock Springs v. Foster, 9 Wyo. 157 339
Fisher v. City of Charleston, 17 W. Va. 595 259
Foorman v. Wallace, 75 Cal. 552 768
Forsythe v. Washtenaw, 180 Mich. 633 788
Foss v. Witham, 91 Mass. 572 775
Freeman v. Alderson, 119 U. S. 185 567
French v. Peters, 177 Mass. 568 834
Frost v. Shaw, 3 Ohio St. 270 724
Fry v. Hordy, T. Jones 83 449

Gainesville &c. Railway Co. v. Austin, 122 Ga. 823 315
Gallagher v. True Amer. Pub. Co., 75 N. J. Eq. 171 634
Gallatin & W. Tpk. Co. v. Fry, 88 Tenn. 296 62
Garr v. Gomez, 9 Wend. (N. Y.) 649 918
Garthwaite, Griffin & Co. v. Tatum, 21 Ark. 336 363
Gibson v. Ledwitch, 84 Kans. 505 614
Girard v. Grosvenordale Co., 82 Conn. 271 360
Glines v. Cross, 12 Manitoba 442 884
Goldey v. Morning News, 156 U. S. 518 291
Goodwin v. Welshe, Yelv. 151 528
Graves v. Macfarland, 58 Nebr. 802 296
Gray v. Rothschild, 48 Hun (N. Y.) 596 71
Gregoir v. Leonard, 71 Vt. 410 223
Gue v. Tide Water Canal Co., 65 U. S. 257 670
Guild v. Cranston, 62 Mass. 506 104
Gulf, C. & S. F. R. Co. v. Matthews, 28 Tex. Civ. App. 92 442
Gulick v. Webb, 41 Nebr. 706 755
Guyer v. Guyer, 6 Houst. (Del.) 430 518
Gwinn v. Hubbard, 3 Blackf. (Ind.) 14 799

Haebler v. Myers, 132 N. Y. 363 926
Hail v. Spencer, 1 R. I. 17 283
Hambleton v. Dempsey, 20 Ohio 168 463
Hardenburg v. Beecher, 104 Pa. St. 20 760
Harris v. Webster, 58 N H. 481 119
Hartford v. Smith, 199 Fed. 763 250
Harvey v. Wilde, L. R. 14 Eq. Cas. 438 619
Hatchett v. Baddeley, 2 Wm. Bl. 1079 112
Hefner v. Albright, 231 Pa. 396 576
Henry v. Spitler, 67 Fla. 146 304
Henwood v. Cheesman, 3 Serg. & R. (Pa.) 500 277
Herod v. Bartley, 15 Ill. 58 742
Hertz v. Woodman, 218 U. S. 205 900
Highway Comrs. v. Bloomington, 253 Ill. 164 206
Hill v. Nelson, 70 N. J. L. 376 269
Hitchcock v. Munger, 15 N. H. 97 317
Hollister v. Lyon, 177 Ill. App. 652 199
Home Ins. Co. v. Gilman, 112 Ind. 7 75
Hookin v. Quilter, 2 Str. 1271 529
Hopkins v. Clark, 158 N. Y. 299 407
Horner v. Battyn, Buller N. P. 62 798
Hubbard v. Chapman, 28 App. Div. (N. Y.) 577 857
Hubbard v. President &c. Hamilton Bank, 48 Mass. 340 636
Hudson v. Minneapolis, L. & M. R. Co., 44 Minn. 52 435
Humphrey v. Gerard, 83 Conn. 346 684
Hyman & Co. v. H. H. Snyder Co., 159 Ky. 354 421

Independent School Dist. v. Werner, 43 Iowa 643 625
Indiana, B. & W. R. Co. v. Adamson, 114 Ind. 282 70
Indiana R. Co. v. Maurer, 160 Ind. 25 428
Ingham Lbr. Co. v. Ingersoll, 93 Ark. 447 67
Isaacs v. Evans, 16 Times Law Rep. 480 405

Jackson ex dem. Miller v. Hawley, 11 Wend. (N. Y.) 18 814
Jeffry v. Wood, 1 Str. 439 907
Jinks v. American Mtg. Co., 102 Ga. 694 776
Johnson v. Morris, 7 N. J. L. 6 146
Jones v. Goodbar, 60 Ark. 182 758
Jones v. Jones, 1 Bland (Md.) 443 677
Jones v. Woodwarth, 24 S. Dak. 583 345

Karges Furniture Co. v. Amalgamated &c. Union, 165 Ind. 421 39
Karon v. Eisen, 2 N. Y. Civ. Proc. (N. S.) 197 527
Kells v. Nelson-Tenny Lbr. Co., 74 Minn. 8 838
Kennon v. Gilmer, 131 U. S. 22 502
Kenyon v. Saunders, 18 R. I. 590 44
Kerby v. Jenkins, 2 Tyrwhitt 499 509
Kilby v. Erwin, 84 Vt. 266 479
Kimble v. Dailey, 127 Iowa 665 16
King v. Wilmington &c. R. Co., 1 Pennew. (Del.) 452 309
Kip v. Brigham, 6 Johns. (N. Y.) 158 612
Kitchins v. Harrall, 54 Miss. 474 52
Kountze v. Omaha Hotel Co., 107 U. S. 378 840

Lampson v. Hobart, 27 Vt. 784 873
Lamy v. Lamy, 4 N. Mex. 43 863
Lange v. Benedict, 73 N. Y. 12 22
Leame v. Bray, 3 East 593 218
Leeper, Graves & Co. v. First Nat. Bank, 26 Okla. 707 807
Lees v. United States, 150 U. S. 476 852
Levi v. Greer, 236 Pa. 475 757
Levystein v O'Brien, 106 Ala. 352 108
Linson v. Spaulding, 23 Okla. 254 888
Litchfield v. Goodnow, 123 U. S. 549 609
Longworthy v. Featherston, 65 Ga. 165 743
Loomis v. Lehigh Val. R. Co., 208 N. Y. 312 911
Lord v. Veazie, 8 How. (U. S.) 251 31
Low v. Mumford, 14 Johns. (N. Y.) 426 89
Ludwin v. Siano, 36 Misc. (N. Y.) 537 543
Lumley v. Torsiello, 69 App. Div. (N. Y.) 76 117
Lyman v. Fidelity &c. Co., 65 App. Div. (N. Y.) 27 419
Lyon v. City of Elizabeth, 43 N. J. L. 158 673

McDonald v. Metropolitan St. R. Co., 167 N. Y. 66 412
McDonald v. Pless, 238 U. S. 264 451
McElhanon v. McElhanon, 63 Ill. 457 36
McElroy v. Reading, 7 Phila. (Pa.) 433 530
McNaughton v. McLean, 73 Mich. 250 741
McNulty v. O'Donnell, 27 Pa. Super. Ct. 93 61
McNulty's Estate, In re, 230 Pa. 387 886
M'Voy v. Wheeler, 6 Port. (Ala.) 201 186
Mack v. Parks, 74 Mass. 517 658
Mac Rae v. Kansas City Piano Co., 69 Kans. 457 45
Macurda v. Lewiston Journal Co., 104 Maine 554 327
Manby v. Scott, 1 Mod. 124 801
Marter v. Henry Sanchez Co., 77 N. J. L. 95 324
Mason v. Fox, Cro. Jac. 632 538
Masterson v. Herndon, 77 U. S. 416 831
Matthew's Appeal, 104 Pa. St. 444 872
May v. Emerson, 52 Ore. 262 626
Megehe v. Draper, 21 Mo. 510 726
Memmer v. Carey, 30 Minn. 458 579
Merchants' Bank of Canada v. Schulenberg, 54 Mich. 49 397
Mille Lacs County Comrs. v. Morrison, 22 Minn. 178 332
Miller v. Commonwealth, 5 Pa. St. 294 728
Miller v. Parnell, 2 Marsh. 78 794

Miller v. Ralston, 1 Serg. & R. (Pa.) 309 922
Mitchell v. McNabb, 58 Maine 506 189
Moore v. Cass, 10 Kans. 288 362
Moore v. Hobbs, 79 N. Car. 535 311
Moore v. Terhune, 161 Ill. App. 155 61
Morgan v. Kinney, 38 Ohio St. 610 713
Morrice v. Green, 3 Salk. 213 522
Morrow v. Dudley & Co., 144 Fed. 441 295
Mutual Assur. Soc. v. Stanard, 4 Munf. (Va.) 539 631

Nalle v. Oyster, 230 U. S. 165 879
National Bank v. Buckwalter, 214 Pa. 289 80
Nevil v. Soper, Salk. 213 327
New Jersey v. Morris, 82 N. J. L. 14 279
New York v. Rotolo, 16 Misc. (N. Y.) 579 14
Nichols v. Guthrie, 109 Tenn. 535 681
Nierenberg v. Wood, 59 N. J. L. 112 91
Noell v. Wells, 1 Levinz 235 572
Northampton v. Smith, 52 Mass. 390 19
Noyes v. Parker, 64 Vt. 379 488

Oakley v. Pegler, 30 Nebr. 628 507
Old Dominion &c. Co. v. Bigelow, 203 Mass. 159 596
Orchard v. Williamson, 6 J. J. Marsh. (Ky.) 558 701
Osman v. Crowley, 101 App. Div. (N. Y.) 597 792

Page v. Contoocook Val. Railroad, 21 N. H. 438 359
Page v. Freeman, 19 Mo. 421 88
Palmer v. Board &c. Essex County, 77 N. J. L. 143 547
Parham v. Harney, 14 Miss. 55 450
Parham v. Thompson, 2 J. J. Marsh. (Ky.) 159 665
Parker v. Clemmons, 80 Vt. 521 210
Payne v. Payne, 8 B. Mon. (Ky.) 391 654
Peck v. Snyder, 13 Mich. 21 462
People v. Mann, 97 N. Y. 530 11
People ex rel. Fitch v. Mead, 29 How. Pr. (N. Y.) 360 781
People ex rel. Raster v. Healy, 230 Ill. 280 253
Peoples Nat. Bank v. Nickerson, 106 Maine 502 313
Persey v. DeB., Y. B. 45 Edw. III, 3 18
Peter v. Steel, 3 Yeates (Pa.) 250 202
Peterson v. San Francisco, 115 Cal. 211 667
Phillips v. Ward, 2 H. & C. 717 594
Pinckney v. Pinckney, 114 Iowa 441 766
Pleasants v. Fant, 89 U. S. 116 410
Pond v. Kimball, 101 Mass. 105 721
Poole's Case, 1 Salk. 568 665
Postal v. Cohn, 83 App. Div. (N. Y.) 27 248
Powers v. Sturtevant, 200 Mass. 519 874
Prentis v. Atlantic Coast Line, 211 U. S. 210 6
Press Pub. Co. v. Monteith, 180 Fed. 356 893
Price v. Virginia-Carolina C. Co., 136 Ga. 175 175
Pursley v. Withle, 4 Ind. App. 383 536
Pyles v. Piedmont Mt. Airy Guano Co., 58 Fla. 348 385

Quagliana v. Jersey City &c. R. Co., 77 N. J. L. 101 475

Rains v. McNairy, 4 Humph. (Tenn.) 356 691
Rand v. King, 134 Pa. St. 641 820
Ransom v. Pierre, 101 Fed. 665 844
Ray v. Chesapeake & O. R. Co., 57 W. Va. 333 422
Reber v. Schroeder, 221 Pa. 152 805
Reilly v. Sicilian &c. Co., 170 N. Y. 40 582
Reynolds v. Hoxsie, 6 R. I. 463 737

Rhoads v. Booth, 14 Iowa 575 63
Rice v. Sergeant, 7 Mod. 37 700
Richeson v. Ryan, 14 Ill. 74 827
Ringgold v. Haven & Livingston, 1 Cal. 108 401
Roberts v. Hughes, 7 M. & W. 399 454
Robinson v. Robinson, Cro. Jac. 14 606
Rogers v. Duhart, 97 Cal. 500 247
Rogers v. Kennay, 11 Jur. 14 687
Romain v. Board &c. Muscatine County, 1 Morris (Iowa) 357 286
Root v. Fellowes, 60 Mass. 29 506
Ross v. McCaldin, 195 N. Y. 210 336
Royal Aquarium &c. Soc. v. Parkinson, L. R. 1 Q. B. 431 2
Rumford Nat. Bank v. Arsenault, 108 Maine 241 404

St. John v. Andrews Inst., 192 N. Y. 382 914
St. Louis, I. M. & S. R. Co. v. Spencer, 71 Fed. 93 430
Sampson v. Juxon, Cro. Jac. 699 925
Savage v. Everman, 70 Pa. St. 315 643
Savery v. Busick, 11 Iowa 487 484
Schmidt v. New York Mut. F. Ins. Co., 67 Mass. 529 364
Schwinn v. Perkins, 79 N. J. L. 515 164
Scott v. Shearman, 2 W. Bl. 977 563
Semayne's Case, 5 Coke 91 704
Sessions v. Johnson, 95 U. S. 347 588
Sheridan v. New York, 68 N. Y. 30 53
Shives v. Eno Cotton Mills, 151 N. Car. 290 486
Sibley v. Leek, 45 Ark. 346 881
Sikes v. Ransom, 6 Johns. (N. Y.) 279 855
Singer v. Hutchinson, 183 Ill. 606 617
Sinnott v. Feiock, 165 N. Y. 444 238
Slingsby v. Boulton, 1 Ves. & B. 334 733
Smith v. Biesiada, 174 Ind. 134 470
Smith v. Eames, 4 Ill. 76 366
Snow v. West, 37 Utah 528 501
Southern Bell Tel. & T. Co. v. Glawson, 140 Ga. 507 903
Starr v. Taylor, 4 McCord L. (S. Car.) 413 115
State v. Whitaker, 114 N. Car. 818 266
State ex rel. Mackey v. District Court, 40 Mont. 359 275
Steamboat Burns, 9 Wall. (U. S.) 237 37
Steele, In re, 156 Fed. 853 1
Stephens v. Howe, 127 Mass. 164 643
Stevens v. Clark, 62 Fed. 321 817
Stewart v. Peterson, 63 Pa. St. 230 638
Storm v. United States, 94 U. S. 76 877
Stumps v. Kelley, 22 Ill. 140 426
Sybell Belknap's Case, Y. B. 1 Hen. IV, Pl. 2 111
Sypherd v. Myers, 80 N. J. L. 321 894

Tait v. Atkinson, 3 U. C. Q. B. 152 188
Tandy v. Waesch, 154 Cal. 108 55
Taylor v. Carpenter, 2 Woodb. & M. (U. S.) 1 133
Taylor v. Claypool, 5 Blackf. (Ind.) 557 587
Tegarden v. Phillips, 14 Ind. App. 27 351
Thaw, In re, 172 Fed. 288 382
Tillman v. Davis, 28 Ga. 494 298
Thomas v. People, 107 Ill. 517 574
Thompson v. Douglas, 35 W. Va. 337 354
Thompson v. McManama, 2 Disn. (Ohio) 213 751
Thompson's Case, 122 Mass. 428 796
Thomson v. Clerk, 1 Cro. Eliz. 504 736
Thouron v. Paul, 6 Whart. (Pa.) 615 179
Towner v. Phelps, 1 Root (Conn.) 250 301
Townsend v. Masterson &c. Co., 15 N. Y. 587 825

Trier v. Herman, 115 N. Y. 163 520
Truett v. Legg, 32 Md. 147 648
Turner v. Fendall, 1 Cranch. (U. S.) 117 661

United States v. Dashiel, 70 U. S. 688 778
United States Cement Co. v. Cooper, 172 Ind. 599 425
Upton v. Wells, 1 Leon. 145 810

Van Horn v. Hann, 39 N. J. L. 207 126

Waite v. Dolby, 8 Humph. (Tenn.) 406 803
Walker v. Waterbury, 81 Conn. 13 867
Wallace v. United Elec. Co., 211 Pa. 473 288
Waller v. Weedale, Noy 107 737
Washburn v Allen, 77 Maine 344 393
Waters v. Gooch, 6 J. J. Marsh. (Ky.) 586 170
West v. Ratledge, 4 Dev. L. (N. Car.) 31 281
Western & A. R. Co. v. Brown, 102 Ga. 13 384
Wetzel v. Hancock County, 143 Ill. App. 178 307
White v. Improved Property Holding Co., 140 App. Div. (N. Y.) 520 322
Whitney v. Hopkins, 135 Pa. 246 515
Whitney v. Wellesley & B. St. R. Co., 197 Mass. 495 433
Whittaker v. Stangvick, 100 Minn. 386 213
Wiesmann v. Donald, 125 Wis. 600 124
Wilber v. Widner, 1 Wend. (N. Y.) 56 504
Wilbur v. Gilmore, 38 Mass. 250 606
Wilkins v. Brock, 81 Vt. 332 525
Williams v. Gallien, 1 Rob. (La.) 94 771
Wilson v. Abrahams, 1 Hill (N. Y.) 207 440
Wilson v. Louisiana Purchase Exp. Com. 133 Iowa 586 41
Woddye v. Coles, Noy 59 746
Wood v. Gunston, Style 466 473
Wood v. Stoddard, 2 Johns. (N. Y.) 194 358
Woods v. Monell, 1 Johns. Ch. (N. Y.) 502 747
Work v. Prall, 26 Pa. Super. Ct. 104 577
Worth v. Newlin (N. J. Eq.), 36 Atl. 30 420
Wright v. Sharp, 1 Salk. 288 850

Young v. Ashburnsham, 3 Leonard's Rep. 161 191
Young v. Central R. Co., 232 U. S. 602 418
Young v. Kershaw, 81 L. T. Rep. 531 476

Zahorka v. Geith, 129 Wis. 498 496

CHAPTER I.

THE COURT.

IN RE STEELE.

UNITED STATES DISTRICT COURT, N. D. ALABAMA, 1907.

156 *Fed.* 853.[1]

HUNDLEY, J.: The word "court" originally meant only a yard, palace, or garden, and according to Cowell it meant "the house where the king remained with his retinue; also the place where justice was administered."—Anderson's Law Dictionary. So, in early history, the court meant the place where the king was domiciled, because the king was actually the fountain and dispenser of justice. The earlier courts were merely assemblages in the courtyard of the baron or of the king himself by those whose duty it was to appear at stated times or upon summons. This idea of the place predominating as the designation of a court caused Blackstone to adopt Coke's definition that "a court is a place where justice is judicially administered." 3 Blackstone's Commentarie 24. Indeed, the Supreme Court of Alabama, in Ex parte Branch & Co., 63 Ala. 384, adopted the definition that a court is "a place where justice is administered." This definition has been held to be too narrow, and the definition given by a majority of judicial decisions is that: "A court is a tribunal duly constituted, and present at the time and place fixed by law for judicial investigation and determination of controversies." 2 Century Dictionary, p. 1312; 8 A. & E. Encyc. of Law, p. 22.

A court is also held to be "an incorporeal being, which requires for its existence the presence of the judge." 8 A. & E. Encyc. of Law, p. 22; *State* v. *Judges*, 32 La. Ann. 1261; *Lawyers Tax Cases*, 8 Heisk. (Tenn.) 650; *Mason* v. *Woerner*, 18 Mo. 570; *Hobart* v. *Hobart*, 45 Iowa 503; *Matter of Terrill*, 52 Kan. 29, 34 Pac. 457, 38 Am. St. Rep. 327. It has been further held that: "The court is not the judge or judges as individuals, but only when at the proper time and place, they exercise judicial powers." [2]

---

[1] Extract from opinion of the court.

[2] 3 Blackstone's Commentaries, ch. 4; 2 Lowell's Government of England, pt. 7, p. 439; Stephen's Commentaries (15th ed.), bk. 5, ch. 4; Constitution of United States, Art. III, 11th Amendment; 1 Kent's Commentaries, lectures 14 to 17; Bryce's American Commonwealth (2d ed.), chaps. 22, 23, 42; United States Judicial Code, Act of March 3, 1911, 36 Stat. at Large 1087 and amendments.

ROYAL AQUARIUM SUMMER AND WINTER GARDEN SOCIETY *v.* PARKINSON.

IN THE COURT OF APPEAL, 1892.

Law Reports (1892), 1 *Queen's Bench*, 431.[3]

LORD ESHER, M. R.: In this case the action was for a slander upon the plaintiffs in the way of their business, and the jury found a verdict for the plaintiffs for 250*l*. We are now asked to enter judgment for the defendant on several grounds. The statement complained of was made by the defendant at a meeting of the London County Council, of which he is a member, when the question before such meeting was whether a license for music and dancing should be granted to the plaintiffs. He expressed a very strong opinion that it should not be granted, and in expressing such opinion he used very strong language. He said, in effect, that he had been to the Aquarium and had seen there an indecent performance—a performance which was the most indecent that could be imagined. He described it as a performance between two figures dressed as a male and a female. Even if it had been so, to call the performance described the most indecent that could be imagined seems to me nonsense. But it turned out that the figures were not dressed as a male and female, but as two males, so that all this story of gross indecency was nothing but the defendant's own imagination. The jury appear in effect to have found that he stated what he knew to be untrue. The question for us on this appeal is whether, upon the evidence, the case for the plaintiffs can be supported.

It was argued, in the first place, on behalf of the defendant, that he was exercising a judicial function when he spoke the words complained of, and therefore was entitled to absolute immunity in respect of anything he said. It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby*[4] the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act. Then

---

[3] The reporter's statement of the facts, the arguments of counsel and portions of the judgments are omitted, as is the concurring opinion of Lopes, L. J.

[4] L. R. 8 Q. B. 255; L. R. 7 H. L. 744, and see *People* v. *Van Allen*, 55 N. Y. 31 (1873).

can it be said that a meeting of the county council, when engaged in considering applications for licenses for music and dancing, is such a tribunal? It is difficult to say who are to be considered as judges acting judicially in such a case. The manner in which the business of such a meeting is conducted does not appear to present any analogy to a judicial inquiry. Again, there is another consideration. It is argued for the plaintiffs that this function of granting licenses, which has been transferred from the justices to the county council, is not judicial, but merely administrative. The justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty they would be entitled to the absolute immunity which I have mentioned. They had also administrative duties, one of which was this duty of granting licenses, and for the purpose of performing these they held consultations among themselves. In the case of duties properly administrative, such as that of granting licenses, their action was consultative, for the purpose of administration, and not judicial. When such duties are transferred to the county council, what they do in respect of them is likewise consultative for the purpose of performing an administrative duty; it is not judicial. That consideration also appears to me to show clearly that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to courts of justice.

FRY, L. J.: I am of the same opinion. * * * I do not desire to attempt any definition of a "court." It is obvious that, according to our law, a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a court. There are many other courts which, though not courts of justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a court of justice, but whether it is a court in law. Wherever you find a court in law, to that the law attaches certain privileges, among which is the immunity in question.

But this argument was used on behalf of the defendant. It was said that the existence of this immunity is based on consideration of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word "judicial" is used in that argument is this: It is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the inns of court when consid-

ering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man,[5] and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege. I find no necessity or propriety in carrying the doctine so far as this argument requires. It is to be borne in mind that there is a great difference between the constitution of bodies of the kind to which I have referred and most courts. Courts are, for the most part, controlled and presided over by some person selected as specially qualified for the purpose; and they have generally a fixed and dignified course of procedure, which tends to minimize the risks that might flow from this absolute immunity. These considerations do not apply to bodies such as I have mentioned. Furthermore, there is no precedent for extending this immunity to all bodies which are bound to decide matters "judicially," in the sense in which this argument uses the term. One observation I wish to make here, in order to prevent what I have said from being misunderstood. I have spoken of the immunity as applying to "courts." I do not wish anything I have said to be taken as expressing a doubt that there are matters done by a member of a court in a judicial capacity as to which, though done in his private room and not in open court, this immunity may exist. No question arises here as to such a case, and I only refer to it to prevent being misunderstood.

The question then arises, whether the county council, when hearing application for licenses, were acting as a court, and whether the defendant on that occasion was acting as a judge or member of that court. The character in which the council acted turns, in the first place, on the language of the statute 25 Geo. 2, ch. 36. The second section of that Act provides for the granting by the quarter sessions of such licenses for dancing and music, etc., as they in their discretion shall think proper. That enactment appears to me to confer on the justices an administrative duty or power. I find in the Act no words prescribing any particular mode of procedure, or requiring them to hear and determine. I find, on the contrary, that certain things subsequent to the granting of the license are to be done in open court. The license is to be sealed by the justices in open court, and it is to be read by the clerk of the peace publicly in court. These provisions appear to me to be applicable to a proceeding which may take place in the magistrates' private room, but the result of which is afterwards to be made public in open court. The nature of the discretion given and the language of the Act appear to me to show that the proceeding is administrative, not judicial. We were pressed with the words "in their discretion," used in the statute. It was argued that these words imported a judicial discretion. But it is not every discretion that is judicial. The magistrates are clothed

[5] Compare *Groenvelt* v. *Burwell*, 1 Salk. 200 (1700); s. c. 1 Ld. Raym. 213 with *Allbutt* v. *General Medical Council*, L. R. (1889) 23, Q. B. Div. 400; *Leeson* v. *General Medical Council*, L. R. (1889) 43 Ch. Div. 366.

in many cases with a discretion that is not judicial. The first statute that deals with the county rate (12 Geo. 2, ch. 29, § 1) says that the justices shall have power to make a rate for such sums or sum of money as they in their discretion shall think fit; but it could not be contended that that discretion is judicial. There is nothing in the section which makes the proceeding that of a court, though it has to be done discreetly. Then comes the question, whether there is anything in the Local Government Act, 1888, to alter the nature of the proceeding in this respect. I come to the conclusion that there is not. It is clear from the language of the Act that it was intended to draw a broad line between the administrative and judicial functions of the justices, and to transfer the former to the county council, while leaving the latter in the hands of the justices. Section 3 provides that there shall be transferred to the county council the administrative business of the justices of the county in quarter sessions assembled—that is to say, all business done by the quarter sessions, or a committee appointed by the quarter sessions, in respect of the several matters following; and these include, by subsection 5, the licensing, under any general Act, of houses and other places for music and dancing. But the matter does not rest there. For section 78, subsection 2, shows the intention to have been to exclude from the transfer of the magistrates' duties to the county council all judicial duties. That section provides in subsection 2 that the transfer of powers and duties enacted by the Act shall not authorize any county council to exercise any jurisdiction under the Summary Jurisdiction Acts, or to perform any judicial business, or otherwise act as justices or a justice of the peace. The statute, therefore, so far from giving any new color to the suggestion made on behalf of the defendant, leaves the matter precisely where it was before. I, therefore, come to the conclusion that the body to which the statements complained of were made was not a court, and that those statements are not entitled to the immunity claimed for them.

Application dismissed.[6]

---

[6] *Reg* v. *London County Council*, L. R. (1892) 1 Q. B. 190; *Boulter* v. *Kent Justices*, L. R. (1897) A. C. 556; *Reg* v. *London County Council*, 71 L. F. 638 (1894); *Fuller* v. *Colfax*, 4 McCrary (U. S.) 535, 14 Fed. 177 (1882); *Grider* v. *Tally*, 77 Ala. 422 (1884); *State* v. *Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956 (1901); *Staples* v. *Brown*, 113 Tenn. 639 (1904); *Chinn* v. *Superior Court*, 156 Cal. 478 (1909). Compare *Queen* v. *Manchester Justices*, L. R. (1899), 1 Q. B. 571; *Barratt* v. *Kearns*, L. R. (1905), 1 K. B. 504; *Rex* v. *Woodhouse*, L. R. (1906), 2 K. B. 501; *Donoghue's License*, 5 Pa. Sup. Ct. 1 (1897).

PRENTIS *v.* ATLANTIC COAST LINE.

SUPREME COURT OF THE UNITED STATES, 1908.

211 *U. S.* 210.[1]

HOLMES, J.: These are bills in equity brought in the Circuit Court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the Fourteenth Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the state, which the courts of the United States are forbidden to enjoin, Rev. Stats., sec. 720,[2] and that the decision of the commission makes the legality of the rates res judicata. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the Fourteenth Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

The State Corporation Commission is established and its powers are defined at length by the constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that for some purposes it is a court within the meaning of Rev. Stat., sec. 720, and in the commonly accepted sense of that word. Among its duties it exercised the authority of the state to supervise, regulate and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial and executive powers. *Norfolk & Portsmouth Belt Line R. R. Co.* v. *Commonwealth,* 103 Virginia, 289, 294.

The state constitution provides that the commission, in the performance of the duty just mentioned, shall from time to time prescribe and enforce such rates, charges, classification of traffic, and rules and regulations, for transportation and transmission companies doing business in the state, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just. Before prescribing or fixing any rate or

---

[1] The arguments of counsel are omitted and only so much of the judgment given as relates to the distinction between judicial and legislative functions.

[2] "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. Stat. (1901), sec. 720, 4 Fed. Stat. Ann. 509.

charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the Supreme Court of Appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as in its opinion the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct or annul the action of the commission, and in collateral proceedings the validity of the rates established by it can not be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies doing business in Virginia, and all persons interested, that at a certain time and place it would hear objections to an order prescribing a maximum rate of two cents a mile for the transportation of passengers, with details not needing to to be stated. A hearing was had, and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the commission passed an order prescribing the rates, but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be two cents; for certain excepted branches of the Southern Railway Company, two and half; for others, including the Chesapeake Western Railway, three; and for others three and a half cents a mile, with a minimum charge of ten cents. Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. *Dreyer* v. *Illinois*, 187 U. S. 71, 83, 84; *Winchester & Strasburg R. R. Co.* v. *Commonwealth*, 106 Va. 264, 268. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would

be sitting as a court and would be protected from interference on the part of the courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Va. 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others* v. *Commonwealth*, 106 Va. 264, 281. See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land and Town Co.* v. *Jasper*, 189 U. S. 439, 440.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat., sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice and Coal Co.*, 134 Fed. Rep. 82, 94, affirmed sub nom. *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stat., sec. 709, and Act of February 18, 1875, ch. 80, 18 Stat. 318. See *Upshur County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*. 204 U. S. 415, 423. The decision upon them can not be res judicata when a suit is brought. See *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering* v. *Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should de-

clare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law res judicata, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so-called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co.* v. *Commonwealth,* 102 Va. 599, 621. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation can not bolster itself up in that way. Litigation can not arise until the moment of legislation is past. See *Southern Ry. Co.* v. *Commonwealth,* 107 Va. 771, 772.[9]

DE CHASTELLUX *v.* FAIRCHILD.

SUPREME COURT OF PENNSYLVANIA, 1850.

15 *Pa.* 18.

Error to the Common Pleas of Bradford County.

Trespass was brought to May term, 1840, for cutting and carrying away timber trees. On the trial there was a verdict for the plaintiff for $600, a new trial was refused and judgment was entered on the verdict. The defendant took a writ of error in 1844 upon which a non pros. was entered. A second writ of error was taken in 1845, the cause argued in the Supreme Court and judgment affirmed. An execution having issued, the legislature on March 16, 1874, passed an act providing that "a new trial is hereby granted and allowed and directed to be granted and allowed by the court of common pleas," in said case, "with like effects in all respects as if the same had not been heretofore tried in said court and passed upon on motion for new trial." Subsequently the court of common pleas set aside the execution and the plaintiff brought error.[10]

---

[9] The remainder of the opinion is omitted, as well as the dissenting opinions of Fuller, C. J., and Harland, J. The decree of the circuit court in favor of the railroads that were the plaintiffs below was reversed on the ground that the proceedings had been prematurely brought.

Accord: *Mississippi R. Com.* v. *Ill. Cent. R. Co.,* 203 U. S. 335 (1906); *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1 (1909); *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298 (1913). Contra: *People* v. *Willcox,* 194 N. Y. 383 (1909).

[10] The statement of facts is abridged and the arguments of counsel omitted.

GIBSON, C. J.: If any thing is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislature, the executive, and the judiciary, which, within their respective departments, are equal and co-ordinate. Each derives its authority, mediately or immediately, from the public; and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be a despotism—a government of unlimited irresponsible, and arbitrary rule. It is idle to say that the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention.

From its very position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency; else causes would be decided not only by the legislature, but, sometimes, without hearing or evidence. The mischief has not yet come to that, for the legislature has gone no farther than to order a rehearing on the merits; but it is no more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk and expense of another contest.

It has become the duty of the court to temporarize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small.

We are bound to say, therefore, that *Braddee* v. *Brownfield*[11] is not law, and that it was erroneously decided. As the act before us is null, the plaintiff ought to have been allowed to proceed on his judgment.[12]

Order reversed.

---

[11] 2 W. & S. (Pa.) 271 (1841).

[12] Accord: *Merrill* v. *Sherburne*, 1 N. H. 199, 8 Am. Dec. 52 (1818); *Lewis* v. *Webb*, 3 Greenl. (Maine) 326 (1825); *Young* v. *State Bank*, 4 Ind. 301 (1853); *Taylor* v. *Place*, 4 R. I. 324 (1856); *Trustees* v. *Bailey*, 10 Fla. 238 (1863); *People* v. *Frisbie*, 26 Cal. 135 (1864); *Weaver* v. *Lapsley*, 43 Ala. 224 (1869); *Griffin's Exr.* v. *Cunningham*, 20 Gratt. (Va.) 31 (1870); *Arnold* v. *Kelley*, 5 W. Va. 446 (1872). See, also, *Marbury* v. *Madison*, 1 Cranch (U. S.) 137, 2 L. ed. 60 (1803); *Dupy* v. *Wickwire*, 1 D. Chip. (Vt.) 237, 1 Am. Dec. 729 (1814); *Holden* v. *James*, 11 Mass. 396, 6 Am. Dec. 174 (1814); *Picquet, appellant*, 22 Mass. 65 (1827); *Hill* v. *Sunderland*, 3 Vt. 507 (1831); *State*

THE PEOPLE *v.* MANN.

SUPREME COURT OF NEW YORK, 1885.

97 *N. Y.* 530.

An appeal from an order of the general term of the Supreme Court awarding a writ of prohibition, directed to the defendants, commanding them to desist from further proceedings in an action before Mann, a justice of the peace, who was over seventy years of age. Article 6, sec. 12 of the State Constitution provided that, "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age."[13]

ANDREWS, J.: The question presented is whether the limitation of age contained in this section applies to justices of the peace. That it does so apply has been determined by the judgment now under review. The same question was considered by the general term of the fourth department in the case of *People* v. *Dohring* (2 Supr. Ct. Rep. 458), and was determined the other way. The Dohring case was decided in 1873, and the question now presented for the first time in this court, has never, so far as we can ascertain, been considered in the courts below, except in that case and the one now before us, which was first decided at special term in January, 1884. It has come to the knowledge of the court from official sources that since the adoption of the present judiciary article of the constitution many persons in different parts of the state have been elected justices of the peace, who have served after having attained the age of seventy years, some having been elected before, and others after they had reached that age. The question is therefore important, not only because it involves the interpretation of a constitutional provision, but also for the reason that it practically affects important public and private interests.

---

v. *Fleming*, 7 Hump. (Tenn.) 152, 46 Am. Dec. 73 (1846); *Burch* v. *Newbury*, 10 N. Y. 374, Seld. notes 28 (1852); *McDaniel* v. *Correll*, 19 Ill. 226, 68 Am. Dec. 587 (1857); *Denny* v. *Mattoon*, 84 Mass. 361, 79 Am. Dec. 784 (1861); *Richards* v. *Rote*, 68 Pa. 248 (1871); *Sparhawk* v. *Sparhawk*, 116 Mass. 315 (1874). In *Merrill* v. *Sherburne*, 1 N. H. 199 (1818), it is said *per* Woodbury, J.; "A marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one, and made by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature, a legislative act; and if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

[13] The statement of facts is condensed, arguments of counsel and part of the opinion of the court omitted.

The policy of fixing by constitutional provision a limitation of age to judicial service, first established in this state in respect to the chancellor and judges of the Supreme Court by the constitution of 1822, and abandoned in the constitution of 1846, was re-established by the judiciary article of 1869, primarily with reference to the terms of those judges, which by the same article had been extended to the period of fourteen years (Folger, J., *People* v. *Gardner,* 45 N. Y. 819).

It is, however, we think, quite evident that the limitation does not apply to every officer who is invested with judicial power. It is the "office of justice or judge of any court," which the clause declares shall not be held by any person beyond the age specified. But the judicial function may be vested in a person, to be exercised for certain purposes and on particular occasions, who does not hold the "office of justice or judge of any court," within the meaning of this clause. The constitution itself furnishes one illustration. The president of the senate, the senators and the judges of the Court of Appeals, comprise the court for the trial of impeachments, created by the first section of the sixth article. But neither the Lieutenant-Governor, nor the senators, although they act as judges on the trial of an impeachment, "hold the office of justice or judge of any court." The office which the Lieutenant-Governor holds is that indicated by his title, and so of the senators. The judicial function which they exercise in the particular case is annexed to their respective offices. They sit as judges on the trial of impeachments, but they do not hold the office of judges while acting as such. We think it plain that they would not be disqualified from acting as members of the court after attaining the age of seventy years, under the clause in the constitution now in question. Another illustration is furnished in the statutes creating mayor's courts in cities, by which judicial powers are vested for certain limited purposes in mayors, and other municipal officers. There is such a court in the city of Hudson, and it may be in other cities, which is held by the mayor, or by the mayor in conjunction with other officers. The mayor in these cases acts as a judge, or magistrate, but the judicial function is incident to the office of mayor. He does not hold the office of judge, and if eligible to the office of mayor, although seventy years of age, he may, we think, discharge the duties connected with that office after that time, including the holding of the mayor's court, without a violation of the constitution.

Returning to the immediate point now in judgment the question recurs: Does a justice of the peace "hold the office of justice or judge of any court," within the meaning of sec. 13, art. 6, of the constitution? This office was not created by the constitution. Justices of the peace had been known to the common law of England for a century and a half before America was discovered. They were, in their original institution, mere conservators of the peace, exercising no judicial function. It is said in Burns' Justice (vol. 3 [19th ed.], p. 4), that by the statute 1 Edw. III, which is the first statute that ordains the assignment of justices of the peace by the king's commission, "they had no other power but only to keep the peace." But

from time to time their powers were enlarged, and they came to constitute a very important agency in the administration of local government in England. They discharged a great variety of duties connected with the support of the poor, the reparation of highways, the imposition and levying of parochial rates and other local affairs. See enumeration in Stat. 16, Geo. II, ch. 18. They were invested with judicial powers for the first time (it seems) by the Statute 34, Edw. III, ch. 1, which gave them power to try felonies, but then only when two or more acted together, and not singly, and it is said by Blackstone (vol. 1, p. 349), "they then acquired the more honorable appellation of justices." I do not find that they ever exercised in England jurisdiction in civil causes.

The office of justice of the peace was brought here by the English colonists. From the earliest colonial period it has existed in this country. By the code known as "the Duke's Laws" for the government of the colony of New York, promulgated in 1665, justices of the peace were commissioned for the towns in the province, with the same powers as in England. The judicial establishment created by "the Duke's Laws," comprised a local court in each town, with jurisdiction of actions of debt and trespass under £5, to be held by the constable and overseers of the town; a court of sessions for each of the three ridings, and a court of assize for the whole province. Justices of the peace were entitled to sit as members of the court of sessions and the court of assize, but not of the town courts. In 1691 the judicial system was reorganized by an act of the colonial legislature. By that act the town courts were changed into courts of justice of the peace, to be held by one justice and two freeholders. It was not until 1737 that a justice of the peace was empowered singly to hold a court for the trial of actions.[14] (See monograph upon the courts in this state by Chief Judge Daly, preface 1 E. D. Smith's Rep.; also 3 Daly's Rep. App.) But from the earliest colonial period until this time, justices of the peace here, as in England, have been invested with various and important functions connected with local administration, quite independent of their judicial authority. A glance at the statutes will show how important a part these officers have had in the administration of the poor laws, the highway acts, the adjustment of town charges, and indeed in nearly every department of local administration. It is important to notice that the judicial function exercised by justices of the peace was a graft upon their original authority, and that the enlargement of their powers has not been in this direction alone, but that by gradual accretion they have come to constitute a most important factor in the corporate administrative life of towns and counties. The gradual growth of their powers and functions furnishes a good illustration of the manner in which institutions grow up and adapt themselves to the changing conditions and demands of society, until

---

[14] In Pennsylvania, an act of May 28, 1715, 3 Stat. at Large 63, permitted a single justice of the peace to hear civil cases involving debts under forty shillings.

they are brought to subserve, in the most effective way, the public interests.

We have failed in the purpose of this brief historical reference to the origin and growth of the office of justice of the peace, unless it shows how widely it differs in the circumstances of its institution and development, and in the variety of its functions, from the office of judge of an ordinary court. We know, from observation, that justices of the peace are not in common speech known as judges, but are uniformly called by the distinctive title of their office. Unquestionably their jurisdiction as a tribunal for the trial of small causes is now the most important of their functions, but they have never lost their character as administratitve officers, and in this respect they occupy a position and character and exercise powers unique, and in many respects quite dissimilar to those exercised by other judicial officers.[15]

The order of the general and special terms should be reversed and the writ dismissed.

THE PEOPLE OF THE STATE OF NEW YORK *v.* ROTOLO.

COUNTY COURT, OSWEGO COUNTY, 1908.

61 *Misc.* (*N. Y.*) 579.

Three indictments for violation of the Excise Law.

Motion to dismiss the same upon the ground that, when the evidence was presented to the grand jury and the indictment found, no court was in session at Oswego, and the acts of the grand jury were void.[16]

STOWELL, J.: On January 6, 1908, a trial term of the Supreme Court, with a grand jury, began at the courthouse in Oswego and continued until January 31, when the presiding judge made an order "That this court be continued open but stand in recess until such time as it shall be adjourned by the court." No further term or session of the court was held until February 26. On January 26, the presiding judge discharged the trial jurors and excused the court officers and attendants from further service; and, during the interim between January 31 and February 26, he was absent from the city of Oswego.

---

[15] As to whether the court of a justice of the peace is a court of record the American authorities are divided and the question depends largely on local statutes and practice. They have been held courts of record in Connecticut. *McVeigh* v. *Ripley*, 77 Conn. 136 (1904) and Delaware, *Cloud* v. *The State*, 2 Harr. (Del.) 361 (1838); contra, West Virginia, *Roberts* v. *Hickory Camp, C. & C. Co.*, 58 W. Va. 276 (1905).

The civil jurisdiction of a justice of the peace is wholly statutory. *Gurnsey* v. *Lovell*, 9 Wend. (N. Y.) 319 (1832); *Albright* v. *Lapp*, 26 Pa. 99 (1856); *Schroder* v. *Ehlers*, 31 N. J. L. 44 (1864); *Horton* v. *Elliott*, 90 Ala. 480, 8 So. 103 (1889).

[16] A brief portion of the opinion is omitted.

On February 4, the judge held a special term of the Supreme Court at Syracuse, which continued several days, and he was presumably engaged in duties of his office during all the time between January 31 and February 26, at other places than in Oswego County.

The evidence against defendant was presented to the grand jury February 4 or 5, and, on the fifth, the grand jury adjourned until February 26 at which time they were discharged. I am unable to see that, with the judge holding court in Onondaga County, a grand jury sitting in Oswego County have power to find an indictment.

A court has been defined to be "an organized body with defined powers, meeting at certain times and places for the hearing and decision of cases and other matters brought before it and aided in its proper business by its proper officers." Matter of Choate, 24 Abb. N. Cas. 430-433. "A place where justice is judiciously administered. * * * A court is properly composed of persons consisting of the judge or judges and other proper officers, united together in a civil organization, and invested by law with the requisite functions for the administration of justice. * * * The court is clearly an organization invested by law with certain functions for the administration of justice. * * * When summoned, sworn and organized, the grand jury are a constitutent part of the court, for the performance of the functions and duties devolved upon the court, as much as a body of twelve petit jurors impaneled for the trial of a person." Id. 435.

"The court is the totality of the constituent parts. It consists of the entire judicial organization for the trial of causes and it is immediately present whenever and wherever—from the opening to the adjournment of the sitting—these constituent parts are actually performing the functions devolving upon them by law." The times and places for holding terms of court are fixed by statute, Code Civ. Pro., par. 238. In Matter of Savin, 131 U. S. 267, the court said: "We are of the opinion that within the meaning of the statute the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses."

I think that the attempt of the learned justice to keep the court open, he being in the meantime absent from the county and part of the time holding a term of court at Syracuse, is not warranted by the law or practice and that the action of the grand jury during that time was null and void.[17]

Motion granted.

---

[17] *Dunn* v. *State*, 2 Ark. 229, 35 Am. Dec. 54 (1839), at p. 252; *In matter of King's Co. Elev. Railroad Co.*, 78 N. Y. 383 (1879); *Greenwood* v. *Bradford*, 128 Mass. 296 (1880); *Lewis* v. *Hoboken*, 42 N. J. L. 377 (1880); *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570 (1895); *White County* v. *Gwin*, 136 Ind. 562 (1893); *Butts* v. *Armor's Estate*, 164 Pa. 2, 30 Atl. 357, 26 L. R. A. 213 (1894); *State* v. *Woodson*, 161 Mo. 444, 61 S. W. 252 (1900); *Johnston* v. *Hunter*, 50 W. Va. 52, 40 S. E. 448 (1901); *Mitchell* v. *Emmons*, 104 Maine 76 (1908); *Moline* v. *Chicago, B. & Q. R. Co.*, 262 Ill. 52 (1914). As to terms of court, see *Horton & Heil* v. *Muller*, 38 Pa. 270 (1861); *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. ed. 797 (1881); *Von Schmidt* v. *Widber*, 99 Cal. 511, 34 Pac. 109 (1893). As to places for holding court, see *King* v. *King*, 1 Penn. & W. (Pa.)

KIMBLE *v.* DAILEY.

SUPREME COURT OF IOWA, 1905.

127 *Iowa* 665.[18]

LADD, J.: Prior to the appointment of J. I. Dailey, in 1892, as guardian of B. F. Kimble, who had been adjudged insane, Martin Davis had acted in that capacity, and had procured an order of court directing him to sell 160 acres of land to the Oak and Highland Park Improvement Company for the consideration of $60,000, of which $5,000 was to be paid in cash, $5,000 in one year, $10,000 in two years, and $40,000 in five years, with interest at seven per cent. per annum on deferred payments. Before the order was executed, Davis was succeeded by Dailey as guardian, and he was directed by the court to carry out the contract of his predecessor. This was done, and the Oak and Highland Park Improvement Company, upon receiving a deed, conveyed to the Auburn Heights Land Company. The land was platted into blocks and lots, and the lots divided into thirteen groups, on each of which was executed a mortgage to a trustee, securing ten bonds of the face value of $1,000 each. These 130 bonds were delivered to the guardian as security for the purchase price. When the cash payment was made he surrendered to the Oak and Highland Park Improvement Company one block of ten bonds, and one of like number when the second $5,000 was paid. Subsequently the officers of the company requested him to deliver to them three blocks of ten bonds each, to be sold and the proceeds applied in improving the property. The guardian did so, but, as the testimony tended to show, upon the advice of a district judge when at his home sick. It will be noted that in turning over these thirty bonds the guardian parted with security on three of the thirteen groups of lots, and so did on the mere promise of the officers to improve the remaining property against which the guardian retained a lien.

One of the exceptions to the final report of the guardian raises the question as to whether the guardian should be charged with the value of these bonds. The advice of the judge, given orally outside of court, furnished no justification for what he did. What the judge said was entitled to no more consideration than a similar view expressed by any other equally reputable lawyer would have been. Judges are authorized by statute to make certain orders in vacation, and these are expressly defined to be directions made in writing (sec. 3842, Code), and when so made are to be filed forthwith with the

---

15 (1829); *Eaton & Hamilton County* v. *Varnum*, 10 Ohio St. 622 (1858); *Gould* v. *Bennett*, 59 N. Y. 124 (1874); *State* v. *Beverly*, 43 N. J. L. 139 (1881); *Williams* v. *Rentzel*, 60 Ark. 155, 29 S. W. 374 (1895); and compare *Smith* v. *Jones*, 23 La. Ann. 43 (1871); *Christie* v. *Bowne*, 76 Hun (N. Y.) 42 (1894); *Bates* v. *Sabin*, 64 Vt. 511, 24 Atl. 1013 (1892); *Litchfield Bank* v. *Church*, 29 Conn. 137 (1860). *King* v. *Faber & Co.*, 51 Pa. 387 (1865).

[18] The statement of facts is omitted and only that part of the opinion of the court relating to the unofficial action of the judge is printed.

clerk (sec. 3846, Code). *Bristol Savings Bank v. Judd,* 116 Iowa, 26. The power of a judge in vacation to make orders or exercise judicial functions is that only which is conferred by statute. *Prosser* v. *Prosser,* 64 Iowa, 378; *Laughlin* v. *Peckham,* 66 Iowa, 121; *Blair* v. *Reading,* 99 Ill. 600; 17 Am. & Eng. Encyc. of Law (2d ed) 724.[19] And nowhere in the code is he authorized to advise officers of courts or others, or to make oral directions, in any matter. On the contrary, he is prohibited from practicing as an attorney or counselor at law, and from giving "advice in relation to any action pending or about to be brought in any of the courts of this state." Section 281, Code. The functions of his office are not advistory, but to direct and command, and what he may say outside of court, unless reduced to writing so as to constitute an order, is not official, and can be regarded as of no more consequence than it would if spoken by him when not a judge. *State Central Sav. Bank* v. *Fanning Ball-Bearing Chain Co.,* 118 Iowa, 698, 709; *Whitlock* v. *Wade,* 117 Iowa, 153; *Young* v. *Rothrock,* 121 Iowa, 588; *In re Thomas' Estate,* 26 Colo. 110. In the last case the court said: "It is not the duty of an incumbent of a judicial position to advise parties to any action regarding their rights or duties, or to make any orders in relation to them, except when the matter calling for an order is presented to him in his official capacity; and mere advice or suggestion upon his part regarding matters which are not before him for consideration, and in which he does not assume to act judicially, are no protection to those who choose to rely upon them." In *Marlow* v. *Marlow,* 48 Iowa, 640, and *Latham* v. *Myers,* 57 Iowa, 519, the orders were made by the court and overlooked in making up the record, and oral evidence of what the orders were seems to have been received without objection, rather than a record thereof entered nunc pro tunc. In *Harlin* v. *Stevenson,* 30 Iowa, 374, the payments, though made on the oral advice of the judge, were subsequently approved in a settlement with the county court, which was in no manner assailed. No order was entered by the judge in this case, and what he may have said in conversation with the guardian furnished no justification for the conduct of the latter in surrendering the bonds.[20]

[19] In *Pittsburg, F. & W. R. Co.* v. *Hurd,* 17 Ohio St. 144 (1866), it is said per Scott, J.: "Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself. It is the power to hear and determine out of court, such questions arising between the parties to a controversy, as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court without requiring them to be brought before the court in actual session. It follows that the jurisdiction of a judge at chambers, can not go beyond the jurisdiction of the court to which he belongs, or extend to matters with which the court has nothing to do." See further, *Larco* v. *Sasanewa,* 30 Cal. 560 (1866); *Comm.* v. *Magee,* 8 Pa. 240 (1848); *Pressley* v. *Harrison,* 102 Ind. 14 (1884); *Clover* v. *Adams,* L. R. 6 Q. B. D. 622 (1881); *Grierson* v. *Harmon,* 16 S. Car. 618 (1881); *Key* v. *Paul,* 61 N. J. L. 133 (1897).

[20] The principal case is to be distinguished from those in which formal application is made to a chancellor or judge for instructions in his official capacity. *Gibbins* v. *Shepard,* 125 Mass. 541 (1878); *Baxter* v. *Baxter,* 43 N. J. Eq. 82 (1887); *Nobbs* v. *Law Reversionary Interest Soc.,* L. R. (1896), 2 Ch. Div. 830.

PERSEY *v.* DEB.

ASSIZES, 1372.

Liber Assisarum, 45 Edward III, 3.[21]

Henry Persey and another once brought an assize of of novel disseisin against one A. DeB. before Monbray and Wakbruge—and pending the assize, Wakbruge died, and a commission was directed to the said Henry to be associated as companion to the said Monseigneur Monbray, *ad omnes Assisas coram quibuscunque Justiciares arrainment capieret,* etc., and now Henry was summoned to this assize and he appeared by attorney.

HOLT:[22] Sir, you see well how Monseigneur John Monbray and Henry Persey are justices to take this assize, and Henry can not be a party and a judge and take this assize, and Monseigneur John can not take it without a companion, wherefore on this day nothing can be done.

FITZ, J.: Sir, this assize was brought by Henry at a time when Wakbruge was justice, and it is not reasonable that the suit of Henry should be prejudiced because of a thing that did not happen because of his own act, nor of his default, and the said Henry was made justice pending his suit by command of the King; a matter in which he had no choice. Wherefore it is not reasonable that his suit should be delayed on this account.

And afterward he would have been nonsuited, so that the other plaintiff with him could have the assize of the moiety.

MONBRAY: I can not make a nonsuit without my companion and Henry can never make a nonsuit against himself, wherefore nothing can be done in this suit to-day.

TANK:[23] Sir, it is not reasonable that he who is named plaintiff with Henry should suffer disadvantage because Henry is named justice pending the writ. And sir, since Persey never appeared to this suit in his proper person, it is possible that he is another Henry Persey who brought the writ than this Henry who is made justice. Wherefore since this is possible, it is not inconvenient that you and Henry should make the nonsuit.

And upon this it was adjourned before themselves at Westminster. Upon which day it was the advice of all the sages that Henry could not hold this plea, but that it behooved that a special assize be granted for Henry and the other plaintiff before other justices.[24]

---

[21] The plaintiff Persey was king's sergeant and occasionally employed as judge of assize. He was made a baron of the exchequer in 1375 and a judge of the common pleas in 1377.

[22] John Holt, made a judge of the common pleas in 1383.

[23] William Tank was made chief baron of the exchequer in 1374.

[24] Accord: *Chancellor of Oxford's Case,* 8 Henry VI, 18; *City of London* v. *Wood,* 12 Mod. 669 (1701), at p. 687; *Wright* v. *Crump,* 7 Mod. 1 (1702), s. c. Salkeld, 201, 2 Ld. Raym. 766. Holding stock in a corporation disqualifies

INHABITANTS OF NORTHAMPTON *v.* SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1846.

52 *Mass.* 390.*

SHAW, C. J.: This was an appeal from the decree of the judge of probate of the County of Hampshire, by which he declined, on account of interest, to take jurisdiction of the probate of the will of Oliver Smith, late of Hatfield, and directed the proceedings upon the said will to be transferred to the court of probate of the County of Worcester, being the most ancient adjoining county. This objection is founded on the provision of the Rev. Stat., ch. 83, § 15, directing that when a judge of probate shall be interested in any case within his jurisdiction, the case shall be transferred to the probate court of the most ancient adjoining county. The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests, and of course in proving the will; and that by means thereof, Mr. Conkey, the judge of probate, as an inhabitant of Amherst and a member of the corporation, had a derivative interest in the same bequests.

---

the holder from sitting as chancellor or judge in a suit to which the corporation is a party. *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759 (1852); *Adams* v. *Minor,* 121 Cal. 372 (1898). As to whether mere relationship to a stockholder ought to disqualify. Compare: *Searsburg Turnpike Co.* v. *Cutler,* 6 Vt. 315 (1834), with *Place* v. *The Butternut Woolen Co.,* 28 Barb. (N. Y.) 503 (1857).

At the common law it was no objection that the judge was related to a party to the suit. *Brookes* v. *Earl of Rivers,* Hard. 503 (1669). But now by statutes and decisions the general rule is that near relationship of the judge to a party to the suit will disqualify him from acting. *Matter of Aldrich,* 110 Mass. 189 (1872); *Russell* v. *Belcher,* 76 Maine 501 (1884); *Stearnes* v. *Curll, Campbell & Co.,* 4 Pa. C. C. 265 (1887).

At the common law no impropriety attached to sitting as judge in a case after having acted as counsel. *Tounsend* v. *Hughes,* 2 Mod. 150 (1677); *Thellusson* v. *Rendlesham,* 7 H. L. Cas. 428 (1859); *Owings* v. *Gibson,* 2 A. K. Marsh 515 (1820); *Den* v. *Tatem,* 1 N. J. L. 164 (1793), but see Gen. Stat. N. J. (1896), Vol. II, p. 2576.

Now by statutes and decisions a judge is generally held disqualified from acting in a case where he has previously appeared as counsel. Rev. Stat. U. S., § 615, and see *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387 (1892), at p. 476; *Moses* v. *Julian,* 45 N. H. 52 (1863); *Kolb's Estate,* 4 Watts (Pa.) 154 (1835). But a judge is not disqualified because he may have formerly represented the parties in other matters. *Keller* v. *Riverton Water Co.,* 34 Pa. Super. Ct. 301 (1907), or because his son is of counsel. *People* v. *Patrick,* 183 N. Y. 52 (1905).

* The statement of the facts and a part of the opinion of the court are omitted.

The great question, and the one raised on the appeal, is, whether the judge of probate, as an inhabitant of the Town of Amherst, and a member of that municipal corporation, had such an interest in this will, within the meaning of the statute, as to supersede his jurisdiction of the probate of the will, and transfer it to another county.

It is true that the plain dictates of natural justice, independently of all articles of Magna Charta, bills of rights, or other provisions of positive law, require that a man shall not be judge in his own cause. And it is only a just application of this principle, that he shall not sit in judgment in deciding a question, in which he has a personal interest. But this, like all other very general propositions, in order to make it the basis of a practical rule, must have a reasonable construction, and must be taken, not as absolute and invariable, but with all necessary and implied qualifications. If the term "interest" were used in the loose sense it sometimes is, consisting in a strong and sincere desire to promote all enterprises for the advancement of learning, philanthropy, and general charity, or a similar interest, with all good men, to repress and put down pernicious and mischievous schemes, no man could be found fit to be intrusted with the administration of justice; for no man can be exempt from such interests. But, even where there are pecuniary interests, there must be some exceptions; as when the Commonwealth is a party in a criminal prosecution or a penal action, where the penalty enures to the state, and all civil suits on recognizances and other debts, or for the recovery of property, every citizen has a pecuniary interest. And yet none but citizens can be judges. Our own declaration of rights has made some approximation towards a limitation of the generality of the maxim, by declaring (art. 29) that "it is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit." It is obvious that no nearer approximation to the rule of absolute impartiality can be made, by any system of laws.

We are then to consider what is the nature of the interest, intended by Rev. Stat., ch. 83, sec. 15, which shall take the case out of the jurisdiction of the judge of probate, and transfer it to the court of probate of an adjoining county.

1. We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates; but one that is visible, demonstrable and capable of precise proof. *Cottle, Appellant,* 5 Pick. 483. *Sigourney* v. *Sibley,* 21 Pick. 101, and 22 Pick. 507. It is not the bias or prejudice which would be sufficient to set aside a juror. *Davis* v. *Allen,* 11 Pick. 466. It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of probate, which otherwise would not have it. It must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extensively in-

jurious. *Holyoke* v. *Haskins,* 5 Pick. 20. *Coffin* v. *Cottle,* 9 Pick. 287.

2. It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror.[28] *Smith* v. *Bradstreet,* 16 Pick. 264.

3. It must be certain, and not merely possible or contingent. *Hawes* v. *Humphrey,* 9 Pick. 350. *Wilbraham* v. *County Commissioners,* 11 Pick. 322. *Danvers* v. *County Commissioners,* 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.

It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject-matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent.

On examining this will of Oliver Smith, we can not perceive that it vests any pecuniary interest, legal or beneficial, in the towns named, other than Northampton. The will provides for the future annual distribution of considerable sums of money, in charity, for the relief and assistance of various classes of indigent persons to be selected from those residing within the limits of these towns. But the distribution of a sum of money within the limits of a town, although it may give a spring to business, and indirectly benefit the inhabitants, as members of society, and holders of property, yet is not a direct pecuniary interest to the town in its corporate capacity, through which its members derive a pecuniary interest. And although it may be said, in a loose sense, that such a provision for various classes of persons, and the distribution of so much money, would be of great benefit to the town, and although the inhabitants of such town would feel strongly inclined to aid in promoting and establishing such a charity, and even be willing to pay money in securing it, yet, when strictly considered, it means only that such

---

[28] Accord: *Bryan* v. *State,* 41 Fla. 643, 26 So. 1022 (1899). Statutes in many states have made bias or prejudice a ground for disqualifying a judge. See 23 Cyc. 582; 17 Am. & Eng. Ency. of Law (2d ed.) 738.

an establishment would be useful and beneficial to the dwellers in such town; not that it would confer any corporate right upon the town. It affords no direct or necessary exemption from taxes. It is the same interest which the inhabitants of a town often feel and manifest in the establishment of a college, academy, hospital, and even a courthouse and jail, within their limits.

The court are therefore of opinion, that the town of Amherst, as a municipal corporation, in its corporate capacity, takes no pecuniary interest, legal or beneficial, under this will, and that, of course, Mr. Conkey, judge of probate, as an inhabitant of that town, takes no such interest; that he is not prevented from taking jurisdiction of the probate of this will; and that no other probate court of the commonwealth can take jurisdiction of it.

The decree of the probate court is reversed, and the case remitted to that court, for further proceedings, in the probate of said will, and the settlement of the said Oliver Smith's estate.[27]

EDWARD LANGE *v.* CHARLES L. BENEDICT.

COURT OF APPEALS OF NEW YORK, 1878.

73 N. Y. 12.

The plaintiff brought an action against the defendant for false imprisonment. From the complaint it appeared that the defendant was judge of the District Court for the United States for the Eastern District of New York; that the defendant had been found guilty of stealing mail bags, the property of the United States, and had been sentenced by the defendant to pay a fine of $200 and to be imprisoned for one year, although by the act of congress the punishment was a fine or imprisonment. The plaintiff paid the fine and had undergone imprisonment for five days when the judge vacated the sentence and resentenced the plaintiff to imprisonment for one year. This resentence the Supreme Court of the United States held unauthorized and on habeas corpus the plaintiff was discharged

---

[27] *Great Charte* v. *Kennington*, 2 Str. 1159 (1743); *Upper Dublin* v. *Germantown*, 2 Dall. (Pa.) 213 (1793). The fact that a judge is a property owner and taxpayer does make him "personally interested" in an action against the county so as to entitle the plaintiff to a change of venue. *Brittain* v. *Monroe County*, 214 Pa. 648 (1906). Accord: *Commonwealth* v. *Fletcher*, 157 Mass. 14 (1892), on statutory grounds; *Jeffersonian Pub. Co.* v. *Hilliard*, 105 Ala. 576 (1894); *Lawton Rapid Trans. Co.* v. *Lawton*, 31 Okla. 458 (1912). Contra, *Peck* v. *Essex*, 21 N. J. L. 656 (1847); *Meyer* v. *San Diego*, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. 22 (1898). It has been held that where the judicial power is confined to one judge, he may act, although interested, if the necessity is imperative. *Matter of Ryers*, 72 N. Y. 1 (1878); *Hill* v. *Wells*, 23 Mass. 104 (1828); *Philadelphia* v. *Fox*, 64 Pa. 169 (1870); *Forest Coal Co.* v. *Doolittle*, 54 W. Va. 210, 46 S. E. 238 (1903); *State* v. *Houser*, 122 Wis. 534, 100 N. W. 964 (1904); *State* v. *Polley*, 138 N. W. 300 (S. Dak. 1912).

from custody.[28] To the complaint the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the New York Supreme Court and the plaintiff appealed to this court.[29]

FOLGER, J.: In our judgment, the question between the parties is brought to what, in words at least, is a very narrow issue: Did the defendant impose the second sentence as a judge; or, although he was at the moment of right upon the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond or in excess of the jurisdiction which he then had as a judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not to be easily determined to the satisfaction of a cautious inquirer.

There are not many topics in the law which have received more discussion and consideration than that of the liability of a person holding a judicial, or quasi judicial office, to an action at law, for an act done by him while, at the same time, exercising his office. The principles which should govern such action are, therefore, well settled. The difficulty in satisfactorily disposing of a particular case is, not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie.

The general rule, which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: Such as are by law, made judges of another, shall not be criminally accused, or made liable to an action for what they do as judges; to which the Year Books (43 Edw., 3, 9; 9 Id., 4, 3) are cited in *Floyd* v. *Baker* 12 Coke 26). The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge; the proceeding is as nothing (*Perkin* v. *Proctor,* 2 Wilson, 382-384), citing the *Marshalsea Case* (10 Coke 65-76), which says: "Where he has no jurisdiction, non est judex." It has been stated thus, also: No action will lie against a judge, acting in a judicial capacity, for any errors which he may commit, in a matter within his jurisdiction. (*Gwynne* v. *Pool,* Lutw., 290.) It has been, in modern days, carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. (*Bradley* v. *Fisher,* 13 Wall. 351.)

It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity; it must have been a judicial act. So it always remains to be determined, when is an act done as judge, in a judicial capacity. And

---

[28] Ex parte Lange, 85 U. S. 163 (1873). The Supreme Court held that the judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties the power of the court was ended. Clifford and Strong, J. J., dissented.

[29] The statement of facts is condensed from the opinion of the court, portions of which are omitted. Reported below in 8 Hun (N. Y.) 362.

this is the difficulty which has most often been found in the use of this rule, and which is present here; to determine when the facts exist which call into play that qualification.

For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander to be stricken off, and be obeyed, he would be liable. Thus, a person in the office of judge of the Ecclesiastical Court in England, excommunicated one for refusing to obey an order made by him, that he become guardian ad litem for an infant son, and though the order was made in a matter then lawfully before the court for adjudication, and of which he as judge had jurisdiction, he was held liable to an action. (*Beaurain* v. *Sir Wm. Scott,* 3 Campb. 388.) He had not, as judge, jurisdiction of the person to whom he addressed the order. On the other hand, one rightfully holding a court for the trial of a criminal action fined and imprisoned a juror, for that he did not bring in a verdict of guilty against one on trial for an offense, after the court had directed the jury that such a verdict was according to the law and facts. The juror was discharged from imprisonment on habeas corpus brought in his behalf, and it was held that the act of fining and imprisoning him was unlawful, inasmuch as there was no allegation of corruption or like bad conduct against the juror. The juror then brought an action against him who sat as judge and made the order for the fine and imprisonment, but took nothing thereby, for it was held that the judge acted judicially, as judge, as he had jurisdiction of the person of the juror, and jurisdiction of the subject-matter, to wit: The matter of punishing jurors for misbehavior as such, and that his judgment that the facts of that case warranted him in inflicting punishment was a judicial error to be avoided and set aside in due course of legal proceedings, for which, however, he was not personally liable. (*Hammond* v. *Howell, Recorder of London,* 2 Mod. 218; *Bushell's Case,* Vaughan Reps., 135.) So a judge of Oyer and Terminer was protected from indictment when he had made entry of record that some were indicted for felony before him; whereas, in fact, they were indicted for trespass only. (12 Coke 25.)

Thus it appears that the test is not alone that the act is done while having on the judicial character and capacity, nor yet is it alone that the act is not lawful.

We have seen, too, that the test is not that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority. (*Bradley* v. *Fisher, supra.*)[30]

---

[30] Accord: *Taylor* v. *Doremus,* 16 N. J. L. 473 (1838); *Pratt* v. *Gardner,* 56 Mass. 63 (1848); *Fray* v. *Blackburn,* 3 B. & S. 576 (1863); *Woodruff* v. *Stewart,* 63 Ala. 206 (1879); *Anderson* v. *Gorrie,* L. R. (1895) 1 Q. B. 668 (1894); *Scott* v. *Fishblate,* 117 N. Car. 265 (1895); *Webb* v. *Fisher,* 109 Tenn. 701, 72 S. W. 110, 60 L. R. A. 791, 97 Am. St. 863 (1902); *Wyatt* v. *Arnot,* 7 Cal. App. 221 (1907); *Kruegel* v. *Cobb,* 124 S. W. 723 (Tex. 1910); *Casser-*

We think it clear that there is no liability to civil action, if the act was done "in a matter within his jurisdiction," to use the words of *Gwynne* v. *Pool* (*supra*). Those words mean, that when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in *Hunt* v. *Hunt* (72 N. Y. 217). It is not confined within the particular facts, which must be shown before a court or a judge, to make out a specific and immediate cause of action; it is as extensive as the general or abstract question, which falls within the power of the tribunal or officer to act concerning. Our idea will be illustrated by a reference to *Groenvelt* v. *Burwell* (1 Ld. Raym. 454). There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was malpractice by him. He brought his action. They pleaded the charter of the college, giving them power to make by-laws for the government of all practitioners in medicine in London, and to overlook them and to examine their medicines and prescriptions, and to punish malpractice by fine and imprisonment; that they had, in the exercise of that power, adjudged the plaintiff guilty of mala praxis, and fined him twenty pounds, and ordered him imprisoned twelve months, nisi, etc. It was held that the defendants had "jurisdiction over the person of the plaintiff, inasmuch as he practiced medicine in London; and over the subject-matter, to wit, the unskillful administration of physic. That is the language of Holt, C. J., in that case. And because the defendants had power to hear and punish, and to fine and imprison, it was held that they were judges of record, and because judges, not liable for the act of fining and imprisoning. (See also *Ackerly* v. *Parkinson*, 3 Maul. & Selw. 411.) It is the general abstract thing which is the subject-matter. The power to inquire and adjudge whether the facts of each particular case make that case a part or an instance of that general thing—that power is jurisdiction of the subject-matter. Thus in *Hammond* v. *Howell* (*supra*), the defendant was saved from liability to civil action, inasmuch as he he had as judge jurisdiction of the subject-matter of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons, and he had jurisdiction of the subject-matter, and his error was a judicial error; an act done quatenus judge; not an act as Howell, the private person, though it was an act contrary to law, grievous and oppressive upon the citizen.

---

leigh v. *Malone*, 50 Colo. 597 (1911); *Broom* v. *Douglass*, 57 So. 860 (Ala.) (1912). Contra: *Hollon* v. *Lilly*, 100 Ky. 553, 18 Ky. L. 968, 38 S. W. 878 (1897); *Willis* v. *Linn*, 148 Ky. 841 (1912); *Gault* v. *Wallis*, 53 Ga. 675 (1875) *semble*.

The inquiry, then, at this stage of our consideration of the case is this: Whether the defendant, sitting upon the bench of the circuit court and being on that occasion de jure et de facto the circuit court, and having as such jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance; whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge whether the facts in the case of the plaintiff, as then presented to him fell within any of those subject-matters. It is not the inquiry whether the act then done as the act of the court was erroneous and illegal; that is but another form of saying whether it could or could not be lawfully done as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act based upon them would be lawful or unlawful.

That the defendant, as that court, had jurisdiction of the person of the plaintiff is manifest. He was before it on a return of a writ of habeas corpus, sued out by him, and was produced in court by the marshal to whom the writ was sent. He was in the custody of law upon a judgment and sentence of that court, the validity of which he was questioning, and seeking from that court a vacating and annulling thereof. At least until the order for vacating it was made the plaintiff was lawfully within the power of the court.

The court also had jurisdiction of the subject-matter. It might by law indict and try persons charged with stealing and appropriating mail bags; it might pass sentence upon them, when duly convicted, of fine or imprisonment; during the same term of the court at which one sentence had been imposed, it might vacate it or modify it, as law and justice would require. (*Ex parte Lange*, 18 Wall. 163). If it had imposed a sentence greater than that prescribed by law, it could vacate it and inflict one in accord with the law. If no part of the invalid sentence imposed had been executed, it could vacate and inflict one different in kind or degree. (*Ex parte Lange* 18 Wall. 163; *Miller* v. *Finkle*, 1 Park. Cr. R., 374, and cases cited there.) In England it has been held that at the same term the judgment might be altered, and by reason of subsequent conduct of the convicted person the punishment be increased. (*Reg.* v. *Fitzgerald*, 1 Salk. 401.) And another sentence has been given after a portion of the former one had been suffered. (*Rex* v. *Price*, 6 East, 323.) The judgment, as expressed in the prevailing opinion in *Ex parte Lange* (*supra*), is not in accord with those two cases, and we cite them without expression of approval or otherwise.

This was the subject-matter—the general matter then before the court. The particular matter or question presented was the sentence of fine and imprisonment passed upon the plaintiff; was it erroneous and unlawful in that it went beyond the limit of the law, he having been some days in imprisonment under it, and having paid a sum of money equal in amount to the fine, to the clerk of the court, who in turn had paid it to an officer of the United States government; was it lawful to vacate the sentence if in excess of the law;

if that sentence should be vacated, was it lawful, under the facts of the case, to impose another sentence which should be in accord with the statute—did all these things present a case for the exercise of power, by virtue of the jurisdiction over the subject-matter? The court, we have seen, had the jurisdiction last named; did it not also have jurisdiction to adjudicate upon that state of facts? If it did have it, and did adjudicate erroneously, was it not a judicial error to be relieved from, by such writ as would bring it up for review, rather than a wrong done personally to be answered for in a civil action? Is not the person who filled the office of judge and by his presence on the bench made that court free from liability for that adjudication, though the act done by him was erroneous and unauthorized by law?

It is true that the United States Supreme Court upon a certain state of facts before it, and in a proceeding by certiorari to which this defendant was not a party, and in which he was not heard by that court, reached the conclusion that the second sentence of the circuit court was pronounced without authority, and discharged the plaintiff from his imprisonment thereunder. (*Ex parte Lange, supra.*) In the prevailing opinion given in the case are repeated expressions to the effect that the power of the circuit court to punish, further than the first sentence, was gone; that its power to punish for that offense was at an end when the first sentence was inflicted, and the plaintiff had paid the $200 and laid in prison five days; that its power was exhausted; that its further exercise was prohibited; that the power to render any further judgment did not exist; that its authority was ended.

The opinion also says: "A judgment may be erroneous and not void; and it may be erroneous because it is void. The distinctions between void and voidable judgments are very nice, and they may fall under the one class or the other, as they are regarded for different purposes." We do not think that learned court would disregard the reasoning of *Howell's Case* (*supra*) and others like unto it. Yet in *Bushnell's Case* (*supra*), he was discharged on habeas corpus, on the ground that Howell as judge had no power or authority to fine or imprison him for the cause set up; it was called "a wrongful commitment" (1 Mod. 184), as contrasted with "an erroneous judgment" (12 Mod. 381, 392); and yet when Howell was called to answer in a civil action for the act, it was held that though without authority it was judicial. In *Bushnell's Case* (1 Mod, 119), Hale, C. J., said: "The habeas corpus and the writ of error, though it doth make the judgment void, doth not make the awarding of the process void to that purpose," i. e., of an action against the judge, "and the matter was done in a court of justice," he continued. So is the comment upon that case. (*Yates* v. *Lansing*, 5 Johns 290.) "It had jurisdiction of the cause because it had power to punish a misdemeanor in a juror, though in the case before the court the recorder made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor." (2 Mod. 218.) So in *Ackerley* v. *Parkinson* (*supra*) the defendant was held protected though the citation issued by him

was considered as a nullity; on the ground that the court had a general jurisdiction over the subject-matter.

Let it be conceded, at this point that the law is now declared, that the act of the defendant was without authority and was void, yet it was not so plain as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, have agreed with him in his view of the law.

He was, in fact, sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public and to the plaintiff to pass as such, upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars, the validity of his judgment may depend. (*Ackerly* v. *Parkinson, supra.*) For such an act, a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous (see *Garnett* v. *Farrand,* 6 B. & C. 611).

There is another view of this case. It is certain that the defendant as the circuit court, had at first jurisdiction of the plaintiff, and jurisdiction of the cause and the proceedings. That jurisdiction continued to and including the pronouncing of the first sentence; nay, until and including the giving of the order vacating that sentence. If it be admitted that at the instant of the utterance of that order jurisdiction ceased, as is claimed by the plaintiff, on the strength of the opinion in *Ex parte Lange* (*supra*), as commented upon *Ex parte Parks* (93 U. S. R. 18), and that all subsequent to that was corum non judice, and void; still it was so, not that the court never had jurisdiction, but that the last act was in excess of its jurisdiction. Thus in the opinion (*Ex parte Lange, supra,* p. 165) it was said that the facts very fairly raised the question whether the circuit court in the sentence which it pronounced, and under which the prisoner was held, had not exceeded its powers. (See, also, p. 174.) We think, that the whole effect of the opinion is, not that the court had no jurisdiction, no power over the prisoner and the case, but that it had no authority to impose further punishment.

This act of the defendant was then one in excess of, or beyond the jurisdiction of the court. And though when courts of special and limited jurisdiction exceed their powers, the whole proceeding is coram non judice, and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a

superior court, or one of general jurisdiction, for an act done by him in a judicial capacity. (*Yates* v. *Lansing, supra; Bradley* v. *Fisher, supra; Randall* v. *Brigham,* 7 Wall. 523.)[31]

In the case last cited it is said of judges of superior courts: They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps they are done maliciously or corruptly. (Pp. 536, 537.) And in the other cases a distinction is observed and insisted upon between excess of jurisdiction and a clear absence of all jurisdiction over the subject-matter. And to the same effect is this: "For English judges, when they act wholly without jurisdiction * * * have no privilege." (Per Parke, B; *Calder* v. *Halket,* 3 Moore P. C. C. 28, 75.)

Now it may be conceded that the circuit court is not a court of general jurisdiction; that in a sense it is a court of limited and special jurisdiction (*Kempe's Lessee* v. *Kennedy,* 5 Cranch 173); inasmuch as it must look to the acts of congress for the powers conferred. But it is not an inferior court. It is not subordinate to all other courts in the same line of judicial function. It is of intermediate jurisdiction between the inferior and the Supreme Courts. It is a court of record; one having attributes and exercising functions, independently of the person of the magistrate designated generally to hold it; per Shaw, C. J. (*Ex parte Gladhill,* 8 Metc. 168, 170); it proceeds according to the course of the common law; it has power to render final judgments and decrees which bind the persons and things before it, conclusively, in criminal as well as civil cases, unless revised on error or appeal (*Grignon's Lessee* v. *Astor,* 2 How. (U. S.) 341; see *Ex parte Tobias Watkins,* 3 Pet. 193). "Many cases are found wherein it is stated generally that when an

---

[31] In *Piper* v. *Pearson,* 68 Mass. 120 (1854), it is said, per Bigelow, J.: "The common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But on the other hand, if they act without any jurisdiction over the subject-matter; or if, having cognizance of a cause, they are guilty of an excess of jurisdiction; they are liable in damages to the party injured by such unauthorized acts. In all cases therefore where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii,* the single inquiry is whether he has been guilty of an excess of jurisdiction." Accord: *Clarke* v. *May,* 68 Mass. 410, 61 Am. Dec. 470 (1854); *Miller* v. *Searle,* 2 W. Bl. 1141 (1776); *Tracy* v. *Williams,* 4 Conn. 107, 10 Am. Dec. 102 (1821); *Blood* v. *Sayre,* 17 Vt. 609 (1843); *Waterville* v. *Barton,* 64 Maine 321 (1874); *Hanna* v. *Slevin,* 8 Pa. Super. Ct. 509 (1898) *semble; Stephens* v. *Wilson,* 115 Ky. 27 (1903); *Duffin* v. *Summerville,* 9 Ala. App. 573 (1913). But in *Thompson* v. *Jackson,* 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92 (1895), the rule that protects superior judges exceeding their authority and refuses the same protection to inferior judges is described as "unreasonable, unjust and illogical," and in other jurisdictions the tendency is to hold that a judge of an inferior court acting in good faith without malice in excess of his jurisdiction ought not to be civilly liable. *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633, 24 Am. St. 137 (1891); *Bell* v. *McKinney,* 63 Miss. 187 (1885); *Austin* v. *Vrooman,* 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138 (1891); *Robertson* v. *Parker,* 99 Wis. 652, 75 N. W. 423 (1898); *Calhoun* v. *Little,* 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. 254 (1898); *Bowman* v. *Seaman,* 152 App. Div. (N. Y.) 690 (1912).

inferior court exceeds its jurisdiction its proceedings are entirely void and afford no protection to the court, the party, or the officer who executes its process. I apprehend that it should be qualified when the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause." (Marcy, J.; *Savacool* v. *Boughton*, 5 Wend. 172.) How much more so when the court is not inferior?

For these reasons we are of the opinion that the defendant is protected by his judicial character from the action brought by the plaintiff. We have not gone into a written consideration of the matters urged by the learned and zealous counsel for the plaintiff in his very elaborate and exhaustive brief and printed argument. We have read them with great interest and benefit. To follow them in an opinion, and to comment upon all the cases cited and positions taken, would be to write a treatise upon this subject. That would be no good reason why they should not be followed and discussed, if the requirements of the case demanded it. The case turns upon a question more easily stated than it is determined: Was the act of the defendant done as a judge? Our best reflections upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us to the conclusion that as he had jurisdiction of the person and of the subject-matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of or beyond jurisdiction, the act was judicial. We are not unmindful of the considerations of the protection of the liberty of the person, and of the staying of a tendency to arbitrary exercise of power, urged with so much eloquence by the learned and accomplished counsel for the appellant. Nor are we of the mind of the court in 2 Mod. (218, 220), that "these are mighty words in sound, but nothing to the matter." They are to the matter, and not out of place in such a discussion as this. Nor have we been disposed to outweigh those considerations, with that other class, which sets forth the need of judicial independence, and of its freedom from vexation on account of official action, and of the interest that the public have therein. (See *Bradley* v. *Fisher, supra; Taffee* v. *Downs*, in note to *Calder* v. *Halket*, 3 Moore P. C. C. 28, 41, 51, 52.) These are not antagonistic principles; they are simply countervailing. As with all other rules which act in the affairs of men, preponderance may not be fondly given to one to the disregard of the other; each should have its due weight yielded to it, for thus only is a safe equipoise reached.

We have arrived at our decision upon what we hold to be long and well-established principles applied to the peculiar facts of this interesting case.

The judgment of the general term should be affirmed.

All concur, except Andrews, J., absent.

Judgment affirmed.[32]

---

[32] Accord: *Ross* v. *Rittenhouse*, 2 Dall. (Pa.) 160 (1792), s. c. 1 Yeates 443; *Phelph* v. *Sill*, 1 Day (Conn.) 315 (1804); *Yates* v. *Lansing*, 9 Johns. (N. Y.) 395 (1811); *Doswell* v. *Impey*, 1 B. & C. 163 (1823); *Garnett* v. *Ferrand*, 6 B. & C. 611 (1827); *Tompkins* v. *Sands*, 8 Wend. (N. Y.) 462, 24

NATHANIEL LORD *v.* JOHN W. VEAZIE.

SUPREME COURT OF THE UNITED STATES, 1850.

8 *How.* (*U. S.*) 251.

This case was brought up by writ of error from the Circuit Court of the United States for the District of Maine.

It appeared that in 1842 the Bangor and Piscataquis Canal and Railroad Company executed a deed to the City Bank at Boston by which the bank claimed the entire property of the company. By an act passed in 1847 the company was reorganized and the bank claimed to be sole proprietors under the new charter. John W. Veazie, a shareholder in the original company, claimed that control was granted to the stockholders. In August, 1848, Veazie and Lord executed an instrument purporting to be a conveyance from Veazie to Lord of 250 shares of the company which Veazie covenanted to warrant and defend, and in September, 1848, Lord brought this action of covenant and a statement of facts agreed upon under which the opinion of the court was to be taken. In October, 1848, judgment *pro forma* was given for defendant at the request of the parties in order that the question might be brought before this court. Mr. Moor on his own account as counsel for the City Bank moved to dismiss the appeal on the ground that it was a fictitious case contrived to settle legal questions upon which he, Moor, and the City Bank had a large amount of property depending. A number of affidavits were filed in support of and against the motion.[33]

TANEY, C. J.: The court is satisfied, upon examining the record in this case, and the affidavits filed in the motion to dismiss, that the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in the question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the circuit

---

Am. Dec. 46 (1832); *Dicas* v. *Brougham*, 1 M. & Rob. 309 (1833); *Morrison* v. *McDonald*, 21 Maine 850 (1842); *Stone* v. *Graves*, 8 Mo. 148 (1843); *Bailey* v. *Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650 (1854); *Burnham* v. *Stevens*, 33 N. H. 247 (1856); *Lancaster* v. *Lane*, 19 Ill. 242 (1857); *Way* v. *Townsend*, 4 Allen (Mass.) 114 (1862); *Scott* v. *Stansfield*, L. R. 3 Exch. 220 (1868); *Pappa* v. *Rose*, L. R. 7 C. P. 32 (1871); *Busteed* v. *Parsons*, 54 Ala. 393, 25 Am. Rep. 688 (1875); s. c. 25 Am. Rep. 688, note; *Jones* v. *Brown*, 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185 (1880); *Grove* v. *VanDuyn*, 44 N. J. L. 654, 43 Am. Rep. 412 (1882); *Rudd* v. *Darling*, 64 Vt. 456, 25 Atl. 479 (1892); *Marks* v .*Sullivan*, 9 Utah 12, 33 Pac. 224 (1893); *Webb* v. *Fisher*, 109 Tenn. 701, 72 S. W. 110, 60 L. R. A. 791, 97 Am. St. 863 (1902); *Krugel* v. *Murphy*, 126 S. W. 343 (Tex. 1910); *Alzua* v. *Johnson*, 231 U. S. 106 (1913).

[33] The statement of facts is abridged and the arguments of counsel omitted.

court, and no opportunity of being heard there in defense of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment *pro forma* entered by their mutual consent, without any actual judicial decision by the court. It is a question, too, in which it appears that property to a very large amount is involved, the right to which depends on its decision.

It is proper to say that the counsel who argued here the motion to dismiss, in behalf of the parties to the suit, stand entirely acquitted of any participation in the purposes for which these proceedings were instituted; and indeed could have had none, as they were not counsel in the circuit court, and had no concern with the case until after it came before this court. And we are bound to presume that the counsel who conducted the case in the court below were equally uninformed of the design and object of these parties; and that they would not knowingly have represented to the court that a feigned controversy was a real one.

It is the office of courts of justice to decide the rights of persons and of property, when the persons interested can not adjust them by agreement between themselves,—and to do this upon full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purpose, when there is no real and substantial controversy between those who appear, as adverse parties to the suit, is an abuse which the courts of justice have always reprehended, and treated as a punishable contempt of court.

The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of this kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms of technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties.[34] The objection in the case before us is, not that the proceedings were amicable, but that there is

[34] *Dubuque & P. R. Co.* v. *Litchfield*, 23 How. (U. S.) 66, 16 L. ed. 500 (1859).

no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceedings was in contempt of the court, and highly reprehensible, and the learned district judge who was then holding the circuit court, undoubtedly suffered the judgment pro forma to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed.[35]

---

[35] There must be a real controversy presented to the court. Abstract or fictitious questions will not be decided. *Coxe* v. *Phillips,* Lee (Tenn.) 237 (1736); *Da Costa* v. *Jones,* Cowp. 729 (1778); *In re Elsau,* 3 L. J. (O. S.) K. B. 75 (1824); *Glasgow N. Co.* v. *Iron Ore Co.,* L. R. (1910) App. Cas. 293; *Smith* v. *Cudworth,* 24 Pick. (Mass.) 196 (1837); *Brewington* v. *Lowe,* 1 Ind. 21, 48 Am. Rep. 349 (1848); *Berks* v. *Jones,* 21 Pa. 413 (1853); *Willard's Appeal,* 65 Pa. St. 265 (1870); *Murphy* v. *Railroad,* 110 Mass. 465 (1872); *Little* v. *Thorne,* 93 N. Car. 69 (1885); *Lincoln* v. *Aldrich,* 141 Mass. 342, 5. N. E. 517 (1886); *Patter's Estate,* 4 Pa. D. R. 329 (1895); *Scott* v. *Sheehan,* 145 Cal. 691, 79 Pac. 353 (1905). In *Mills* v. *Green,* 159 U. S. 651, 40 L. ed. 293 (1895), it is said, by Gray, J.:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Accord: *Wilson & Co.* v. *Russell,* 40 Iowa 697 (1875); *People* v. *Troy,* 82 N. Y. 575 (1880); *State v. Porter,* 58 Iowa 19, 11 N. W. 514 (1882); *Cheong Ah Moy* v. *United States,* 113 U. S. 216, 28 L. ed. 983 (1884); *Flanagan* v. *Central Lunatic Asylum,* 79 Va. 554 (1884); *Chicago, R. I. & P. R. Co.* v. *Dey,* 76 Iowa 278 (1888); *People* v. *Squire,* 110 N. Y. 666 (1888); *Gloucester* v. *Greene,* 45 N. J. Eq. 747, 18 Atl. 81 (1889); *State* v. *Board of Comrs. Grant County,* 153 Ind. 302 (1899); *Watkins* v. *Huff,* 94 Tex. 631 (1901); *Tampa Gas Co.* v. *Tampa,* 44 Fla. 813, 33 So. 465 (1902); *Jones* v. *Montague,* 194 U. S. 147, 48 L. ed. 913 (1904); *Hotel Co.* v. *Merchants Ice Co.,* 41 Wash. 620, 84 Pac. 402 (1906); *McDaniel* v. *Hurt,* 88 Miss. 769, 92 Miss. 197, 41 So. 381 (1906); *Southern P. T. Co.* v. *Interstate Commerce Comm.,* 219 U. S. 498 (1910); *Reichard's License,* 45 Pa. Super Ct. 606 (1911); *Comm.* v. *Cairns,* 46 Pa. Super. Ct. 96 (1911).

In *Brown* v. *Leeson,* 2 H. Bl. 43 (1792), an action was brought on a wager to determine the number of ways of throwing seven and eleven with two dice. Lord Loughborough struck the case off the list, and was sustained by the court in banc.

In *Faust* v. *Cairns,* 242 Pa. 15 (1913), an appeal was taken from an order refusing an injunction to restrain the board of health from maintaining a quarantine. The quarantine was removed three months before the appeal was argued. Appeal dismissed.

CHAPTER II.

PARTIES.

SECTION 1. IN GENERAL.

"In life, liberty and estate, every man who hath not forfeited them, hath a property and right which the law allows him to defend; and if it be violated, it gives an action to redress the wrong, and to punish the wrong doer." *Thomas* v. *Sorrell,* Vaughan 380 (1668).[1]

"The word party is unquestionably a technical word and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether at law or in equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons; they are parties in the writ, and parties on the record, and all others who may be affected by the writ indirectly or consequentially are persons interested, but not parties." Per Parker, C. J., in *Merchants' Bank* v. *Cook,* 4 Pick. 405 (1826).

MARY J. ASHBY *v.* JOSEPH S. ASHBY.

SUPREME COURT OF LOUISIANA, 1887.

39 La. Ann. 105.

Appeal from the Civil District Court for the parish of Orleans.

TODD, J.: This is a suit instituted by plaintiff, claiming to be a judgment creditor of the defendant Joseph H. Ashby, to annul a mortgage executed by him in favor of his children—co-defendants —which is charged to be fraudulent and intended to secure an unjust claim against him in their favor to the prejudice of the plaintiff's rights. The defendant excepted on the ground that the petition disclosed no cause of action.

From a judgment in favor of the plaintiff annulling the mortgage assailed, the defendants have taken this appeal.

It appears from the pleadings and record:

That the plaintiff has no moneyed judgment against the defendant Joseph H. Ashby, on the faith of which she seeks the annullment of the mortgage. This judgment, which is referred to in the petition, is not a judgment in favor of the plaintiff, but one in favor of her children, to whom she was at one time tutrix.[2]

---

[1] "In this state any person of sound mind, of lawful age and under no restraint or legal disability, has the legal capacity to sue, although it may ultimately appear that he has no cause of action." *Hunt* v. *Monroe,* 32 Utah 428 (1907).

[2] A woman appointed to the office of tutor, by the civil law, is one who has the care of the person and property of a minor.

It further appears that, when this suit of nullity was instituted, these children had attained their majority, and one of them had married, had children and died.

It is not alleged or proved that the plaintiff ever acquired from her children this judgment or any right thereto, and the parties owning the judgment are not parties to the suit, or in any matter represented therein, but the plaintiff sues alone and in her personal capacity.

It follows, therefore, that plaintiff has instituted and prosecuted a suit in which she has no personal interest whatever, and in which she does not represent the real parties in interest.

An action can only be brought by one having a real and actual interest which he pursues. C. P., art. 15; *Corral & Co.* v. *Towboat Co.*, 37 Ann. 803.[8]

Judgment reversed.

JOHN McELHANON *v.* JOHN McELHANON Assignee, Etc., for the Use of Thomas J. Le Compte.

SUPREME COURT OF ILLINOIS, 1872.

63 *Ill.* 457.

Writ of error to the Circuit Court of Washington County.

MCALLISTER, J: John McElhanon instituted a suit in chancery against James Hughes, and applied for an injunction. He was re-

---

[8] "The rule, I think, must be regarded as fundamental, that no person can maintain an action respecting a subject-matter, in respect to which he has no interest, right or duty, either personal or fiduciary." Per Van Fleet, V. C., in *Baxter Exr.* v. *Baxter*, 43 N. J. Eq. 82, 10 Atl. 114 (1887). Accord: *Murray* v. *Webster*, 5 N. H. 391 (1831); *Campbell* v. *Galbreath*, 5 Watts (Pa.) 423 (1836); *Fulham* v. *McCarthy*, 1 H. L. C. 703 (1848); *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272 (1859); *Attorney-General* v. *Telegraph Co.*, 30 Bevan 287 (1861); *Niederhaus* v. *Heldt*, 27 Ind. 480 (1867); *Jones* v. *Gordon*, 124 Pa. 263, 16 Atl. 862 (1889); *Brock* v. *Rogers*, 184 Mass. 545, 69 N. E. 334 (1904); *King* v. *Tyler*, 6 Pennew. (Del.) 287 (1907); *Clark* v. *Anderson*, 103 Maine 134 (1907).

If, however, an interest in the plaintiff is conceded, his motive in suing is immaterial. *Mazet* v. *Pittsburg*, 137 Pa. 548 (1890); *Brockman* v. *Creston*, 79 Iowa 587 (1890); *Eggers* v. *Newark*, 77 N. J. L. 198 (1908).

A plaintiff must show some injury peculiar to himself beyond that suffered by the public at large. *Winterbottom* v. *Lord Derby*, L. R. (1866) 2 Exch. 316. And, ordinarily, he is not authorized to bring an individual action to redress some wrong against the community, *Doolittle* v. *Broome County Supervisors*, 18 N. Y. 155 (1858); *Buck Mountain Coal Co.* v. *Lehigh Navigation Co.*, 50 Pa. 91 (1865); *Kennedy* v. *Consumers Gas Co.*, 142 Mass. 91 (1886); *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. (U. S.) 91 (1838). But such authority may be conferred by legislation. *Hawthorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326 (1909); and citizens and tax payers may maintain a bill in equity to restrain public officers from acts in violation of the law and constitution. *Sample* v. *Pittsburg*, 212 Pa. 533 (1905); *Kircher* v. *Pederson*, 117 Wis. 68 (1903). A civil action can not be maintained in the name of the state to redress a purely private wrong. *Attorney-General* v. *Salem*, 103 Mass. 138 (1869); *People* v. *Booth*, 32 N. Y. 397 (1865); *State* v. *Parkville & G. R. Co.*, 32 Mo. 496 (1862).

quired to give a bond to Hughes in the penal sum of $500, with James M. McElhanon as his security. The bond was given, and John McElhanon, averring that he is the assignee of Hughes in bankruptcy, brings debt upon that bond, against himself and surety for the use of Thomas J. Le Comte. The default of defendant below was entered and plaintiff's damages assessed at $50, whereupon judgment was rendered in favor of plaintiff, for debt, $500 to be discharged upon payment of the damages. The case was brought to this court by writ of error, and the principal error assigned is the insufficiency of the declaration.

Chitty says that "it is an answer to an action that a party is legally interested in each side of the question. A party can not be both plaintiff and defendant in an action." 1 Chitty, Pl. 40.

This rule will operate, although the party appears on one side in his *personal* and on the other in his *official* character. *Pearson* v. *Nesbitt*, 1 Dev. 315, 5 ib. 288.

The judgment of the court below is reversed.[4]

STEAMBOAT BURNS.

SUPREME COURT OF THE UNITED STATES, 1869.

9 *Wall.* (*U. S.*) 237.

These were two cases brought before the court by what purported to be writs of error to the Supreme Court of Missouri. The writ in the first case referred to a judgment in that court in a suit "between the *steamboat Burns, her tackle, etc., appellant,* and James

---

[4] At law the same person can not be both plaintiff and defendant in the same suit. *Mainwaring* v. *Newman*, 2 Bos. & P. 120 (1800); *Holmes* v. *Higgins*, 1 B. & C. 74 (1822); *Eastman* v. *Wright*, 23 Mass. 196 (1826); *Portland Bank* v. *Hyde*, 11 Maine 196 (1834); *Chandler* v. *Shehan*, 7 Ala. 251 (1845); *Mahan* v. *Sherman*, 7 Blackf. (Ind.) 378 (1845); *Trustees of Methodist Church* v. *Stewart*, 27 Barb. (N. Y.) 553 (1858); Price 1. Spencer, 7 Phila. (Pa.) 179 (1870); *Brown* v. *Mann*, 71 Cal. 192, 12 Pac. 51 (1886); *Wilson* v. *Benedict*, 90 Mo. 208, 2 S. W. 283 (1886); *Byrne* v. *Byrne*, 94 Cal. 576 (1892); *Sweetland* v. *Porter*, 43 W. Va. 189 (1897); *Oliver* v. *Oliver*, 178 Ill. 527, 53 N. E. 303 (1899); *Taylor* v. *Thompson*, 176 N. Y. 168, 68 N. E. 240 (1903); *Medlin* v. *Simpson*, 144 N. Car. 397 (1907). The remedy is in equity. *Cole* v. *Reynolds*, 18 N. Y. 74 (1858); *Price* v. *Spencer*, 9 Phila. (Pa.) 281 (1873); *Cooper* v. *Nelson*, 38 Iowa 440 (1874). The case of firms having common members is now generally covered by statutes, e. g., Pa. act. of April 14, 1838, P. L. 457; *Hall* v. *Logan*, 34 Pa. 331 (1859); and in England by the rules of court under the Judicature Act of 1873, Order 48a, rule 10.

It has been held no bar to a recovery that one of several defendants has become possessed of a right of action prosecuted against him and his co-defendants, unless his name appears on record both as plaintiff and defendant. *Blanchard* v. *Ely*, 21 Wend. (N. Y.) 342 (1839). See also *Pringle* v. *Pringle*, 130 Pa. 565 (1890).

The authorities differ as to whether a plaintiff can summon himself as garnishee. Compare *Graigher* v. *Notnagel*, 1 Peters C. C. (U. S.) 245 (1816); *Coble* v. *Nonemaker*, 78 Pa. 501 (1875); *Lyman* v. *Wood*, 42 Vt. 113 (1869); *Morris* v. *Ludlam*, 2 H. Bl. 362 (1794), with *Belknap* v. *Gibbens*, 54 Mass. 471 (1847); *Hoag* v. *Hoag*, 55 N. H. 172 (1875).

Reynolds, and James Aiken, respondents and appellees," in which "a manifest error hath happened, to the great damage of the said *steamboat, her tackle, etc.*, as by *her* complaint appears." The citation made the same recital. The writ and citation in the second case varied from this only in the names of the defendants in error.[5]

MILLER, J.: It is believed to be the first time that anything but a human being, or an aggregation of human beings, called a corporation or association, has attempted to bring a writ of error or appeal in this court.

It is said in support of the writ that the proceeding below was *in rem* against the steamboat by name, and that as it was so conducted through all the state courts it should be so here.

There is nothing in the essential nature of proceedings *in rem* which justifies or requires this. Whenever the *res* is seized in admiralty proceedings proper, or in revenue or in other proceedings partaking of that character, the property is condemned and sold, and with the distribution of the proceeds the case ends, unless some one appears in court as claimant either of the *res* or its proceeds.[6] When a claimant appears he becomes a party to the proceedings, and may defend, take an appeal, or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to.

It is true that in placing such cases on the dockets of our courts, and in the reports of our decisions, the name of the vessel or thing seized is often retained; but in all cases where any defensive action is taken, some person must appear and claim an interest or a right to be heard on account of his relation to the property.

If any person or corporation whom this court can recognize as a legal entity, capable of sustaining a suit in this court, has an interest in such a controversy, that party must connect himself with the case in such a manner as to enable himself to assert his rights here. It can not be done in the name of a steamboat.[7]

---

[5] Part of the statement of facts and opinion of the court are omitted.

[6] *Scott* v. *Shearman*, 2 W. Bl. 977 (1775); *State* v. *One Bottle of Brandy*, 43 Vt. 297 (1871).

[7] The parties to an action must have legal entities either as real persons or as artificial persons authorized by law to sue or be sued. *White* v. *Road District*, 9 Iowa 202 (1859); *Steamboat Pembinaw* v. *Wilson*, 11 Iowa 479 (1861); *Mexican Mill* v. *Jellow Jacket M. Co.*, 4 Nev. 40, 97 Am. Dec. 510 (1868); *Western and Atlantic R. Co.* v. *Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978 (1905); *Nelson* v. *Atlantic Coast Line Relief Department*, 147 N. Car. 103 (1908); *Hill* v. *Armour Fertilizer Works*, 80 S. E. 294 (Ga. App. 1913). Compare *Steamboat Kentucky* v. *Hine*, 1 Greene (Iowa) 379 (1848); *Doe* v. *Penfield*, 19 Johns. N. Y. 308 (1812); *Clark Bro.* v. *Wyche*, 126 Ga. 24 (1906).

Parties to an action must be designated by name not merely by description. *Kountz* v. *Brown*, 16 B. Mon. (Ky.) 577 (1855). Thus, a suit against an "Estate" is not a suit with a real defendant. *Estate of Columbus* v. *Monti*, 6 Minn. 568 (1861); *Knox* v. *Greenfields' Estate*, 7 Ga. App. 305 (1910). At the common law the true Christian name of the party was required. *Shadgett* v. *Clipson*, 8 East. 328 (1807); *Gardner* v. *Kraft*, 52 How. (N. Y.) 499 (1877); *Anderson* v. *Horn*, 23 Abbotts N. Cas. (N. Y.) 475 (1889); *Parks* v. *Tolman*, 113 Mo. App. 14 (1905). A mere misnomer is not fatal but may be cured by amendment. *Horbach* v. *Knox*, 6 Pa. 377 (1847); *Welch* v. *Hull*, 73 Mich. 47 (1888).

In some jurisdictions where the plaintiff is ignorant of the defendants'

An examination of the records in these cases shows that Adolph Heinecke did in the inferior court claim to be the owner, and defended the suit in the name of the steamboat. He likewise made affidavit that he was the owner, and gave bond to enable him to appeal to the Supreme Court of that state. But instead of taking the appeal in his own name he took it in the name of the steamboat. We are of opinion that by a liberal construction of the record he may be so far regarded as claimant and party to the record as to enable him to bring a writ of error to this court in his own name if he shall be so advised. The present writs are dismissed.

KARGES FURNITURE CO. v. AMALGAMATED WOODWORKERS LOCAL UNION, No. 131.

SUPREME COURT OF INDIANA, 1905.

165 *Ind.* 421.

Suit by the Karges Furniture Company against the Amalgamated Woodworkers Local Union Number 131 and others. From a decree for plaintiff against certain defendants, plaintiff appeals.[a]

HADLEY, J.: Appellant brought this suit against the appellees, the Amalgamated Woodworkers Union No. 131 of Evansville, an unincorporated labor organization, and its members, to enjoin them, such members being on a strike, from picketing, intimidating, and otherwise interfering with the plaintiff's employes and business. The complaint, in two paragraphs, was answered by a general denial. There was a trial, special findings, and injunction awarded against fourteen of the appellees, and finding and decree in favor of the remaining appellees, including said amalgamated woodworkers union.

The first question to be considered is: Can an action be maintained against an unincorporated society or association? "Private corporations," says Field, J., in *Pembina, etc., Mining Co.* v. *Pennsylvania* (1888), 125 U. S. 181, 189, 8 Sup. Ct. 737, 31 L. ed. 650, "are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a

---

name he may designate the defendant by a fictitious name. In New York a description identifying the person intended must be added. New York Code of Civil Procedure, § 451; *Simon* v. *Underwood*, 61 Misc. (N. Y.) 369 (1908); The California Code Civil Procedure, § 474, requires the record to be amended by inserting the true names when discovered. *Alameda County* v. *Crocker*, 125 Cal. 101 (1899); *Moore* v. *Lewis*, 76 Mich. 300 (1889); *Gillian* v. *McDowall*, 66 Neb. 814 (1902).

Persons suing or sued in a representative capacity are distinct persons and strangers to any right or liability they may have as individuals. *Leonard* v. *Pierce*, 182 N. Y. 431 (1905). But a description of the character in which a party sues or is sued must be treated as surplusage when the facts establish a right or liability independent of the description. *Hampton* v. *Foster*, 127 Fed. 468 (1904); *Filson* v. *Dunbar*, 26 Pa. 475 (1856). Compare *Clifford* v. *Prudential Insurance Co.*, 161 Pa. 257 (1894).

[a] Only so much of the case is given as relates to the question of procedure.

succession of members without dissolution." In England corporations exist only by virtue of letters patent issued by permission of the crown, and in this state corporations can be created only by special permission of the state expressed in legislative enactment. Corporations may in their corporate name sue and be sued, and hold title to property. The interests of their several members are represented by shares, which may be sold and transferred to a stranger without affecting a dissolution of the status of the corporate body. A fundamental purpose for the creation of corporations is to subserve public welfare and convenience by bestowing the character of individuality upon a combination of capital and individuals, for the accomplishment of such things as may not be so well or readily achieved by a single person, and that may not be ended by death, or the withdrawal of a part of their members; and such body being created by authority of a statute, and endowed with certain rights and obligations, is recognized by the law as an artificial person possessed of the right to sue and be sued.

On the other hand, in the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized at common law as having any legal existence distinct from their members, hence no power to sue or be sued in the company name. Such unincorporated associations, so far as their rights and liabilities are concerned, are rated as partnerships, and to enforce a right either for or against them, as in partnerships, the names of all the individual members must be set forth either as plaintiffs or defendants.[9]

We have no statute abrogating the rule at common law; hence it must be held that this rule is still in force in this state, and, regardless of the evidence, the court committed no error in denying an injunction against the appellee, the Amalgamated Woodworkers Local Union No. 131.[10]

Affirmed.

---

[9] *Hays* v. *Lanier*, 3 Blackf. (Ind.) 322 (1833); *Hughes* v. *Walker*, 4 Blackf. (Ind.) 50 (1835); *Holland* v. *Butler*, 5 Blackf. (Ind.) 255 (1839); *Livingston* v. *Harvey*, 10 Ind. 218 (1858); *Adams Express Co.* v. *Hill*, 43 Ind. 157 (1873); *Pollock* v. *Dunning*, 54 Ind. 115 (1876); 22 Enc. Pl. and Pr. 230. While voluntary associations have frequently been described as partnerships, they are not partnerships in the true sense of that term, since there exists no authority in a single member to bind the others by his individual act, and the death or retirement of a member does not dissolve the society. Dicey on Parties (2d ed.) 149; 4 Cyc. 301; *Ash* v. *Guie*, 97 Pa. 493, 39 Am. Rep. 818 (1881).

[10] At common law a voluntary, unincorporated association being a mere aggregation of individuals, can not sue or be sued in the name of the association. *Lloyd* v. *Loaring*, 6 Ves. 773 (1802); *Pipe* v. *Bateman*, 1 Iowa 369 (1855); *Marsh* v. *Astoria Lodge*, 27 Ill. 421 (1862); *Detroit S. B.* v. *Detroit Agitations Verein*, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270 (1880); *Barbour* v. *Albany Lodge*, 73 Ga. 474 (1884); *St. Paul's Typothetae* v. *St. Paul's Bookbinders Union*, 94 Minn. 351 (1905); *Maisch* v. *Order of Americus*, 223 Pa. St. 199 (1909); *Farmers Mutual* v. *Reser*, 43 Ind. App. 634 (1908); *O'Rourke* v. *Kelley P. Co.*, 135 S. W. 1011 (1911 Mo. App.); *Hanley* v. *Elm Grove M. T. Co.*, 129 N. W. 807 (Iowa 1911); *Home Benefit Assn.* v. *West-*

WILSON *v.* LOUISIANA PURCHASE EXPOSITION COMMISSION.

SUPREME COURT OF IOWA, 1907.

133 *Iowa* 586.

This was a suit brought by the plaintiff for a writ of mandamus to compel the commission to pay him the sum of $200 which he claimed to be due from the State of Iowa under an alleged contract with the commission by which he was engaged to work for the horticultural department. The executive committee of the commission had disallowed his bill. The answer alleged that the suit was in effect against the State of Iowa and also put in issue the material averments of the petition. The court below dismissed the petition and plaintiff appealed.[11]

SHERWIN, J.: The appellant makes but one point in his brief and argument of this case, which is that the court erred in refusing to submit the issues involved to a jury for determination. On the other hand, the appellees contend that the suit can not be maintained, because it is in effect a suit against the state, and because the state has never consented thereto. We think it must be conceded that, under the allegation of the petition, the defendants in this case are nominal only. The Louisiana Purchase Exposition Commission was a creature of the state, created for the specific purpose of representing the state and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the state set apart by legislative authority for that express purpose. The commission was clearly but an agent of the state through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the state is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would compel the defendant to make a draft

---

er, 146 S. W. 1022 (Tex. 1912); *Francis* v. *Perry,* 82 Misc. (N. Y.) 271 (1913); *Kimball* v. *Lower Columbia Relief Assn.,* 135 Pac. 877 (Ore. 1913); *Caine* v. *Armenia Lodge,* 77 S. E. 184 (Ga. 1913). "At law, if the objection is properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of members may be made parties defendant as representatives of the class." *Pickett* v. *Walsh,* 192 Mass. 572 (1906); *Meux* v. *Maltby,* 2 Swanst. 277 (1818); *Snow* v. *Wheeler,* 113 Mass. 179 (1873); *Platt* v. *Colvin,* 50 Ohio St. 703 (1893), 735; N. Y. Code Civ. Proc., § 1919; *Ostrom* v. *Greene,* 161 N. Y. 353, 55 N. E. 919 (1900); *Taff Vale R. Co.* v. *Amalgamated Soc.,* L. R. (1901); App. Cas. 426; *Pearson* v. *Anderburg,* 28 Utah 495 (1905); *Wolfe* v. *Limestone Council,* 233 Pa. 357 (1912). By statute, in some jurisdictions, an unincoporated society known by some distinguishing name, may sue or be sued by such name. 22 Enc. Pl. & Pr. 235, 245; *Huth* v. *Humboldt Stamm,* 61 Conn. 227 (1891); *Ex parte Hill,* 51 So. 786 (Ala. 1910).

[11] The statement of facts is abridged.

upon state funds; in other words, the effect thereof would be to compel the state itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from state funds. It is fundamental that a state can not be sued in its own courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the state to enforce satisfaction for claims. *Cunningham* v. *Macon, etc., R. R. Co.*, 109 U. S. 446 (3 Sup. Ct. 292, 27 L. ed. 992); *In re Ayres*, 123 U. S. 443 (8 Sup. Ct. 164, 31 L. ed. 216); *Aplin* v. *Board of Supervisors of Grand Traverse County*, 73 Mich. 182 (41 N. W. 223, 16 Am. St. Rep. 576); *People* v. *Dulaney*, 96 Ill. 503; *Commonwealth* v. *Wickersham*, 90 Pa. 311; *Weston* v. *Dame*, 51 Maine 461.

Under the rule that a state can not be sued in its own courts without its consent, it necessarily follows that a writ of mandamus will not ordinarily issue to compel state officers or agents to do an act involving discretionary or judicial determination of the question. Nor will such writ issue to compel the state to execute a contract made by it. Nor will the writ issue to compel the allowance of a rejected or disputed claim. *Payne* v. *Board of Wagonroad Commissioners*, 4 Idaho 384 (39 Pac. 548); *State* v. *Merrell*, 43 Neb. 575 (61 N. W. 754); *State* v. *Commissioners*, 26 Ohio St. 364. It is made to appear from the allegations of the petition herein that the plaintiff's claim for services was to be audited and allowed before a voucher was issued therefor by the executive committee of the defendant; and, under the rule of the cases heretofore cited, and many others which might be cited, a writ of mandamus will not issue to compel an officer or tribunal to do an act involving discretionary or judicial determination. This branch of the case has not been argued by the appellant, and we need give it no further consideration. For the reasons thus briefly stated, there was no error in dismissing the plaintiff's petition, and we need not determine whether the plaintiff was entitled to a trial by a jury if the court had jurisdiction of the case.[12]

Affirmed.

---

[12] Accord: *Young* v. *The Scotia*, L. R. (1903) A. C. 501; *Kiersted* v. *People*, 1 Abb. Pr. (N. Y.) 385 (1855); *Seitz* v. *Messerschmitt*, 117 N. Y. App. Div. 401 (1907); *Kansas* v. *Appleton*, 73 Kans. 160 (1906); *Nash v. Commonwealth*, 174 Mass. 335 (1899); *Hodgdon* v. *Haverhill*, 193 Mass. 406 (1907); *Alabama Industrial School* v. *Addler*, 144 Ala. 555 (1905); *Union Trust Co.* v. *California*, 154 Cal. 716 (1908); *Thomas* v. *State*, 16 Idaho 81 (1909); *Kansas* v. *United States*, 204 U. S. 331 (1907); *Statham* v. *Watham and the Gaekwar of Baroda*, L. R. (1912) Prob. Div. 92; *Porto Rico* v. *Ramos*, 232 U. S. 627 (1914). For cases where the plaintiff was by statute permitted to sue the state, see *Russ* v. *Commonwealth*, 210 Pa. 544 (1905); *Nussbaum* v. *New York*, 119 App. Div. (N. Y.) 755 (1907).

A foreign sovereign or state can not be made a defendant without his or its consent: *Mighell* v. *Sultan of Jahore*, L. R. (1894) 1 Q. B. D. 149; *The Parliament Belge*, L. R. (1880) 5 Prob. Division 197; *Strousberg* v. *Costa Rico*, 44 L. T. (N. S.) 199 (1880); *Long* v. *The Tampico*, 16 Fed. 491 (1883); *Mason* v. *Inter Colonial Railroad of Canada*, 197 Mass. 349 (1908). But a sovereign or state may sue. *Delafield* v. *Illinois*, 2 Hill (N. Y.) 159 (1841); *Honduras* v. *Soto*, 112 N. Y. 310 (1889); *State* v. *Ohio Oil Co.*, 150 Ind. 21 (1897); and then may be subjected to a counter claim in mitigation

CLAY *v.* OXFORD.

COURT OF EXCHECQUER, 1866.

L. R. (1866) *2 Exch.* 53.

This action was commenced on the 10th of May, in the name of John Clay, as plaintiff. It was afterwards discovered that John Clay had died before the date of the writ, and on the 14th of June a summons was taken out to substitute the names of his executrix and executors as plaintiffs. This summons was abandoned; but on the 7th of November, another summons to the same effect was taken out before Martin, B., who made the order prayed. It was desired to have the action continued, in order that some depositions which had been taken before the discovery of John Clay's death might be read in the cause.[13]

J. A. Russell having obtained a rule nisi to rescind this order,

Jones, Q. C., showed cause.—The amendment asked is not beyond what might have been made at common law in cases where, as in this case, a peculiar reason of convenience operates in favor of continuing the existing suit.

J. A. Russell, in support of the rule, was not called upon.

BRAMWELL, B.: This is not a case where it can be said that persons, not formally entitled to be parties, have brought an action to try certain matters perfectly well known to both sides, which is the explanation of *Blake* v. *Done*, 7 H. & N. 465, 31 L. J. Ex. 100, and *La Banca Nazionale* v. *Hamburger*, 2 H. & C. 330. But here the plaintiff is altogether wrong, or rather there is no plaintiff; the man in whose name the action was brought was dead. It can not be said that this is an amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties," nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted.[14]

Rule absolute.

---

of the relief claimed by the plaintiff. *South African Republic* v. *La Campagne Franco-Belge*, L. R. (1898) 1 Ch. Div. 190.

[13] Concurring opinions of Kelly, C. B., Chamrell, B. and Pigott, B. are omitted. In England now under the rules of court, order 16, rule 2, where an action, through a bona fide mistake, is commenced in the name of the wrong person as plaintiff, the court may substitute a new plaintiff. *Hughes* v. *Pump House Hotel Co.*, L. R. (1902) 2 K. B. 485. Upon this principle an executor was substituted for a plaintiff dead when the suit was brought in *Ram* v. *Tinn*, 19 Western Canada L. R. 529 (1911).

[14] Accord: *Doe* v. *Butler*, 3 Wend. (N. Y.) 149 (1829); *Hurst* v. *Fisher*, 1 W. & S. 438 (1841); *Alexander & Bros.* v. *Davidson*, 2 McM. (S. Car.) 49

KENYON *v.* SAUNDERS.

SUPREME COURT OF RHODE ISLAND, 1894.

18 *R. I.* 590.[15]

STINESS, J.: Susan C. Kenyon died in August, 1893, leaving a will, from the probate of which her husband, George N. Kenyon, appealed. At the time of taking the appeal he was serving a sentence of fifteen years imprisonment in the state prison for the crime of manslaughter, imposed by this court at the March term, 1893, which sentence is still in force. A motion to dismiss the appeal was granted by the common pleas division on the ground: First, that said George N. Kenyon was incapacitated, by reason of his sentence and imprisonment to take the appeal or to sign and seal the appeal bond required by law.

Undoubtedly under the common law of England a person convicted of a felony could not maintain an action. This rule was founded upon the reason that as the conviction worked a forfeiture of goods to the crown, he had no longer any property to sue for. But under our law, Public Stat. R. I. ch. 248, sec. 34, no conviction or sentence for an offense whatsoever works a forfeiture of estate. The reason for the common-law rule does not here exist, and an enforcement of it might practically work a forfeiture of estate. Indeed, this case is a plain example of the possibility. Here, assuming the appellant's interest in the estate and the invalidity of the will, he is the party to take an appeal, and it must be taken within forty days from the probate. If it should be held that his conviction deprives him of his right to appeal, then he would thereby also be deprived of the power ever to enforce his right to the property itself. Notwithstanding the difficulties which may attend cases of this kind, such a rule would be contrary to the spirit of the statute and unsupported by the reason upon which it was originally based. A convict is neither civilly dead, nor deprived of his rights of property; and, if this be so, he should be entitled to enforce such right when it is necessary to do so.[16]

Reversed.

(1841); *Bollinger* v. *Chouteau*, 20 Mo. 89 (1854); *Wolf* v. *Brown*, 142 Mo. 612 (1897); *Kountz* v. *National T. Co.*, 197 Pa. St. 398, 47 Atl. 350 (1900), and see *Loring* v. *Folger*, 73 Mass. 505 (1856); *Winship* v. *Conner*, 42 N. H. 341 (1861); *Watt* v. *Brookover*, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. 811 (1891). As to whether the rule applies to nominal plaintiffs, compare *Lewis* v. *Austin*, 144 Mass. 383, 11 N. E. 538 (1887); *Denton* v. *Stephens*, 32 Miss. 194 (1855) with *Karrick* v. *Wetmore*, 22 App. D. C. 487 (1903).

At common law the death of either party to a suit before verdict and judgment abated the action, but by statutes it is now provided that *if the cause of action survives*, the suit shall not abate but may be continued by or against the representatives of the deceased. 5 Enc. Pl. & Pr. 786; 1 Cyc. 47 and cases cited. As to the survival of the cause of action, see Street's Foundation of Legal Liability, vol. 3, ch. 6. *Hayden* v. *Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723 (1875).

[15] A part only of the opinion of the court is printed.

[16] "Besides men attainted in a praemunire, every person that is attainted of high treason, petit treason, or felony, is disabled to bring any action; for

J. D. MacRAE AND L. S. NAFTZEGER *v.* THE KANSAS CITY PIANO COMPANY.

SUPREME COURT OF KANSAS, 1904.

69 *Kans.* 457.

CUNNINGHAM, J.: The Kansas City Piano Company brought its action in replevin against J. D. MacRae to recover the possession of a piano. A redelivery bond was given by MacRae, with L. S. Naftzger, one of the plaintiffs in error, as surety, and the instrument retained. The piano company had judgment for the recovery of the possession of it and, upon its inability to obtain it or MacRae's failure to deliver it, for the recovery of the sum of $200. To reverse that judgment MacRae brought proceedings in error in this court, but it was affirmed.[17] (*MacRae* v. *Piano Co.*, 64 Kans. 580.)

After the final determination of that action the piano company caused garnishment summons to be issued and served on plaintiff in error Naftzger. In this garnishment proceeding MacRae filed his answer setting out the reasons why the funds in the hands of Naftzger belonging to him should not be subjected to the payment of the above money judgment against him. The first reason, briefly summarized, was that, after the commencement of the action and prior to the rendition of the judgment, the piano company, which was a Missouri corporation, had been dissolved in accordance with the law of its domicil; that more than one year had elapsed since its dissolution, and the action had not been revived in the name of the real parties in interest or the successors in interest of the company, or in the name of any one authorized further to prosecute the case. He set out the statute of the State of Missouri in force at the time of the dissolution of the corporation, which, in so far as it relates to the persons who are authorized to carry on pending litiga-

---

he is *extra legem positus*, and is accounted in law *civiliter mortuus*." Coke on Littelton 130 a. By the act of 33 and 34 Vict. ch. 23 (1870); forfeitures for treason and felony are abolished but a convict is declared incapable of bringing a suit at law or in equity and the Crown may appoint an administrator of the convict's property. *Carr* v. *Anderson*, L. R. (1903) 1 Ch. D. 90.

The American cases are generally in accord with the principal case. *Cannon* v. *Windsor*, 1 Houst. (Del.) 143 (1850); *Willingham* v. *King*, 23 Fla. 478 (1887); *Dade Coal Co.* v. *Haslett*, 83 Ga. 549 (1889); *San Antonio R. Co.* v. *Gonzales*, 72 Pac. 213 (Tex. 1903). In Kansas an action for the recovery of property belonging to a convict must be brought by his trustee. *New* v. *Smith*, 84 Pac. 1030 (Kans. 1906). Under a statute suspending civil rights during the term of imprisonment an escaped convict can not sue. *Beck* v. *Beck*, 36 Miss. 72 (1858). Otherwise where he escapes into another state, *Wilson* v. *King*, 59 Ark. 32 (1894). The fact that the civil rights of a convict are suspended will not prevent him from being sued. *Coppin* v. *Gunner*, 2 Ld. Raym. 1572 (1730); *Ramsden* v. *Macdonald*, 1 Wils. 217 (1748); *Morris* v. *Walsh*, 14 Abb. Pr. (N. Y.) 387 (1862); *Bonnell* v. *Railroad Co.*, 12 Hun (N. Y.) 218 (1877); *Brown* v. *Mann*, 68 Cal. 517 (1886); *Gray* v. *Gray*, 104 Mo. App. 520 (1904).

As to civil death see *Platner* v. *Sherwood*, 6 Johns. Ch. (N. Y.) 118 (1822); *Avery* v. *Everett*, 110 N. Y. 317 (1888).

[17] Part of the opinion of the court is omitted.

tion on behalf of the stockholders thereof, is substantially the same as the Kansas statute (Gen. Stat. 1901, par. 1312). This provides that the directors or managers of a dissolved corporation shall be trustees for the creditors and stockholders thereof, and as such may maintain judicial proceedings for the purpose of collecting debts due to such corporation. The Missouri statute specifically provides that such proceedings shall be "by the name of the trustees of such corporation, describing it by its corporate name."

No issue was taken upon the truth of these answers by any pleading by the piano company. The court, however, proceeded to render judgment directing payment of the money in the hands of Naftzger into court to be distributed in a manner that would protect him, and from that judgment this proceeding in error was brought by MacRae and Naftzger.

The first defense seems quite sufficient. The dissolution of a corporation operates, as to it, the same as the death of an individual; all its powers, prerogatives and authority—its life—ceased, and all legal proceedings then pending were at once suspended. At the common law this termination of corporate powers became so radical that a corporate debtor was entirely discharged of his obligation, and all action by or against it were at once and forever abated; not even an execution on a judgment theretofore obtained could issue. (9 A. & E. Encyc. of Law (2d ed., 603; 10 Cyc. 1310). It is only in virtue of some statute authorizing it or some principle of equity requiring it that these results may be avoided, or that pending proceedings may be further prosecuted, or judgments already rendered enforced. It is not necessary now to decide whether the bar of the statute had run upon a proceeding to revive this action in the name of the parties who, the statute says, may further prosecute it. It is sufficient to say that after the dissolution of the corporation such substitution under authority of such statute and in pursuance of its terms, must be had in order that the action may proceed. It could no longer be maintained in the name of the dissolved corporation. (*Paola Town Co.* v. *Krutz*, 22 Kans. 725; *Eagle Chair Co.* v. *Kelsey*, 23 Kans. 632.) The defendants could raise this question. They could well say that there was no one authorized to receive the fruits of this action, that had there been the money judgment could have been avoided by turning over the replevied property to the persons authorized to receive it. In face of the undenied facts pleaded relative to the dissolution of the company and the failure to substitute the parties whom the statute authorizes to carry on the litigation, we are of the opinion that the court erred in proceeding with the case without such substitution.[18]

Judgment reversed.

---

[18] Accord: *Commercial Bank* v. *Lockwood*, 2 Harr. (Del.) 8 (1835); *Bonaffe* v. *Fowler*, 7 Paige Ch. (N. Y.) 576 (1839); *Miami Exporting Co.* v. *Gano*, 13 Ohio 269 (1844); *Greeley* v. *Smith*, 3 Story (U. S.) 657 (1845); *Farmers & M. Bank* v. *Little*, 8 W. & S. (Pa.) 207 (1844); *Saltmarsh* v. *P. & M. Bank*, 14 Ala. 668 (1848); *Hightower* v. *Thornton*, 8 Ga. 486, 52 Am. Dec. 412 (1850); *Carey* v. *Giles*, 10 Ga. 9 (1851); *Building Association* v. *Anderson*, 7 Phila. (Pa.) 106 (1868); *National Bank* v. *Colby*, 21 Wall. (88 U. S.) 609, 22 L. ed. 687 (1874); *Reifler* v. *Houesdale & D. P. R. Co.*, 1 Pa. C. C. 64 (1884);

SECTION 2. REMEDIAL INTEREST.

CHADSEY *v.* LEWIS.

SUPREME COURT OF ILLINOIS, 1844.

6 *Ill.* 153.[28]

TREAT, J.: This was an action brought by Chadsey, as administrator of Oliver, against William Lewis. The declaration was in debt on a bond, made by Lewis to Oliver, and conditioned for the payment of five hundred dollars. The defendant pleaded two pleas in bar. First, payment; second, that Oliver, in his life-time, made a voluntary gift of the bond to Mary Lewis and Margaret Lewis, and delivered the same for their use and benefit, whereby the property became vested in them. The court overruled a demurrer to this plea, and rendered judgment for the defendant. The administrator prosecutes a writ of error.

The chief point in the case is, as to the validity of the second plea. Without inquiring whether the facts alleged in the plea constitute such a gift of the bond, as a court of equity will protect and enforce when its aid is sought, it is very clear that they constitute no legal defense to this action. This is an action at law, and it is only necessary to ascertain who has the legal interest in the bond. The demurrer only admits such facts as are well pleaded. The plea does not allege an assignment of the bond. Under our statute, the legal interest can only be transferred by indorsement in writing.[29] A mere delivery does not pass such an interest. An action can only be maintained in the name of the person who has the legal interest. *Kyle* v. *Thompson*, 2 Scam. 432; *Campbell* v. *Humphries*, 2 Scam. 478.

The defendant failing to allege an assignment of the bond, the inference is unavoidable, that there was none, and that Oliver never parted with the legal interest. At his decease, as a matter of course, that interest descended to his personal representative, in whose name alone an action must be brought to recover the money. Chad-

American Ex. Bank v. *Mitchell*, 179 Ill. App. 612 (1913). "But courts of equity regard a business corporation as holding the legal title to its property in trust for its stockholders and creditors. Equity treats its property as appropriated and devoted to certain purposes to which it is to be applied, though the existence of the corporation itself is terminated and legal remedies against it are extinguished." *Nelson* v. *Hubbard*, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375 (1891); *Mumma* v. *Potomac Co.*, 8 Pet. (U. S.) 281, 8 L. ed. 945 (1834); *Thornton* v. *Marginal Freight Co.*, 123 Mass. 32 (1877); *Broughton* v. *Pensacola*, 93 U. S. 266, 23 L. ed. 896 (1876); *Kelly* v. *Rochelle*, 93 S. W. 164 (Tex. 1906). By statute the legal existence of a corporation is frequently extended for the purpose of winding up its affairs. *Lindeman* v. *Rusk*, 125 Wis. 210, 104 N. W. 119 (1905); *Castle's Admr.* v. *Acrogen Coal Co.*, 145 Ky. 591 (1911); *Myers* v. *Montgomery*, 130 N. Y. S. 133 (1911); *Harris-Woodbury Co.* v. *Coffin*, 179 Fed. 257 (affd. 187 Fed. 1005) (1910); *Newhall* v. *Western Zinc Mining Co.*, 164 Cal. 380 (1912); *Brandon* v. *Umpqua L. Co.*, 166 Cal. 322 (1913).

[28] The statement of facts and arguments of counsel are omitted.

[29] See 4 Ill. Stat. Ann. 4363, § 7621; 2 Kent's Comm. 439.

sey, in whom the legal interest is thus vested, institutes an action on the bond, and the obligor does not deny that interest, but insists as a defense that third persons have an equitable interest in the obligation. Is this any answer in law to the action? This question was, in principle, settled by this court, in the case of *McHenry* v. *Ridgeley*, 2 Scam. 309. In that case, an action was brought in the name of Ridgeley, on a note assigned to him as cashier. A plea that the note was assigned to Ridgeley as the agent of the bank; that he never had any interest in the note; and that the legal and beneficial interest therein, was in the bank, was held by the court to constitute no defense to the action. In that case, the legal interest was in the plaintiff, and the defendant was not permitted to defeat a recovery, by showing that the note was held for the benefit of others. In the present case, the legal interest of the administrator is not questioned, and the only defense interposed by the obligor is, that third persons are beneficially interested in the bond. This is no reason why he should not perform his obligation. The suit is in the name of the proper person, and it makes no difference to the defendant for whose benefit it is brought. As was said in the case of *McHenry* v. *Ridgeley*, the court will not inquire whether the plaintiff sues for himself, or as trustee for some other person. It is sufficient that he has the legal interest. For aught the record shows, this suit may be prosecuted for the benefit of the donees of the bond. Whether it is or not, the rights of the defendant are not to be affected by the recovery. Admitting the truth of the plea to the fullest extent, it shows but this, that the plaintiff has the legal, and the donees the equitable estate. In a court of law, which of these interests is to prevail? Most assuredly the legal one. This view is conclusive on the defendant. The court of law, having jurisdiction of the case, should proceed to try it according to its rules, leaving to those claiming the beneficial interest in the subject-matter to invoke the aid of equity. If the Lewises are in fact the donees of the bond, the administrator holds it as trustee for them, and if he refuses to account to them, a court of equity will compel him to execute the trust. It may be a serious question whether there was a valid gift of the bond, important alike to the interests of the estate, and the donees. That question ought certainly not to be determined in this collateral manner, in a proceeding to which the donees are not parties, and, of course, not bound by any adjudication which may be made. In this conflict between the legal and the equitable interests, a court of equity is peculiarly the appropriate tribunal to adjust the rights of the parties. The defendant is not interested in that adjustment, it being a matter exclusively between the administrator and the donees.

We think, therefore, that the circuit court erred in deciding the plea to be valid, and its judgment is reversed with costs, and the cause remanded for further proceedings, consistent with this opinion.[21]

Judgment reversed.

[21] See also, *Bauerman* v. *Radenius*, 7 Term Rep. 663 (1798); *Skinner* v. *Somes*, 14 Mass. 107 (1817); *Matlack* v. *Henderson*, 13 N. J. L. 263 (1832); *Garlands* v. *Jacobs*, 2 Leigh (Va.) 651 (1830); *Heald* v. *Warren*, 22 Vt. 409

CLARKSONS *v.* DODDRIDGE.

SUPREME COURT OF APPEALS OF VIRGINIA, 1857.

14 Gratt. (Va.) 42.

This is an action of debt brought in the name of Doddridge and Miller against D. J. W. and John N. Clarkson, on three bonds for the sum of four thousand seven hundred and twenty dollars and sixty-six, and two-thirds cents each, dated December 25, 1851, and payable nine, eighteen and twenty-four months after date. The obligees in whose names the action is brought, are styled "commissioners" in the bonds; and the said sum of money is therein described, respectively as the "'first,' 'second' and 'third' payment on salt property of the late Charles G. Reynolds, sold to D. J. W. Clarkson this day." The defendants tendered a special plea in bar, averring, in effect, therein, that the said bonds were executed to the plaintiffs as commissioners appointed in a chancery suit to sell certain lands; that before the said action was commenced, the said plaintiffs were superseded by the appointment of other commissioners in the said suit, to wit, Quarrier and Gillison; and that thereby the right of action on the said bonds was taken from the said plaintiffs, and vested and now remains in said Quarrier and Gillison. To this plea the plaintiffs objected; and the objection was sustained by the court; "being of opinion that the plea aforesaid does not present a good and sufficient bar to the action brought in this case in the name of Doddridge and Miller, to recover the sums secured to be paid by the several writings obligatory upon which it is founded; and that the present commissioners have a right to sue upon said bonds in the name of said Miller and Doddridge." To this opinion the defendants excepted. Judgment was rendered for the plaintiff for debt, interest and costs. That judgment is now before this court for revision on a writ of supersedeas.[22]

MONCURE, J.: The only error assigned in the judgment is in the rejection of the special plea. Did the court err in rejecting it? Was the action properly brought in the names of the commissioners to whom the bonds were payable? Or ought it to have been brought in the names of the new and substituted commissioners?

It is a general rule, that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The legislature alone has power to make an exception to this rule.

In the case under consideration, the bonds are payable to Miller and Doddridge, the old commissioners, in whom, therefore, by the

(1850); *Bentley* v. *Standard Fire Insurance Co.*, 40 W. Va. 729 (1895); *Martel* v. *Desjardin*, 93 Maine 413, 45 Atl. 522 (1899); *Sentinel Printing Co.* v. *Long*, 28 Pa. Super. Ct. 608 (1905); *Howes* v. *Scott*, 224 Pa. 7 (1909); *Gilray* v. *Metropolitan N. Bank*, 113 Ill. App. 485 (1904); *Dicey on Parties* (2d ed.) 68; 1 *Chitty on Pleading* (7th ed.) 17.

[22] The statement of facts is from the opinion of the court, part of which is omitted.

very terms of the bonds, and according to the general rule of law before stated, the legal interest in, and right of action on, the bonds were vested. There is no law in existence which divests this legal interest and right of action. The court of chancery, it is true, was authorized by law to substitute new, in place of the old, commissioners. But the effect of such substitution was not to transfer the legal interest in the bonds from the old to the new commissioners. It only authorized the new commissioners, upon giving the security required by law, to collect the bonds; and to bring suit, if necessary for the recovery thereof, in the names of the old commissioners. The right of the new commissioners to receive the money, does not imply a right to bring an action therefor in their own names. A person may have a right to receive money, without any corresponding right to bring an action for it in his own name. This happens whenever a chose in action, not negotiable by the law merchant, and not coming under the provisions in the Code, ch. 144, § 24, is assigned. The assignee has a right to receive the money, but not to bring an action therefor in his own name. He has, however, an ample remedy. He has a right to bring an action at law in the name of his assignor; and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights, and will not permit the nominal plaintiff to receive the money, nor to release the debt, nor to dismiss the action. The same principle applies to this case. The circuit court was therefore right in saying that the present commissioners have a right to sue upon the bonds in the name of Miller and Doddridge, the obligees.

But it was argued, that even if they had a right to bring such a suit, it ought to appear that the suit was brought by them or for their use; and that as the declaration does not show that the suit was so brought, the fact, if it had been so, should have been replied to the plea. It is usual, when an action is brought in the name of one person for the use of another, to state the fact in the body of the declaration, or by an endorsement thereon or on the writ. And it is useful and convenient to do so, to give notice to the defendant of the right of the substantial plaintiff, and to enable the court to protect them by its orders. But this is not necessary.[24] The statement is no material part of the pleadings. The cause of action is complete without it. It was, therefore, no bar to the action in this case that new commissioners had been substituted to the place of the plaintiffs, notwithstanding it may not appear on the record that the suit was brought by the former, or for their use. The defendants are in no danger of being compelled to pay the money into the wrong hands. They have an ample remedy to prevent that; but not by a

---

[23] *Skinner* v. *Somes*, 14 Mass. 107 (1817); *Pierce* v. *Talbot*, 213 Mass. 330 (1913).

[24] Accord: *Reigart* v. *Ellmaker*, 6 S. & R. (Pa.) 44 (1820); *American Mfg. Co.* v. *Morgan S. Co.*, 25 Pa. Super. Ct. 176 (1904); *Wey* v. *Dooley*, 134 Ill. App. 244 (1907); *Howes* v. *Scott*, 224 Pa. St. 7 (1909); *Kelly* v. *Greany*, 216 Mass. 296 (1914). The holder of the legal title is called the "legal", or, "nominal" or "record" plaintiff: the beneficial owner the "use", or, the "equitable" or the "real" plaintiff. 30 Cyc. 37.

plea in bar of the action. Their remedy is by motion. If they really apprehend that the action was not brought by or for the use of the new commissioners, and that the old commissioners are fraudulently attempting to recover and collect the money for their own use, they can, by motion, obtain a rule requiring the new commissioners to avow and prosecute, or to disavow and dismiss the action. And the court, if it have cause to suspect any such thing, may and ought, ex mero motu, to award such a rule. The action was no doubt brought by and for the use of the new commissioners. The fact is plainly inferable from the opinion of the court expressed in the bill of exceptions. It also appears, from an exhibit produced and read by the defendants in connection with their plea, that the new commissioners were appointed for the very purpose of bringing an action on the bonds. The action was in fact brought shortly thereafter. The attorneys who brought it, and the new commissioners, bear the same surnames (Quarrier and Gillison) and may be the same persons.

I am of opinion that there is no error in the judgment, and that it be affirmed.[25]

---

[25] *Winch* v. *Keeley*, 1 Term Rep. 619 (1787); *Brandt* v. *Heatig*, 2 Moore 184 (1818); *Smith* v. *Wooding*, 20 Ala. 324 (1852); *Foss* v. *Lowell Five Cents Sav. Bank*, 111 Mass. 285 (1873); *State* v. *Layman*, 46 Md. 190 (1876); *Sumer* v. *Sleeth*, 87 Ill.. 500 (1877); *Richmond & D. R. Co.* v. *Bedell*, 88 Ga. 591 (1891); *Bohanan* v. *Thomas*, 49 So. 308 (Ala. 1909).

At the common law the nominal plaintiff was looked to for costs, *Evans* v. *Rees*, 1 Gale & Davidson's Reports, 579 (1841); hence the use plaintiff could be compelled to indemnify the nominal plaintiff, *Webb* v. *Steele*, 13 N. H. 230 (1842); *Henderson* v. *Webb*, 8 Ill. 340 (1846). Statutes have generally imposed costs on the beneficial party, New York Code Civil Procedure, § 3247, *Slanson* v. *Watkins*, 95 N. Y. 639 (1884); see note to 62 Lawyers Reports, Annotated 617, although the liability may be cumulative, *Ruddell* v. *Green*, 104 Md. 371 (1906); *Gifford* v. *Gifford*, 27 Pa. 202 (1856). A suit can not be maintained by a legal plaintiff against the objection of a use plaintiff having the entire beneficial interest. *Serfass* v. *Serfass*, 15 Penna. Dis. Rep. 748 (1906); but upon proper indemnity furnished, the beneficial party may use the name of the person having the legal title even against his will. *Rockwood* v. *Brown*, 67 Mass. 261 (1854); *Shanks* v. *White*, 36 Ga. 432 (1867); *Foss* v. *Lowell Bank*, 111 Mass. 285 (1873); *Walker* v. *Brooks*, 125 Mass. 241 (1878); *Coffey* v. *White*, 14 W. N. C. (Pa.) 108 (1883). The device of suing to use will not be permitted to impair the rights of the defendant, *Harriman* v. *Hill*, 14 Maine 127 (1837); *Stone* v. *Hubbard*, 7 Cush. (Mass.) 595 (1851). So also the use plaintiff will be protected from defenses arising out of acts of the plaintiff after notice of the assignment; *Littlefield* v. *Story*, 3 Johns. (N. Y.) 425 (1808); *Wagner* v. *National Life Insurance Co.*, 90 Fed. 394 (1898), at page 401. Thus a *retraxit* entered by the nominal plaintiff without the consent of the beneficial owner is unavailing, *Sloan* v. *Summers*, 14 N. J. L. 509 (1834). But the defendant may avail himself of all prior defenses against the assignor, *Craighead* v. *Swartz*, 219 Pa. 149 (1907). Partial assignments were not within the rule permitting assignees to sue at common law, *Manderville* v. *Welch*, 5 Wheat. (U. S.) 277 (1820); *Fairgrieves* v. *Lehigh N. Co.*, 2 Phila. (Pa.) 182 (1856); *Burnett* v. *Crandall*, 63 Mo. 410 (1876); *Thiel* v. *Lumber Company*, 137 Wis. 272 (1908); in equity see *James* v. *Newton*, 142 Mass. 366 (1886), and under the judicature act of 1873 see *Foster* v. *Baker*, L. R. (1910), 2 K. B. Div. 636. The right of an assignee of a chose in action to sue at law in the name of his assignor has been said to afford an adequate remedy so as to preclude a

KITCHINS *v.* HARRALL.

SUPREME COURT OF MISSISSIPPI, 1877.

54 *Miss.* 474.

Appeal from the Chancery Court of Tippah County. Hon. A. B. Fly, chancellor.

This suit was to subject land, a bond for title to which had been given by Harrall to Kitchins, to the payment of notes for the purchase money, executed by Kitchins to Harrall, and by him indorsed to Pryor Scally and William Pollard.

There was a decree for the plaintiff and Kitchins, the defendant, appealed.[26]

CAMPBELL, J.: Harrall exhibited this bill for the use of Pryor Scally and William Pollard. Harrall is the only complainant, and complains for the use and benefit of the persons named, who are not made parties to the bill. The prayer of the bill is to decree payment to the complainant for the use of the parties named. We are not aware of any authority for this new mode of instituting a suit in chancery.[27] Courts of law permit the holder of the legal title, in

---

suit in equity. *New York G. Co.* v. *Memphis W. Co.*, 107 U. S. 205 (1882); *Walker* v. *Brooks*, 125 Mass. 241 (1878).

In England the judicature act of 1873, §§ 25, 26, provides that an absolute assignment by writing under the hand of the assignor of any debt or legal chose in action of which express notice is given in writing to the debtor, shall be effectual in law to pass the legal right to such debt, subject to prior equities, and all legal remedies for the same. If an assignment does not come within this section it may be enforceable as an equitable assignment, and one seeking to recover on an equitable title must make the holder of the legal title a party, *Allen* v. *Woods*, 68 L. T. (N. S.) 143 (1893); *Bawden's Patents Syndicate* v. *Smith*, L. R. (1904) 2 Ch. Div. 86. An application under the rules of court (Order 16, rule 2) to add the name of the assignor as plaintiff will only be granted on proof of his consent or that he has been notified and all the terms necessary for his protection from liability offered to him. *Turquand* v. *Fearon*, L. R. (1879), 4 Q. B. Div. 280.

[26] The arguments of counsel and part of the opinion of the court are omitted.

[27] Accord: *Hammond* v. *Messenger*, 9 Sim. 327 (1838); *Frye* v. *Bank of Illinois*, 10 Ill. 332 (1848); *Seibert* v. *Seibert*, 1 Brewst. (Pa.) 531 (1868); *Walker* v. *Brooks*, 125 Mass. 241 (1878); *Hart* v. *O'Brien*, 16 W. Va. 791 (1879); *Hayward* v. *Andrews*, 106 U. S. 672, 27 L. ed. 271 (1882); *New York Guar. Co.* v. *Memphis Water Co.*, 107 U. S. 205, 27 L. ed. 484 (1882); *Kellam* v. *Sayer*, 30 W. Va. 198, 3 S. E. 589 (1887).

While at law he alone sues in whom is vested the legal title, in equity a person beneficially interested may and generally should maintain the suit in his own name. *Burlew* v. *Hillman*, 16 N. J. Eq. 23 (1863); *Olds* v. *Cummings*, 31 Ill. 188 (1863); *Field* v. *Maghee*, 5 Paige (N. Y.) 539 (1863); *Smith* v. *Brittenham*, 109 Ill. 540 (1884); *Fidelity Co.* v. *Trust Co.*, 143 Fed. 152 (1906). But in some instances the holder of the legal title may be permitted to sue alone in equity, as where a trustee sues for all the beneficiaries in a proceeding that does not affect his relations with them. *Kerrison* v. *Stewart*, 93 U. S. 155, 23 L. ed. 843 (1876); *Ashton* v. *Atlantic Bank*, 85 Mass. 217 (1861); *Winslow* v. *Minnesota R. Co.*, 4 Minn. 313 (1860); *Tavenner* v. *Barrett*, 21 W. Va. 656 (1883); *Vetterlein* v. *Barnes*, 124 U. S. 169, 31 L. ed. 400 (1888). Compare *Tyson* v. *Applegate*, 40 N. J. Eq. 305 (1885); *Gibson* v. *Ledwitch*, 84 Kans. 505 (1911).

certain cases, to sue for the use of the beneficial owner, who is regarded as the real plaintiff. This is because the beneficial owner can not sue in a court of law in his own name; and, therefore, the name of the holder of the legal title must appear as nominal plaintiff. There is no reason for any such rule in chancery courts, and it has never obtained recognition by them. Coke said, *Nihil simul inventum est et perfectum,* which is applicable to this suit.

Decree reversed..

NEW YORK CODE OF CIVIL PROCEDURE.

§ 449. "Every action must be prosecuted in the name of the real party in interest except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section." [28]

SHERIDAN *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

COURT OF APPEALS OF NEW YORK, 1876.

68 *N. Y.* 30.[29]

CHURCH, Ch. J.: The only question submitted to the jury was whether the plaintiff was the real party in interest. A written assignment, properly executed and acknowledged before a proper officer, was produced in terms transferring absolutely for a valuable consideration the demand in suit from Morgan Jones to the plaintiff, and proof was made of the delivery thereof by the former to the latter. As to these facts there was no dispute, nor could there be any dispute that the plaintiff held the legal title to the demand. The learned judge submitted the question to the jury in this language: "If you believe from the evidence that the real party in interest in this suit is Morgan Jones and that this is a sham transaction, then I think the plaintiff should be defeated in the action."

Precisely what the learned judge meant by a sham transaction, as applied to the transfer of the demand, is not very apparent, but I

[28] Montana Code of Civil Procedure, § 570 (1908), contains identical language. The provision that actions must be prosecuted in the name of the "real party in interest" has been incorporated in the codes of many states, but with different limitations. See for examples the California Code of Civil Procedure, § 367; Missouri Code Civil Procedure, § 540; General Code of Ohio (1910), § 11241; Washington Code of Civil Procedure (Ballinger's Statutes), § 4824; Oregon Code of Civil Procedure, § 27; South Carolina Code of Civil Procedure, § 132; Pomeroy's Civil Remedies (4th ed.), § 62, p. 87.

[29] Arguments of counsel and part of the opinion are omitted. Reported below in 8 Hun. (N. Y.) 424.

infer from this and other parts of the charge that he intended to charge, that although a legal title to the claim was transferred to the plaintiff and the assignment was valid as against the assignor, yet if the jury believed that the transaction was colorable, that is, that by any private or implied understanding the transfer was not intended as bona fide, or an actual and real sale of the demand as between the parties, the plaintiff could not recover. In this, with great respect, I think the learned judge erred. A plaintiff is the real party in interest under the code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor. In this case, from the undisputed facts, the defendant would be protected if it paid to the assignee or if a recovery was had against it by him. No question was made and none submitted to the jury as to the execution or delivery of the assignment, and conceding that the circumstances were such as to justify the jury in finding that it was colorable as between the parties, yet that would constitute no defense on the ground that the plaintiff was not the real party in interest. Such an inquiry might become material if the rights of creditors were involved, or upon the right of interposing some defense or counterclaim against the assignor. Nor is it of any moment that no consideration was paid for the demand by the assignee. The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or recovery by the assignee. It is not a case of mala fide possession which the defendant can avail itself of, as if a thief should bring an action upon a promissory note which he had stolen. These views are well settled by authority. (44 N. Y. 231; 61 N. Y. 614; 27 Barb. 178; 38 Barb. 579; 29 N. Y. 554; 15 Wend. 640.)

As before remarked, there was no question as to the making and delivery of the assignment, and the remarks of the learned judges at general term, therefore, as to when and under what circumstances a jury is or is not justified in finding contrary to the evidence of one or more witnesses, has no application to the question involved in this case, viz.: the bona fides as between assignor and assignee of the transfer. Suppose after the trial of this action the assignor had commenced an action. The defendant, by proving the making and delivery of the assignment to the plaintiff, could have defeated the action on the ground that he was not the party in interest, and I apprehend he would not have been permited to show that the transfer was not as between them an actual bona fide sale, and the result might be that, although the defendant justly owed the debt, it would avoid liability because no one had a right to prosecute. The code never anticipated such a result.

Judgment reversed.[30]

[30] Accord: *Hays* v. *Hathorn*, 74 N. Y. 486 (1878); *Friedman* v. *Schulman*, 46 Misc. (N. Y.) 572 (1905); *Manley* v. *Park*, 68 Kans. 400 (1904)

TANDY *v.* WAESCH.

SUPREME COURT OF CALIFORNIA, 1908.

154 *Cal.* 108.

HENSHAW, J.: Plaintiff sued to recover the sum of one thousand dollars, paid on account of the purchase price of a piece of land under contract with defendant, whereby defendant agreed to convey the land by a title free and clear of all encumbrances. He averred that defendants' title was encumbered by restrictions, reservations and covenants.[81]

It was alleged that a reasonable time had been given to remove these encumbrances, and that they had not been removed; and, indeed, upon the trial, it was conceded that they were still in existence. Defendant pleaded by answer and cross-complaint, calling in as defendants to his cross-complaint, besides the plaintiff Tandy, W. M. Garland and E. T. Ames. Trial was had, judgment passed for plaintiff Tandy, and from that judgment and the order of the court denying defendant's motion for a new trial, he appeals.

His principal contention upon appeal seems to be that as it was disclosed and known to him that Tandy was acting as agent, and that the defendant Garland was principal, the action should have been brought by Garland, and can not be maintained in the name of Tandy. Tandy, however, was a proper party plaintiff. To the general rule laid down in section 367 of the Code of Civil Procedure, that every action must be prosecuted in the name of the real party

---

overruling *Stewart* v. *Price*, 64 Kans. 191 (1902), annotated in 64 L. R. A. 581; *Cassidy* v. *Woodward*, 77 Iowa 354 (1889); *Abell N. B. & Co.* v. *Hurd*, 85 Iowa 559 (1892); *Leon* v. *Building Assn.*, 14 Ariz. 294 (1912). Contra *Robbins* v. *Deverill*, 20 Wis. 142 (1865); *Bostwick* v. *Bryant*, 113 Ind. 448 (1887); *Hougland* v. *Van Etten*, 23 Nebr. 462 (1888); *Brown* v. *Ginn*, 66 Ohio St. 316 (1902); *Guerney* v. *Moore*, 131 Mo. 650 (1895); *Simon* v. *Trummer*, 57 Ore. 153 (1910).

In California "a trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name." *Toby* v. *Oregon P. R. Co.*, 99 Cal. 401 (1893); *Cortelyou* v. *Jones*, 132 Cal. 131 (1901). The amended code of 1901, § 367, provided that a person to whom a cause of action has been assigned merely for collection was not the real party in interest. But this clause fell when the act adopting the amendments was held unconstitutional. *Lewis* v. *Dunne*, 134 Cal. 291 (1901).

In some cases it has been held, as at common law, that the assignment of part of a claim does not permit the assignee to sue in his own name. *Smith* v. *Atkinson*, 18 Colo. 255 (1893) *Skobis* v. *Ferge*, 102 Wis. 122 (1899); In others the assignee may sue, but the assignor ought to be joined. *Chambers* v. *Lancaster*, 160 N. Y. 342 (1899); *Singleton* v. *O'Blenis*, 125 Ind. 151 (1890); *Dean* v. *St. Paul & D. R. Co.*, 53 Minn. 504 (1893).

In South Carolina it has been said that the code "has not gone to the extent of making things legally assignable that were not so before, but it simply declares that when a transfer or an assignment has been made, which in equity has the effect of making the assignee the real party in interest, that then such assignee must sue." *Childs* v. *Alexander*, 22 S. Car. 169 (1884). See also, *Joseph Dixon Crucible Co.* v. *Paul*, 167 Fed. 784 (1909).

[81] Part of the opinion omitted.

in interest, there are certain exceptions specified in section 369 of the Code of Civil Procedure. That section authorizes the trustee of an express trust to sue without joining the beneficiary and declares that a person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. The contract having been made in Tandy's name for the benefit of Garland, Tandy thus became the trustee of an express trust and entitled to maintain the action.

Judgment affirmed.[82]

ERVIN *v.* THE STATE, EX REL. WALLEY.

SUPREME COURT OF INDIANA, 1897.

150 *Ind.* 332.

McCABE, C. J.: The appellee sued the appellants to recover money alleged to have been lost by William A. Walley, the relator's husband, to the appellees by betting on a game called faro, under §§ 6676, 6678 Burns' Rev. Stat. 1894 (4951, 4953, Rev. Stat. 1881). The complaint was in five paragraphs, and the court overruled a several demurrer by the defendants to each paragraph for want of sufficient facts, and that the plaintiff had no capacity to sue.

A trial of the issues resulted in a verdict and judgment for $5,414.50 over appellants' several and joint motions for a new trial. The court also overruled appellants' motion to modify the judgment.

The errors assigned call in question these several rulings, and also call in question the sufficiency of the complaint.[83]

It is contended that the demurrers ought to have been sustained because the action is not prosecuted in the name of the real party in interest, namely, Nellie A. Walley, but is prosecuted in the name of the state. It is conceded that the statute on which the action is founded authorizes the prosecution of the action in the name of the state for the benefit of the wife of the loser, under certain circumstances, but it is contended that such statute was passed prior to the code, and that the code makes a different provision in relation thereto, and must be deemed the last expression of the legislative will, and controlling in this respect. Conceding, without deciding, that such was the order of passage of the two statutes, and that the last act would have the effect to modify the first in so far as inconsistent

---

[82] Accord: *Considerant* v. *Brisbane*, 22 N. Y. 389 (1860); *Seymour* v. *Smith*, 114 N. Y. 481 (1889); *Citizens Bank* v. *Corkings*, 9. S. Dak. 614 (1897); *Fidelity & C. Co.* v. *Ballard*, 105 Ky. 253 (1899); *Leach* v. *Hill*, 106 Iowa 171 (1898); *Davidge* v. *Trust Co.*, 136 App. Div. (N. Y.) 78 (1909); *Middleton* v. *Wohglemuth*, 141 App. Div. (N. Y.) 678 (1910); *Goodfellow* v. *First National Bank*, 71 Wash. 554 (1913). See also *Mitchell* v. *St. Mary*, 148 Ind. 111 (1897); *Williams* v. *Julapa Co.*, 3 Alaska 222 (1906); *Koch* v. *Story*, 47 Colo. 335 (1910); *Portoghese* v. *Illinois Surety Co.*, 81 Misc. (N. Y.) 211 (1913); 30 Cyc. 56.

[83] Only as much of the opinion as relates to the question of parties is printed. The judgment was reversed on other grounds.

therewith, we do not think that there was any such inconsistency. Section 251, Burns' Rev. Stat. 1894 (251, Rev. Stat. 1881), provides that: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The next section provides that: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." The state is authorized by the statute in question to sue for the benefit of another, and the state is within the meaning of the last section of the code, if the word "person" as used therein, may be held to include the state.

Among the rules for the construction of the code, it is provided in § 1309, Burns' Rev. Stat. 1894 (1285, Rev. Stat. 1881), that: "The word 'person' extends to bodies politic and corporate." Webster defines the words "body politic" to be "The collective body of a nation or state as politically organized, or as exercising political functions; also a corporation."

Therefore, we hold that the code does not require the action to be brought in the name of the real party in interest, where, as here, a person, the state, is expressly authorized by statute to sue without joining the person for whose benefit the action is prosecuted.[84]

SECTION 3. JOINDER OF PARTIES.

(a) Plaintiffs.

FARNI *v.* TESSON.

SUPREME COURT OF THE UNITED STATES, 1861.

66 *U. S.* 309.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Tesson & Dangen recovered a judgment against Bontcum and Carrey in the Circuit Court of Peoria County, Illinois, on the 12th of September, 1857, for $8,000. On the same day an execution was issued directed to Woodford County, and a levy was soon after made on real and personal property. Bontcum and Carrey filed a bill on the equity side of the court for an injunction to stop further proceedings under the judgment; and the injunction was directed to issue according to the prayer of the bill, "upon the complainants entering into bond in the penal sum of sixteen thousand dollars with Christian Farni and Peter Farni, conditioned according to law." A bond was accordingly executed, in which the two Farnis with Bontcum and Carrey were the obligors, and Tesson, Dangen, Tuber, Gareshe and Miner the obligees. This bond, it was conceded, was

[84] *Atkinson* v. *Cawley,* 112 Ga. 485 (1900); *Swift* v. *Ellsworth,* 10 Ind. 205 (1858).

not framed in accordance with the order of the court, but upon its being filed the injunction was issued. Afterwards the plaintiffs, perceiving the insufficiency of their bond, had a new one executed, to which the parties were the same as to the former one; but the conditions were different. In October, 1858, the injunction was dissolved, and after some time the bill was dismissed. At December term, 1858, Tesson brought suit on the second injunction bond against Christian and Peter Farni in the Circuit Court of the United States for the Northern District of Illinois. The suit was brought in his own name as surviving partner of the firm of Tesson & Dangen, omitting as plaintiffs the other three obligees to whom the bond had been given, and making only two of the four obligors who executed it defendants. To avoid the objection of nonjoinder of the other obligees the plaintiff averred that he was the only one interested in the judgment enjoined; that Miner, one of the obligees, was the sheriff who held the execution enjoined, and the other obligees were merely the agents or trustees of Tesson.

There was a trial and a verdict, and judgment for the plaintiff. Before signing the bill of exceptions the judge put on record a written explanation to the effect that the objection to the nonjoinder of the proper parties, though made by the defendants on the trial, had been understood by the court to have been waived, and was only pressed upon a motion made to arrest judgment, when it was overruled as merely technical. This overruled objection is the only matter in the record to which the opinion of the Supreme Court was addressed, and it has seemed necessary to state only such of the facts as form a necessary introduction to that opinion. The defendants sued out this writ of error.[35]

GRIER, J.: The bond being set forth at length in the declaration, precluded the necessity of oyer, but did not relieve the pleader from the mistake patent in his plea. He sues on a several covenant to pay a sum of money to A, and shows a covenant to pay A, B and C jointly. If one of the joint covenantees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors. If, by the condition, the money to be recovered be not for the joint benefit of all, the suggestion of that fact can not alter the obligation; but will show only that, though all the parties to it should join in the suit, and show a legal title to recover, the judgment will be for the use of the party named in the condition, and equitably entitled to the money. The true reason for the course pursued by the pleader in this case, though not alleged in the pleading, was, perhaps, to give jurisdiction to the Circuit Court of the United States, by omitting the names of obligees who are citizens of Illinois. But it is admitted that such a reason, even if alleged in the pleading, would not have cured the omission.

It is an elemental principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-

[35] The statement of facts is slightly abridged and the arguments of counsel and a portion of the opinion omitted.

joinder of plaintiffs, not only by demurrer, but in arrest of judgment under the plea of the general issue.

When there are several covenants by the obligors, as, for instance, to "pay $300 to A and B, viz.: to A $100, and B $200," no doubt each may sue alone on his several covenant.[36] The true rule, as stated by Baron Parke, is, that "a covenant may be construed to be joint or several, according to the interests of the parties appearing upon the face of the obligation, if the words are capable of such a construction; but it will not be construed to be several, by reason of several interests, if it be expressly joint." In this case, the covenant is joint, and will admit of no construction. The condition annexed can not affect the plain words of the obligation.

It has not been denied on the argument that such is the established rule of the law and such the plain construction of the bond; but it is insisted, that the court should disregard it as merely a technical rule, which does not affect the merits of the controversy. The same reason would require the court to reject all rules of pleading. These rules are founded on sound reason, and long experience of their benefits.[37]

---

[36] *Dicey on Parties* (2d ed.) 112, and see *Withers* v. *Bircham*, 3 B. & C. 254 (1824); *Emery* v. *Hitchcock*, 12 Wend. (N. Y.) 156 (1834); *Keightley* v. *Watson*, 3 Exch. 716 (1849); *Capen* v. *Barrows*, 67 Mass. 376 (1854); *Atlanta R. Co.* v. *Thomas*, 60 Fla. 412, 53 So. 510 (1910).

[37] When a contract, whether by specialty or parol, is made with several persons, if their legal interest is joint, they must, if living, join in an action in form ex contractu for the breach thereof. 1 *Chitty on Pleading* (2d ed.) 9; Slingsby's Case, 5 Co. 18b (1597); *Cabell* v. *Vaughan*, 1 Wm. Saund. 291 (1669); *Eccleston* v. *Clipsam*, 1 Wm. Saund. 153 (1669); *Vaux* v. *Vaux*, Style 203 (1649); *Anderson* v. *Martindale*, 1 East 497 (1801); *Sweigart* v. *Berk*, 8 S. & R. (Pa.) 308 (1822); *Petrie* v. *Bury*, 3 B. &. C. 353 (1824); *Hansel* v. *Morris*, 1 Blackf. (Ind.) 307 (1824); *Halliday* v. *Doggett*, 6 Pick. (Mass.) 359 (1828); *Ehle* v. *Purdy*, 6 Wend. (N. Y.) 629 (1831); *Hatsall* v. *Griffith*, 4 Tyrw. 487 (1834); *Suydam's Admr.* v. *Combs*, 15 N. J. L. 133 (1835); *Archer* v. *Bogue*, 4 Ill. 526 (1842); *Wetherell* v. *Langston*, 1 Exch. 634 (1847); *Marys* v. *Anderson*, 24 Pa. 272 (1855); *Phillips* v. *Henshaw*, 5 Cal. 509 (1855); *Calvert* v. *Bradley*, 16 How. (U. S.) 580, 14 L. ed. 1066 (1853); *Snell* v. *DeLaud*, 43 Ill. 323 (1867); *Titus* v. *Railroad*, 5 Phila. (Pa.) 360 (1864); *Dewey* v. *Carey*, 60 Mo. 224 (1875); *Masterson* v. *Phinizy*, 56 Ala. 336 (1876); *Seymour* v. *Western R. Co.*, 106 U. S. 320, 27 L. ed. 103 (1880); *Osborn* v. *Martha's Vineyard Railroad Co.*, 140 Mass. 549 (1886); *Reynolds' Admr.* v. *Grier*, 7 Houst. (Del.) 329 (1886); *Sandusky* v. *Oil Co.*, 63 W. Va. 260 (1907); *International Hotel Co.* v. *Flynn*, 238 Ill. 636 (1909); *Weinfield* v. *Bergner*, 114 N. Y. S. 284 (1909); *McGara* v. *Ake*, 226 Pa. St. 228 (1910); *Silver* v. *Graves*, 210 Mass. 26 (1911).

On the death of a joint promisee the cause of action passes to the survivors who must all join in the suit, but the personal representatives of the deceased obligee are not joined as parties. *Smith* v. *Franklin*, 1 Mass. 480 (1805); *Vanderhenvel* v. *Storrs*, 3 Conn. 203 (1819); *Roane* v. *Lafferty*, 5 Ark. 465 (1843); *Jackson* v. *People*, 6 Mich. 154 (1858); *Doss* v. *Craig*, 1 Colo. 177 (1869); *Donnell* v. *Manson*, 109 Mass. 576 (1872); *Thomas* v. *Green County*, 159 Fed. 339 (1908). On the death of the last survivor the right of action passes to his personal representatives. *Bebee's admr.* v. *Miller*, Minor (Ala.) 364 (1824).

A contract can not be so framed at common law, as to give the promisees the right to sue on it both jointly and separately. *Eveleth* v. *Sawyer*, 96 Maine 227, 52 Atl. 639 (1902); *Bradburne* v. *Botfield*, 14 M. & W. 559 (1845); *Dicey on Parties* (2d ed.) 111.

It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the court to follow their example. If any one should be curious on this subject, the cases of *Random* v. *Toby* (11 How. 517), of *Bennet* v. *Butterworth* (11 How. 667), of *McFaul* v. *Ramsey* (20 How. 523), and *Green* v. *Custard* (23 How. 484), may be consulted.

The judgment of the circuit court is therefore reversed, with costs.

JOHN MOORE *v.* A. C. TERHUNE.

APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT, 1911.

161 *Ill. App.* 155.

DUNCAN, J.: This was an appeal from a justice of the peace court, and on a trial before the county court without a jury, judgment was rendered in favor of defendants in error and against A. C. Terhune, plaintiff in error, for $12 as damages and for $15 as attorney fees and for costs of suit.

The record shows that John Moore and Charley Cockrum began this suit jointly against the defendant to recover for wages due them on an alleged contract to plaster a house for plaintiff in error. Before the trial in the county court Charley Cockrum died, and his death being suggested on the record, B. R. Cockrum, as his administrator, was substituted as party plaintiff, and the suit proceeded to judgment with Moore and said administrator as joint plaintiffs.

The theory for joining Moore and Cockrum as plaintiffs seems to have been grounded on the supposition that they were partners in this contract of employment. The evidence for plaintiffs only tends to prove that Moore and Cockrum were each separately hired by the defendant at $1.50 per day and that they worked four days each. No joint interest of any kind in the $12, for which judgment was rendered, is shown by this record. The only evidence tending to show a joint right to sue is one statement of Mr. Moore in his evidence that "We were sorter partners." This was stated in answer to the court's question: "Were you and Mr. Cockrum partners in this work?" All the other evidence as to their employments shows separate contracts, and that there was no partnership between them. It is elementary that an action at law can only be maintained by the party or parties in whom the legal title exists, and no party should be joined as plaintiff who has not a joint interest with the other plaintiffs in the subject of litigation in actions ex contractu. *Dix* v. *Mercantile Ins. Co.*, 22 Ill. 272; *Frye* v. *Bank of Ill.*, 5 Gilm. 332. If they had been partners, on the death of Cockrum, Moore, the surviving partner, would have taken the exclusive title to this debt and all other assets for the payment of partnership debts, and the right

to sue for same would have devolved upon him. *Miller* v. *Jones,* 39 Ill. 54; *Finnegan* v. *Allen,* 60 Ill. App. 354.

It is clear that if defendants in error have any right of action against the plaintiff in error, they must maintain separate suits against him. For the errors indicated in the foregoing, the judgment is reversed and the cause remanded.

Reversed and remanded.[88]

McNULTY *v.* O'DONNELL.

SUPERIOR COURT OF PENNSYLVANIA, 1905.

27 Superior Court Reports 93.

Appeal, No. 184, Oct. T., 1904, by defendant, from order of C. P. Potter Co., June T., 1903, No. 284, refusing motion in arrest of judgment in case of Mike McNulty and Thomas Moran for use of Mike McNulty and John Mawn for use of Mike McNulty v. Thomas O'Donnell.

PORTER, J.: The record clearly establishes that the beneficial plaintiff, McNulty, seeks to recover in a single action, brought in the name of three legal plaintiffs, the damages alleged to have arisen from the nonperformance of three distinct and independent contracts, each one of which was entered into by the defendant with one of the legal plaintiffs, individually and severally. The defendant had entered into three several contracts for the purchase of apples from McNulty, T. L. Moran and John Mawn, respectively, which contracts were wholly disconnected, the respective vendors being interested only in the contract for the sale of his own apples. After the alleged default of the defendant, Moran and Mawn, respectively, assigned their claims to McNulty. The assignment of the personal contracts by Moran and Mawn, respectively, did not vest in the plaintiff the right to proceed for a nonperformance of those contracts by an action in his own name, he must sue in that of his assignor: *Cummings* v. *Lynn,* 1 Dallas 444; *Guthrie* v. *White,* 1 Dallas 268; *Robertson* v. *Reed,* 47 Pa. 115; Chitty's Pleading, vol.

[88] Accord: *Smith and Taylor* v. *Hunt,* 2 Chitty 142 (1818). Action for work and labor. The defendant, a carrier, engaged the two plaintiffs to assist him with their horses. Each had three horses and the six drew the wagon. Nonsuit. *Brand* v. *Boulcott,* 3 B. & P. 235 (1802); *Hall* v. *Leigh,* 8 Cranch (U. S.) 50, 3 L. ed. 484 (1814); *Withers* v. *Bircham,* 3 B. & C. 254 (1824); *Gould* v. *Gould,* 6 Wend. (N. Y.) 263 (1830); *Carter* v. *Carter,* 31 Mass. 424 (1833); *Seaton* v. *Booth,* 4 Ad. & El. 528 (1836); *Mytinger* v. *Springer,* 3 W. & S. 405 (1842); *Hinman* v. *Hapgood,* 1 Den. (N. Y.) 188 (1845); *Ford* v. *Bronaugh,* 11 B. Mon. (Ky.) 14 (1850); *Cleaves* v. *Lord,* 69 Mass. 66 (1854); *Masters* v. *Freeman,* 17 Ohio St. 323 (1867); *Germania Fire Ins. Co.* v. *Hawks,* 55 Ga. 674 (1876); *Woodward* v. *Sherman,* 52 N. H. 131 (1872); *Mining Co.* v. *Bruce,* 4 Colo. 293 (1878); *Cofran* v. *Shepard,* 148 Mass. 582, 20 N. E. 181 (1889); *Starrett* v. *Gault,* 165 Ill. 99 (1897); *McIntosh* v. *Zaring,* 150 Ind. 301, 49 N. E. 164 (1897); *Brady* v. *Koontz,* 145 Ill. App. 582 (1908); *Atlanta & S. A. R. Co.* v. *Thomas,* 60 Fla. 412, 53 So. 510 (1910).

1, ch. 1. The plaintiff recognized this rule, and as a result we have in this case three legal plaintiffs: McNulty in his own right, Moran to the use of McNulty and Mawn to the use of McNulty. The legal plaintiffs had no joint right under any one of the contracts. Moran and Mawn could not have brought a joint action against the defendants upon the contracts which he had entered into with them severally. And what they could not have done prior to the assignment can not be done afterwards by their assignee, for the causes of action have not been changed, and the legal plaintiff in any suit upon either of the contracts must still remain the same. Three legal plaintiffs can not maintain a joint action upon three unconnected contracts, each one of which respectively has been entered into by one of the respective legal plaintiffs, acting severally. The evidence was in accord with the pleadings and presented nothing which would have warranted an amendment under which a recovery might have been sustained. The motion in arrest of judgment should have been sustained: *Lockhart* v. *Power*, 2 Watts 371.

The judgment is reversed.

GALLATIN & W. TURNPIKE COMPANY *v.* FRY.

SUPREME COURT OF TENNESSEE, 1889.

88 *Tenn.* 296.

SNODGRASS, J.: The defendant in error sued the turnpike company for $2,000 damages for injuries to horses, resulting in the death of one of them and destruction of a separator, alleged to have been occasioned by defective and improperly constructed road. The defense was "not guilty" and want of property in plaintiff. There was verdict and judgment against the company, and it appealed.

On the trial it appeared that the horse killed and the one injured belonged, at the time of the accident, to plaintiff, but that the separator had been bought by plaintiff and John W. Parker from the Aultman-Taylor Company, and these parties had given their notes for it.

It also appeared that, in May, 1887 (the accident being in July following, plaintiff and Parker had mortgaged it to the Aultman-Taylor Company. It was intended, on a fair construction of the mortgage, that the mortgagors were to retain possession and use the property. While so doing it was destroyed, or so wrecked as to be entirely ruined in this accident.

Upon these facts the defendant insisted that the legal title was in the Aultman-Taylor Company, and it alone could sue.

We think this contention not well founded, the mortgagor being lawfully in possession until default. Jones on Mortgages, § 440; American Decisions, vol. XVIII, pp. 547 to 552, cases cited in notes.

The defendant next objected that the right of action was in Parker and Fry, and that there was no evidence to sustain a finding

in favor of Fry. To meet this objection below, and which is now repeated here, plaintiff undertook to show, that, while nominally the title was in himself and Parker, by an arrangement between themselves, it was really in plaintiff alone. But plaintiff distinctly swears this arrangement was after the accident. There was no evidence to the contrary.

It therefore follows that there was no evidence to sustain the claim of plaintiff to sole ownership when the injury occurred, and the judgment must be reversed and case remanded for a new trial.[39]

RHOADS *v.* BOOTH.

SUPREME COURT OF IOWA, 1863.

14 *Iowa* 575.[40]

WRIGHT, J.: Upon the information of defendant the plaintiffs in this action (three in number, but not partners), were arrested, tried before a justice of the peace for larceny, and after due examination were discharged. They thereupon instituted this action to recover damages for an alleged malicious prosecution. On the trial, defendant, among others, asked these instructions:

First. The damages in the case, if any, are purely personal, that is, they appertain to each person separately, and unless some co-interest or joint interest is shown, plaintiff can not recover.

---

[39] In actions *ex delicto* persons having a joint interest may sue jointly for their joint damage, and they must join if the objection is made by plea or answer. Y. B. 2 Rich. III; M. T. 42; Winterstoke Hundred's Case, 3 Dyer 370a; *Hill* v. *Tucker*, 1 Taunt. 7 (1807); *Foote* v. *Colvin*, 3 Johns (N. Y.) 215, 3 Am. Dec. 478 (1808); *Pickering* v. *Pickering*, 11 N. H. 141 (1840); *Parker* v. *Parker*, 83 Mass. 245 (1861); *Reeder* v. *Sayre*, 70 N. Y. 180, 26 Am. Rep. 567 (1877); *Little* v. *Harrington*, 71 Mo. 390 (1880); *Farnum* v. *Ewell*, 59 Vt. 327, 10 Atl. 527 (1887); *Sack* v. *Schimmel*, 3 Pa. Super. Ct. 426 (1897); *Armstrong* v. *Canady*, 35 So. 138 (Miss. 1903); *Butler* v. *Boynton*, 117 Mo. App. 462, 74 S. W. 723 (1906); *St. Louis R. Co.* v. *Webb*, 36 Okla. 235 (1912); *Moppar* v. *Wiltchik*, 56 Misc. (N. Y.) 676 (1907). For the recovery of property all must join. *Hart* v. *Fitzgerald*, 2 Mass. 509, 3 Am. Dec. 75 (1807); *Ellis* v. *Culver*, 2 Harr. (Del.) 129 (1836); *Reinheimer* v. *Hemingway*, 35 Pa. 432 (1860); *Bray* v. *Raymond*, 166 Mass. 146, 44 N. E. 131 (1896); *McCabe* v. *Transportation Co.*, 131 Mo. App. 531 (1908).

Persons with separate interests and, therefore, having the right to sue severally may, if they have sustained joint damage, join in an action *ex delicto*. *Corylon* v. *Litheby*, 2 Saund. 115 (1671); *Weller* v. *Baker*, 2 Wils. C. P. 414 (1769); *Cook* v. *Batchelor*, 3 B. & P. 150 (1802); *Schuylkill N. Co.* v. *Farr*, 4 W. & S. (Pa.) 362 (1842); *Le Fanu* v. *Malcomson*, 1 H. L. Cas. 637 (1848); *White* v. *Bascomb*, 28 Vt. 268 (1856); *Cleveland* v. *Grand Trunk R. Co.*, 42 Vt. 449 (1869); *Hays* v. *Farwell*, 53 Kans. 78, 35 Pac. 794 (1894); *McIntire* v. *Westmoreland Coal Co.*, 118 Pa. 108, 11 Atl. 808n (1888); *Eddy* v. *Lafayette*, 49 Fed. 807, 1 C. C. A. 441 (1892).

[40] Part of the opinion holding that the objection may be taken at any stage of the case is omitted. Iowa is a code state, but the common law rule is well summarized in this case.

Second. If a man commit a trespass and kill a horse, which belongs to A and B jointly, then they can sue and recover in a joint action. But if he, by the same act, kills two horses, one belonging to A and the other to B, they could not, in a joint action, recover the value of the horses. So in this action plaintiffs can only recover such damages as they have jointly sustained.

By these and other instructions of a like import, defendant claimed the rule to be, that plaintiffs could not maintain this action unless they had a joint interest in the damages claimed, or the judgment to be recovered. These were all refused, and such refusal is now assigned for error.

The instructions should have been given. As a rule it is only when two or more persons are jointly entitled to, or have a joint interest in, the property affected, or the damages to be recovered, that they can unite in an action. Therefore several parties can not sue jointly for injuries to the person, as for slander, a battery, or false imprisonment. For words spoken of parties in their joint trade, or for slander of title, they may sue jointly; but not so when two or more sue for slanderous words, which, though spoken of all, apply to them all separately; or in a case of false imprisonment, or a malicious prosecution, when each, as individuals, are imprisoned or prosecuted. The principle underlying is, that it is not the act but the consequences which are looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequence of that act, and not the act itself, which is redressed, and therefore the injury is several. There can not be a joint action, because one does not share in the suffering of the other. 1 Ch. Pl., 64; 2 Saunders, 116, 117; 2 Bouv. Inst., p. 171.

Reversed.[41]

---

[41] Accord: *Ainsworth* v. *Allen*, Kerby (Conn.) 145 (1786); *Leavet* v. *Sherman*, 1 Root (Conn.) 159 (1790). But expenses jointly incurred have been recoverd in a joint action. *Barrett* v. *Collins*, 10 Moo. C. P. 446 (1825); *Pechell* v. *Watson*, 8 M. & W. 691 (1841). See also, *Story* v. *Richardson*, 6 Bingh. N. Cas. 123 (1839); *Gazynski* v. *Colburn*, 11 Cush. 10 (1853); *Bunker* v. *Tufts*, 55 Maine 180 (1867); *Stepanck* v. *Kula*, 36 Iowa 563 (1873); *Columbia D. B. Co.* v. *Geisse*, 38 N. J. L. 39 (1875); *Robinett* v. *McDonald*, 65 Cal. 611 (1884); *Fouche* v. *Brower*, 74 Ga. 251 (1884); *Booth* v. *Briscoe*, L. R. (1877), 2 Q. B. Div. 496; *St. Louis R. Co.* v. *Dickerson*, 29 Okla. 386 (1911); *Jefferson Fertilizer Co.* v. *Rich*, 182 Ala. 633 (1913).

The common law before the judicature act of 1873 is, in *Hanuay* v. *Smurthwaite*, L. R. (1893) 2 Q. B. Div. 412, summarized by Lord Justice Bowen as follows: "The rule was that, in the case of contract, all persons with whom the contract sued on was made had to join as plaintiffs, and no person could join himself as plaintiff in an action for breach of a contract made by the defendant with another person. With regard to torts, I think the law may be properly summed up as follows: persons who had a joint interest were bound to sue jointly, while persons who had several interests were bound to sue separately; but where persons, although they might have several interests, had sustained joint damage, they might sue jointly also."

As to the pleading of misjoinder and nonjoinder of plaintiffs, see Ames Cases on Pleading (2d ed.) pages 133 to 143.

BARNIER *v.* BARNIER.

HIGH COURT OF JUSTICE FOR ONTARIO, 1892.

23 Ontario Rep. 280.

FERGUSON, J.: The action is for the possession of the easterly one-third of lot number three in the second concession of the township of Dover. The trial took place at Chatham upon admissions made in open court and without any other evidence being given. There are admissions in writing, signed by counsel, which were put in. These, however, do not differ from the plain admissions made at the bar.

The facts, then, on which judgment has to be given are as follows:

The land came by devise from an owner of it to eight persons as tenants in common. This tenancy in common was expectant upon the termination of a life estate in the whole, by the same will given to the widow of the testator. This widow has died, and the tenancy in common is now a tenancy in possession. The plaintiff (not being one of the eight tenants in common who took under the devise) purchased, and has had conveyed to him, five undivided one-eighth shares of the land, one of such shares being the share of the defendant, who was one of the original eight tenants in common. The conveyance of this share was one made directly from the defendant to the plaintiff.

The title of the plaintiff then is, and is admitted to be, a good title to five undivided one-eighth shares in the land, all the shares being equal. The defendant has now no title to the land or any of the shares in it. He does not profess to have really any title to the land or any part of it. It is admitted that he has not. His position is simply this: He was in possession as tenant under a lease from his mother, the widow of the testator, who had the life estate, and after her death he remained in possession and is still in possession. Upon being asked by the plaintiff to give the possession to him, he answered by saying: "take possession of your five one-eight parts, and I will continue in possession of the other three one-eighth parts"; and he confines his defense to such three one-eighth parts. The defendant has not disputed, and does not now dispute, the right of the plaintiff to possession as for and in respect of the five undivided one-eighth parts or shares to which the plaintiff has title; and the question is as to whether or not the plaintiff can recover from the defendant for the whole or more than in respect of the five-eighth parts.

The Judicature Act has not, as I understand, made any material change in the principles that govern the rights of the parties in an action for the recovery of the possession of land; although it very greatly changed the practice in such actions.

In the case *Doe d Hellyer* v. *King*, 6 Ex. at p. 795, Baron Platt is reported to have said: "Now, a tenant in common is the owner of

the whole estate in common with his co-tenants; therefore, as soon as he has proved his right to the possession in common with others, and that the defendant, having no such right, is a wrongdoer as against him, he is, in my opinion, entitled to a general verdict, for the purpose of recovering possession of the whole." This way of considering such a case seems very reasonable and forcible; but the learned Baron was the dissenting judge. The opinion of the other two eminent judges was the opposite of this; and the language of their judgments (especially that of Baron Alderson), leaves no doubt that the opinion was that tenants in common who sue in ejectment can recover (even from a trespasser) only in respect of the shares to which they prove title.

In the case *Denne d. Mowyer* v. *Judge,* 11 East 288, there had been five trustees for sale, whose title was joint. A conveyance had been executed apparently by the five, but the signatures of only three were proved; it was received as a deed of the three. The court said this had the effect of severing the joint estate, and of conveying three-fifths of it to be held in common with the two remaining parts. The plaintiffs in ejectment were depending on this title. A verdict was had for the whole. A rule nisi was obtained to enter a nonsuit or confine the verdict to the three-fifths. A verdict for the three-fifths was ordered.

Both these cases are referred to with approval, and, as I think, followed in the cases *Lyster* v. *Kirkpatrick* and *Lyster* v. *Ramage,* 26 U. C. R. 217 and 233, respectively. In each of these cases the recovery was for two undivided third parts of the estate.

I do not see that what was decided in the case *Doe d. Lulham* v. *Fenn,* 3 Camp. 190, as against the decision above referred to. Even if this were otherwise, the latter decisions should govern.

I may say that I have made very considerable search and perused a large number of cases for authority supporting the view stated by Baron Platt, the dissenting judge in *Doe d. Hellyer* v. *King,* but I can not say that I have found any, and none was referred to on the argument. If I did not consider that the authorities bind me to do otherwise, I should incline to adopt the reasoning of Baron Platt in that case. But I think I can not do anything other than say that the present plaintiff (though the defendant has no title at all) can recover possession only in respect of the five undivided one-eighth shares of the land. These are the shares and the only ones to which he has shown title. (This possession the plaintiff might have had (according to the admissions) without litigation before this action; but, in my view, the defendant deserves little, if any, consideration. Although there are some cases looking in that direction, I am not, I think, bound to decide anything in his favor.

There will be judgment for the plaintiff for the five-eighths undivided, without any costs to either party.[42]

---

[42] Accord: *Dewey* v. *Brown,* 2 Pick. (Mass.) 387 (1824); *Moberly* v. *Bruner,* 59 Pa. 481 (1868); *Kirk* v. *Bowling,* 20 Nebr. 260, 29 N. W. 928 (1886); *Butrick* v. *Tilton,* 141 Mass. 93, 6 N. E. 563 (1886); *Harrelson* v. *Sarvis,* 39 S. Car. 14, 17 S. E. 358 (1892); *King* v. *Hyatt,* 51 Kans. 504, 32 Pac. 1105, 37 Am. St. 304 (1893); *Skinner* v. *Odenbach,* 81 Hun (N. Y.)

INGHAM LUMBER CO. *v.* INGERSOLL.

SUPREME COURT OF ARKANSAS, 1910.

93 *Ark.* 447.[48]

FRAUENTHAL, J.: This was an action instituted by Ingersoll & Company, the plaintiffs below, against the Ingham Lumber Company, to recover damages for an alleged breach of contract. The plaintiffs were a partnership, composed of J. W. Ingersoll and J. H. Cobb, and the firm business was actively managed by said Ingersoll. On February 21, 1908, the plaintiffs instituted this suit, and on April 8, 1908, the said J. H. Cobb appeared before the clerk of the court in

315 (1894); *Marshall* v. *Palmer*, 91 Va. 344, 21 S. E. 672, 50 Am. St. 838 (1895); *Baber* v. *Henderson*, 156 Mo. 566, 57 S. W. 719, 79 Am. St. 540 (1900); *Williams* v. *Coal Creek Co.*, 115 Tenn. 578, 93 S. W. 572, 6 L. R. A. (N. S.) 710, 112 Am. St. 878 (1906), 5 Ann. Cas. 824. Contra: *Clark* v. *Vaughan*, 3 Conn. 191 (1819); *Robinson* v. *Roberts*, 31 Conn. 145 (1862); *Hibbard* v. *Foster*, 24 Vt. 542 (1852); *Williams* v. *Sutton*, 43 Cal. 65 (1872); *Truehart* v. *McMichael*, 46 Tex. 222 (1876); *Newman* v. *Bank of California*, 80 Cal. 368, 22 Pac. 261, 5 L. R. A. 467, 13 Am. St. 169 (1889); *Mays* v. *Witkowski*, 46 La. Ann. 1475, 16 So. 478, (1894); *Mather* v. *Dunn*, 11 S. Dak. 196, 76 N. W. 922, 74 Am. St. 788 (1898); *Winborne* v. *Elizabeth City Lumber Co.*, 130 N. Car. 32 (1902); *Field* v. *Tanner*, 32 Colo. 278, 75 Pac. 916 (1904); *Lamb* v. *Lamb*, 139 Mich. 166, 102 N. W. 645 (1905); *Bergere* v. *Chavois*, 14 N. Mex. 352 (1908); *Lecroix* v. *Malone*, 157 Ala. 434 (1908); *Craver* v. *Mossbach*, 57 Wash. 662 (1910); *Hooper* v. *Bankhead*, 54 So. 549 (Ala. 1911).

At common law, the title of tenant in common being several, they were required to sue severally in real actions. *White* v. *Pickering*, 12 S. & R. (Pa.) 435 (1816); *Decker* v. *Livingston*, 15 Johns. (N. Y.) 479 (1818); *Rand* v. *Dodge*, 12 N. H. 67 (1841); *Throckmorton* v. *Burr*, 5 Cal. 400 (1855). This rule has been changed in many jurisdictions. *Porter* v. *Beetler*, 17 Barb. (N. Y.) 149 (1853); *Hasbrouck* v. *Bunce*, 62 N. Y. 475 (1875); *Den* v. *Brands*, 15 N. J. L. 465 (1836); *Wheat* v. *Morris*, 21 D. C. 11 (1892); Pa. Act of April 13, 1807, 4 Sm. L. 476; *Commissioners* v. *Coleman*, 108 Ill. 591 (1884). In personal actions tenants in common may join, and according to some authorities, must join, when the injury is to the common estate, whether *ex contractu* or *ex delicto*. Bac. Abr., tit. Joint Tenants, K; 38 Cyc. 120; *Hill* v. *Gibbs*, 5 Hill (N. Y.) 56 (1843); *May* v. *Parker*, 12 Pick. (Mass.) 34 (1831); *Suydam's Admr.* v. *Combs*, 15 N. J. L. 133 (1835); *Bullock* v. *Hayward*, 92 Mass. 460 (1865); *Dubois* v. *Glaub*, 52 Pa. 238 (1866); *Kimball* v. *Sumner*, 62 Maine 305 (1873); *Fell* v. *Bennett*, 110 Pa. 181, 5 Atl. 17 (1885); *Clapp* v. *Pawtucket Inst.*, 15 R. I. 489 (1887); *Louisville, N. A. & C. R. Co.* v. *Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549 (1889); *Jackson* v. *Moore*, 94 App. Div. (N. Y.) 504 (1904); *Lumerate* v. *St. Louis R. Co.*, 130 S. W. 448 (Mo. App. 1910); *Fuhrman* v. *Interin Warehouse Co.*, 64 Wash. 159, 116 Pac. 666 (1911); *Hughes* v. *Mendoza*, 156 S. W. 328 (Tex. 1913). For an injury to his several interest, a tenant in common may maintain a several action. *Hall* v. *Leigh*, 8 Cranch. (U. S.) 50, 3 L. ed. 484 (1814); *Cook* v. *Brightly*, 46 Pa. 439 (1864); *Stall* v. *Wilbur*, 77 N. Y. 158 (1879); *McGhee* v. *Alexander*, 104 Ala. 116 (1893); *Roberts* v. *Holland*, L. R. (1893), 1 Q. B. 665; *Boley* v. *Allred*, 25 Utah 402, 71 Pac. 869 (1903). In *Jefferson Fertilizer Co.* v. *Rich*, 182 Ala. 633 (1913), where the maintenance of a fertilizer plant constituted a nuisance, it was held that tenants in common suing jointly could recover damages which occurred to them jointly as owners of the property, but could not recover for personal injuries suffered by each on account of the nuisance.

[48] The arguments of counsel and part of the opinion are omitted.

vacation and filed a written statement dismissing the suit at the plaintiff's cost. Thereafter, at the April term of the court, the said J. W. Ingersoll filed a motion to reinstate the suit. In this motion he stated that he had the entire management of the partnership business, and that Cobb had only a nominal interest therein, and had advised and consented to the institution of the suit, that thereafter he had conspired and colluded with the defendant to defraud the said Ingersoll by dismissing the action. The motion was supported by affidavits, and resisted by the defendant. After hearing the motion, the court reinstated the suit. To this action of the court the said J. H. Cobb made no objecion, and saved no exception, and does not in this court enter any complaint. The lower court was not asked to require the said Ingersoll to indemnify said Cobb against any cost, or to permit the said Cobb to withdraw from the suit as a party plaintiff or to be made a party defendant. Thereupon the defendant filed its answer; and upon a trial of the cause a verdict was returned in favor of plaintiffs for $290 damages. The defendant prosecutes this appeal.

It is urged by the defendant that the court erred in not permitting the plaintiff, J. H. Cobb, to dismiss the suit and in ordering the action to be reinstated on the motion of the plaintiff, J. W. Ingersoll. The claim herein sued on grew out of a contract made with the partnership, and therefore was a partnership asset. All the partners had an interest in the subject-matter of the suit, and accordingly were proper and necessary parties to the action. Kirby's Digest, sec. 6065; 5 Encyc. Pl. & Pr. 854; 30 Cyc. 561; *Summers* v. *Heard*, 66 Ark. 550; *Hot Springs Rd. Co.* v. *Tyler*, 36 Ark. 205; *Matthews* v. *Paine*, 47 Ark. 54; *Coleman* v. *Fisher*, 67 Ark. 27.

The partnership contract was a joint contract, and therefore all partners at the time the contract was made were jointly interested therein. According to the common-law procedure, where one of the several owners of a joint interest refused to join as plaintiff, the other owners were permitted to use his name as a co-plaintiff. *Gray* v. *Wilson*, Meigs (Tenn.), 394; *Sweigart* v. *Berk*, 8 Serg. & R. (Pa.) 308. One of two or more co-plaintiffs has no right to dismiss an action against the objection of the others unless it can be shown that the prosecution of the suit would result injuriously to him. In the event he might be injured by the prosecution of the suit, upon his being indemnified against loss, the court will permit the action to proceed. Where one partner is unwilling to join in a suit to enforce a partnership claim, the other co-partners have a right to use his name upon indemnifying him against loss, if indemnity is demanded. 5 Encyc. Pl. & Pr. 856. And in its sound discretion the court has a right to prevent the dismissal of a suit by one partner where it appears that the dismissal will result in an injury to the other partners. 1 Bates on Partnership, 383; 14 Cyc. 399; *Cunningham* v. *Carpenter*, 10 Ala. 109; *Loring* v. *Brackett*, 3 Pick. (Mass.) 403; *Daniel* v. *Daniel*, 9 B. Mon. 195.[44]

[44] "When the legal interest in a cause of action, whether it arises out of contract or is *ex delicto*, is joint, residing in several persons, all who are living must join in the action founded on it. One or more of the parties may

By our code (Kirby's Digest, 6007) it is provided that: "Of the parties to the action, those who are united in interest must be joined as plaintiffs; but when, for any cause, it may be necessary for the purpose of justice, a person who should have been joined as plaintiff may be made defendant, the reason therefor being stated in the complaint." Under this provision, where a partner refuses to join in an action to recover a claim of the firm, he may be made a party defendant. 5 Encyc. Pl. & Pr. 856.[45]

In the case at bar the claim sued on was founded upon a contract made with the partnership, and all the partners joined in the institution of the suit. Thereafter, one of the partners sought to dismiss the suit to the injury of the other partner. It was claimed by the other partner that he conspired wrongfully with the defendant to defeat him of his rights. Upon the hearing the court refused to dismiss the action. The unwilling partner did not except to the ruling of the court. He did not ask to be indemnified against costs or loss. The defendant now is the only party who complains of this action of the court. We do not think that the court abused its discretion or erred in reinstating the cause.

Affirmed.

NEW YORK CODE OF CIVIL PROCEDURE.

§ 446. All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.[46]

---

use the name of all in the commencement and prosecution of the action. If others are unwilling to join in the prosecution, the unwillingness does not authorize a dismissal of the suit. They can and will on a proper application, be protected by an indemnity against costs, from those prosecuting the suit." Per Brickell, C. J., in *Harris v. Swanson*, 62 Ala. 299 (1878). Accord: *Chambers* v. *Donaldson*, 9 East 471 (1808); *Sweigart* v. *Berk*, 8 S. & R. (Pa.) 308 (1822); *Emery* v. *Mucklow*, 10 Bingh. 23 (1833); *Whitehead* v. *Hughes*, 2 Dowl. P. C. 258 (1833); *Johnson* v. *Holdsworth*, 4 Dowl. P. C. 63 (1835); *Wright* v. *McLemore*, 10 Yerg. (Tenn.) 235 (1837); *Southwick* v. *Hopkins*, 47 Maine 362 (1860); *Winslow* v. *Newlan*, 45 Ill. 145 (1867); *Williams* v. *Pacific Surety Co.*, 66 Ore. 151 (1913).

"Under code procedure an unwilling party is made a defendant. 15 Enc. Pl. & Pr. 735; N. Y. Code Civ. Proc., § 446; New Jersey Practice Act of 1912, P. L. 377, § 5; Cal. Code Civ. Pro., § 382; *Nightingale* v. *Scannell*, 6 Cal. 506, 65 Am. Dec. 525 (1856); *Allen* v. *Miller*, 11 Ohio St. 374 (1860); *Hopkins* v. *Lane*, 2 Hun (N. Y.) 38 (1874); *Hardy* v. *Miles*, 91 N. Car. 131 (1884); *Baron* v. *Lakow*, 121 App. Div. (N. Y.) 544 (1907); *Caylor* v. *Cooper*, 164 Fed. 727 (1908). In England in case of a difference between co-plaintiffs the proper course is to make an order that the name of one of them should be stricken out as plaintiff and added as defendant. *In re Mathews*, L. R. (1905) 2 Ch. 460.

"The word "judgment" has been substituted for "relief" which appeared in the original code of 1848, and has been retained in most of the codes founded on that of New York. Cal. Code Civ. Pro., § 378; Gen. Code Ohio (1910) § 11257; Burns' Ann. Stat. Ind. (1914) § 263; Iowa Code § 3460; Wis. Stat. § 2602; N. Car. Code § 409; Cobbey's Comp. Stat. Nebr. § 1036.

In England the rules of the Supreme Court provide: "All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions]

§ 448. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, can not be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[47]

INDIANA, BLOOMINGTON AND WESTERN RAILWAY CO. *v.* ADAMSON.

SUPREME COURT OF INDIANA, 1887.

114 *Ind.* 282.

The plaintiffs, and appellees, stated in their complaint that they and Nellie Adamson had entered into a contract with the defendant, and appellant, by which they agreed to execute a quitclaim deed for a strip of land for a railroad embankment in consideration of which the defendant agreed to pay the plaintiffs and Nellie Adamson one hundred dollars, and maintain a stone culvert through the river embankment; that the plaintiffs and Nellie Adamson had fully performed their part of the contract; that Nellie Adamson had since died and that defendants in violation of the contract had failed to put in the culvert. The defendants demurred on the ground that neither the heirs nor representatives of Nellie Adamson were made parties to the action.[48]

ELLIOTT, J.: The process of elimination which we have pursued

---

is alleged to exist, whether jointly, severally, or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise; provided that if upon application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials or make such other order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the court or a judge in disposing of the costs shall otherwise direct. Order XVI, rule 1. The parts in brackets were added after it had been decided in *Smurthwaite* v. *Hannay*, L. R. (1894) App. Cas. 494, that the order dealt only with joinder of parties and had no reference to joinder of causes of action. See *Stroud* v. *Lawson*, L. R. (1898), 2 Q. B. Div. 44; *Drincqbier* v. *Wood*, L. R. (1899) 1 Ch. Div. 393; *Benning* v. *Deford Gas Co.*, L. R. (1907), 2 K. B. Div. 290; *Compania Sansinena D. C. C.* v. *Houlder*, L. R. (1910), 2 K. B. Div. 354.

[47] See generally Pomeroy's Code Remedies (4th ed.) p. 161 *et seq.*, Cal. Code Civ. Proc. § 382; Rem. & Ball. Wash. Code (1910) § 189; New Jersey Practice Act of 1912, P. L. 377, §§ 4 and 5; Burns' Ann. Stat. Ind. (1914), § 270; *Union Pacific R. Co.* v. *Vincent*, 58 Nebr. 171 (1899); *McCormac* v. *Wiggins*, 84 N. Car. 278 (1881).

[48] The statement of facts is abridged from the opinion, of which only so much as relates to the question of parties is printed.

trims the case down to the question, whether under the code of civil procedure, the survivors may bring an action on a joint contract without joining the heirs or representatives of the deceased obligee. That they might have done so at common law is indisputable. Dicey, Parties to Actions (2d ed.), p. 149. If the code has not changed the rule they may still do so.

The question with which we have to deal is important, and not entirely free from difficulty, but, after the most careful study we have been able to give the subject, we feel bound to hold that the code does not change the common-law rule. The question goes back of the procedure and takes up the element of the right itself. The right, the statute does not profess to change; it reaches only the remedy. In the case of a joint contract the whole right—the unified interest—vests in the survivors. Upon them falls the entire right. If they do possess the entire right, then they are the real parties in interest, since it is inconceivable that if they do possess the entire right any other person can be a real party in interest. The principle of the common law vesting the whole right in the survivors is not changed by the code, and so long as the principle remains unchanged the persons possessing this entire right must be regarded as the real parties in interest. It requires legislation to abrogate a rule of law, and the courts can not assume the functions of the legislature.

Mr. Pomeroy, who has, as strongly as any one, urged a liberal construction of the code and an extension of its provisions, affirms that the common-law principle has not been abrogated. In discussing this question he said: "In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs, and, when one of them dies, the action must be brought or must proceed in the names of the survivors; the personal representatives of the deceased obligee or promisee can not be joined as co-plaintiffs; and in the same manner, in actions *ex delicto* for injuries to personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force." [49]

Judgment affirmed.[50]

GRAY *v.* ROTHSCHILD.

SUPREME COURT OF NEW YORK, 1888.

48 *Hun* (*N. Y.*) 596.[51]

DANIELS, J.: The plaintiffs consist of seven different firms, who sold goods, at different times, to the defendants, Charles M. Roths-

---

[49] Pomeroy's Code Remedies (4th ed.) p. 205.

[50] *Burkett* v. *Lehmen Higginson Grocery Co.*, 8 Okla. 84 (1899); *Buckman* v. *Brett*, 35 Barb. (N. Y.) 596 (1861); *Medlock v. Merritt*, 102 Ga. 212 (1897); *McNamee* v. *Carpenter*, 56 Iowa 276 (1881). In *Natter* v. *Blanchard Co.*, 153 App. Div. (N. Y.) 814 (1912), two persons were entitled to share jointly a percentage of profits under a contract. In an action by one a demurrer was sustained for nonjoinder of his copromissee.

[51] Part of the opinion is omitted. Affirmed by the Court of Appeals, 112 N. Y. 668.

child and Jacob M. Rothschild, who were co-partners, carrying on business in the city of New York under the name of Charles M. Rothschild & Co. It was alleged, in support of their right to maintain a joint action against the purchasers of the goods, together with Jacob M. Rothschild and Abraham Rothschild, that the goods had been obtained by means of false representations, and that the purchasers, together with the two other defendants, had entered into a conspiracy under which these goods, and others, were to be purchased on credit, and the firm of Charles M. Rothschild & Co. were to defraud the vendors out of the purchase-prices by removing, secreting and disposing of the goods, and that this conspiracy had been carried into execution. The action was not for the recovery of the goods themselves, or a rescission of the sales made, but for the recovery of damages amounting to the aggregate sum owing to the several firms, joined as plaintiffs, for the sale of their goods and merchandise. The defendants demurred to the complaint, alleging in support of the demurrer, a misjoinder of plaintiffs; that causes of action had been improperly united, and that the complaint did not state facts sufficient to constitute a cause of action. And the court, at the trial, sustained the demurrer on the ground of a misjoinder of parties, and that several causes of action were improperly united in the complaint.

The accuracy of this decision has been resisted by the plaintiffs, chiefly under the authority of sec. 446 of the Code of Civil Procedure. This section has provided that all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, subject to exceptions not required now to be noticed. But this section of the code does not support the case, as the plaintiffs disclose it by their complaint, for each one of the firms in selling their goods, if the facts have been correctly set forth in the complaint, is entitled to maintain a separate action for damages against the purchasers and the two other persons implicated in the conspiracy, and that is all the relief, as the facts have been presented, which either one of the firms would be entitled to obtain. There is no joint subject of action in this case, neither can any joint judgment be recovered in the action under the authority of this section, but each one of the firms have a separate and distinct cause of action against the defendants, upon which, in case of a recovery, a separate judgment would necessarily be entered. The subject of the action is the recovery of the damages sustained by each one of the firms in the sale of their own goods. Each sale was distinct from all the others, and made upon fraudulent representations inducing such sale. There was no concurrent or joint action by the several firms, whose members have been joined as plaintiffs, in the sales of their respective goods, but each firm proceeded and transacted the business for itself. And for the value or price of its goods, if the facts are truthfully alleged in the complaint, each firm is entitled to a separate and distinct recovery. And no facts are alleged in the case in any form which would secure to the plaintiffs joint relief by way of a joint judgment. The case, by no construction which can be placed upon this section of the code, is in such a condition as to be

maintained by these several firms as the plaintiffs in one action, and no other provision of the Code has gone so far as to permit separate actions for damages to be prosecuted and sustained in this form.

Authorities have been assiduously collected and cited which are relied upon as sustaining so broad a rule of practice, as to permit this action to be sustained in its present form in behalf of all these different firms. They are cases which have arisen in courts of equity allowing actions to be maintained by persons severally interested in the subject-matter of the action and affecting all alike. In that class of cases an action is allowed to be maintained by all parties interested, in obtaining the same relief, but they have no application to this action, for these different firms are not entitled to any joint, or final relief by way of a single judgment; what they are entitled to, if they can maintain their actions at all, is the damages which each firm has sustained by means of the sale of its own goods induced by fraudulent representations made to it. There is no joint subject-matter to be either set aside or maintained, as there was in the cases cited on the argument, and no joint interest in the action. It is not proposed either to set aside or restrain the effect or progress of the alleged conspiracy, but all that is proposed is the recovery of damages to be apportioned to the goods sold by each one of these distinct and separate firms. The general principle so far as it has been extended by courts of equity allows separate plaintiffs having separate interests to join in an action for relief only where a common object is to be secured by the prosecution of the action. When that is not the case persons having distinct and independent claims against the defendant can not join in a suit for the separate relief of each. This was held in *Murray* v. *Hay* (1 Barb. Ch. 59, 62). And the same principle was acknowledged in *Ballou* v. *Inhabitants of Hopkinton* (4 Gray 324), where it was declared by the court that, if damages were claimed, each party must prosecute his suit separately. And no broader rule was either intimated or sanctioned in *Cadigan* v. *Brown* (120 Mass. 493). In *Marselis* v. *Morris Canal Company* (1 Saxton N. J. Ch. 31), these principles were very fully considered, and the court concluded that the authorities permitted no greater extension of the rule than has already been mentioned. In *Ireland* v. *City of Rochester* (51 Barb. 415); *Schofield* v. *City of Lansing* (17 Mich. 437), and *Kennedy* v. *City of Troy* (14 Hun 308), the actions were for relief affecting a subject-matter in which all the plaintiffs were interested in obtaining a single preventive judgment. And to avoid a multiplicity of suits, as but one object was to be attained, they were allowed to join in securing the relief necessary for the protection of their several interests. The subject-matter was entirely distinct and separate from such an action as this, in which only damages are claimed by each of the firms. In *Smith* v. *Schulting* (14 Hun 52), the complaint was sustained against a demurrer upon the ground that it was to be inferred, not only that the plaintiffs were severally entitled to the same common relief against the same instrument, but that the release itself had been obtained from them by joint false representations. And there the suit was maintained only so far as to avoid release.

And in *Loomis* v. *Brown* (16 Barb. 325), the undertaking on which the action was brought had been jointly entered into with, and for the benefit of, the persons who had joined as plaintiffs in the action. While in *Brinkerhoff* v. *Brown* (6 Johns. Ch. 139), the decision proceeded no farther than to permit several judgment creditors who were alike interested in setting aside a fraudulent disposition of property by their common debtor, to join in an action for that relief. The case is entirely distinguishable from the present suit, for the reason already mentioned that damages only are what these different firms claim to recover, and those damages are strictly limited to their own separate transactions.

The case of *Goodnight* v. *Goar* (30 Ind. 418) is an authority directly against the plaintiff's action, for there it was held that a joint action on an agreement by several persons to pay a proportionate part of what either should pay for a substitute, in case either should be drafted, could not be maintained. But that the suit for contribution must be maintained against each person separately who had bound himself by the agreement. The case of *Wood* v. *Perry* (1 Barb. 114) is likewise opposed to the right of the plaintiffs to maintain this action jointly and so is that of *Emery* v. *Erksine* (66 Barb. 9), and, also, *Howell* v. *City of Buffalo* (2 Abb. Ct. of App. 412). This decision has been assailed by the counsel for the plaintiffs as erroneously made, but it has the support of the general principle already mentioned, observed and enforced in courts of equity, that persons having distinct and independent claims to relief can not, unless the case is a peculiar one, join in the prosecution of one action. There the property of the several plaintiffs had been sold for the nonpayment of separate amounts assessed for an improvement. The object of the action was to restrain the execution and delivery by the city of certificates of sale, upon the allegation that the assessments were unlawful. The certificates when issued would affect only the property of each different owner. They would have no joint effect upon any of the property. And it was held by the court, chiefly for that reason, that the action could not be maintained, each plaintiff having only a separate and distinct right of action for relief in which the others were in no manner interested or identified. In all the cases containing any reference whatever to separate and distinct claims for damages, the decisions have been guarded by the conclusion previously stated, that a joint action by several and distinct parties claiming several and distinct damages, can not be maintained. Any other rule would be attended with so much perplexity, intricacy and confusion at the trial, as to render the jury before which the action must necessarily be tried next to incapable of deciding and disposing of it. If this action could proceed to trial seven different causes of action would be presented for the hearing and decision of the jury, and it would be extremely difficult for them to carry in their minds anything like an intelligent recollection of the evidence given, affecting so many different rights of action. A rule allowing several and distinct firms to join in the prosecution of one suit for damages would not only be attended with the greatest embarrassment, but would result in probable in-

justice to one or more of the parties from misapprehensions or oversight of evidence. The demurrer was properly sustained at the trial and both the judgment and order should be affirmed.[52]

HOME INSURANCE COMPANY *v.* GILMAN.

SUPREME COURT OF INDIANA, 1887.

112 *Ind.* 7.[*]

MITCHELL, J.—A policy of fire insurance was issued to George Sapp, the alleged owner of a store building, stipulating for insurance against loss or damage by fire to the amount of fifteen hundred dollars.

The policy contained the following stipulation: "Loss, if any, under this policy, payable to W. W. Gilman, executor of the Reynolds estate, as his interest may appear."

The complaint alleged that at the time the policy was issued, to wit, on the 14th day of February, 1885, as, also, when the property insured was destroyed by fire—February 16th, 1885,—Sapp was the owner thereof, in fee simple, and that Gilman held a mortgage thereon to secure a debt due him from Sapp, amounting to nine hundred dollars. It also alleged that the amount of the loss exceeded the amount of the debt due Gilman. The appellant contends that Sapp and Gilman can not maintain a joint action on this policy, and hence that the court erred in overruling the demurrer to the complaint.

The learned court below was of opinion that an action might be so maintained, and, after hearing the proofs, rendered judgment "that the plaintiffs do have and recover of and from the defendant the sum of $1,537.51, and that of said sum William W. Gilman, as executor of the estate of Henry Reynolds, deceased, shall first recover the sum of $949.51, and the plaintiff George R. Sapp shall recover the residue."

The question is thus presented, whether after the loss Gilman and Sapp had such a joint interest in the policy as entitled them to join as plaintiffs in an action thereon?

---

[52] Accord: *Cobb* v. *Monjo*, 90 App. Div. (N. Y.) 85 (1904); *Mining Co.* v. *Bruce*, 4 Colo. 293 (1878); *Jeffers* v. *Forbes*, 28 Kans. 174 (1882); *Martin* v. *Davis*, 82 Ind. 28 (1882); *Hellams* v. *Switzer*, 24 S. Car. 39 (1885); *Foreman* v. *Boyle*, 88 Cal. 290 (1891); *Faivre* v. *Gillman*, 84 Iowa 573 (1892); *Morton* v. *Western Union Tel. Co.*, 130 N. Car. 299 (1902). Action by three for damages for mental anguish caused by failure to deliver a telegram. *Norfolk & Western R. Co.* v. *Smoot*, 81 Va. 495 (1886). Compare *McIntosh* v. *Zaring*, 150 Ind. 301 (1897).

There must be community of interest not only in the subject of action but in the relief demanded. *Keary* v. *Mutual Reserve Fund L. A.*, 30 Fed. 359 (1887); *Central State Bank* v. *Walker*, 7 Kans. 748 (1898); *Brownwell* v. *Irwin*, 25 Ind. App. 395 (1900); *Younkin* v. *Milwaukee Light, H. & T. Co.*, 112 Wis. 15 (1901).

[*] Part of the opinion is omitted.

Section 262, R. S. 1881, provides that "All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided;" and by sec. 269 of the code it is enacted that "Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants," etc.

Section 568 provides that judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants, and that the "Judgment may, * * * when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

These statutes must be deemed to have modified the extremely technical and arbitrary rules of the common law, in respect to parties and the rendition of judgments. Their effect is, substantially, to adopt the equitable rules of the chancery courts in regard to these subjects and they require the application of those rules to each case as it arises, whether it be of a legal or equitable character. *Tate* v. *Ohio, etc., R. R. Co.*, 10 Ind. 174; *Goodnight* v. *Goar*, 30 Ind. 418; Pom. Rem., §§ 200, 215; 1 Works Pr. 98, 99.

At the common law it was essential that all those who appeared on the record as plaintiffs should have an interest in the whole of the recovery, so that a judgment *in solido* could be rendered in favor of all the plaintiffs, as, also, against all the defendants.

This rule, never founded upon any substantial reason, has been modified by the provisions of the code already referred to. *Moyer* v. *Brand*, 102 Ind. 301, and cases cited.

While it has often been decided, under the code, that all persons who join as plaintiffs must have an interest in the subject of the action, and that it is necessary that they be united in interest (*Dill* v. *Voss*, 94 Ind. 590; *Faulkner* v. *Brigel*, 101 Ind. 329, and cases cited), it does not follow that the interest of all must be equal, or that their interests may not be legally severable. It is, of course, not meant that two or more persons having separate causes of action, although they arise out of the same transaction, and be against the same defendant, may nevertheless unite in the same action. Where, however, there is, as was said in *Tate* v. *Ohio, etc., R. R. Co., supra*, "one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties can not be maintained," even though the amount of their several interests be unequal, and even though they may be entitled to several judgments, in respect to the amounts to be recovered. All must have some common interest in respect to the subject-matter of the suit and each must be interested that all have relief in respect to that subject-matter. This creates such a unity of interest as entitles parties so related to a particular subject-matter to unite as plaintiffs in an action. *Martin* v. *Davis*, 82 Ind. 38.

In the case before us both parties plaintiff had, by contract, a common interest that a recovery should be had upon the policy of insurance. It was the interest of each that the other should recover, as well as that he should recover himself. A recovery by the mortgagee enured to the benefit of his co-plaintiff, in that it established

a common right. The amount recovered by the mortgagee went in liquidation of the mortgagor's debt, while a recovery by the latter had a like effect upon the common right, and entitled the former to receive payment out of the sum recovered as his interest in the fund might appear. Each was, therefore, interested in the relief sought by the other, and as both appeared upon the face of the policy to have a common interest, neither being entitled to the whole fund, it was proper for the protection of the defendant that both should be parties. "It was not so material whether they were plaintiffs or defendants, so that their rights under the contract would be barred by the event of the suit." *Morningstar* v. *Cunningham,* 110 Ind. 328; *Durham* v. *Hall,* 67 Ind. 123; May Ins., § 449.

There was no error in overruling the demurrer to the complaint.[54].

CLIMAX SPECIALTY COMPANY *v.* SENECA BUTTON COMPANY.

SUPREME COURT OF NEW YORK, 1907.

54 *Misc.* (*N. Y.*) 152.[55]

SUTHERLAND, J.: The plaintiff states in the complaint that the action is brought "for the benefit of itself and of all others who are similarly situated and interested in the questions involved herein and who may contribute to the expenses of the same." The plaintiff's cause of action as alleged may be briefly summarized as follows: The plaintiff owns mills and water rights in the village of Seneca Falls on the Dey race on the north side of Seneca outlet, also called Seneca river, the water for which race is made to flow therein by a wing dam across said stream. Farther up the stream is another dam by means of which a portion of the water of said outlet is run into what is known as the Sackett & Bascom race on the south side, the water from which flows again through tail races into the outlet at points mostly below the wing dam at the head of the Dey race. The complaint alleges that the dam furnishing water for the Sackett & Bascom race was built by the joint efforts and contributions of the owners of hydraulic rights on both sides of the stream at that point, and under an agreement that the waters diverted into the Sackett & Bascom race should in no event exceed one-half the waters of the outlet, and that the other half of the water should be reserved

[54] Accord: *Winne* v. *Niagara Fire Ins. Co.,* 91 N. Y. 185 (1883). Compare, where joinder was permitted, *Loomis* v. *Brown,* 16 Barb. (N. Y.) 325 (1853); *Lasher* v. *North-Western Nat. Ins. Co.,* 18 Hun (N. Y.) 98 (1879); *Graves* v. *Merchants Ins. Co.,* 82 Iowa 637, 49 N. W. 65, 31 Am. St. 507 (1891); *Trompen* v. *Yates,* 66 Nebr. 525, 92 N. W. 647 (1902); *Judy* v. *Jester,* 100 N. E. 15 (Ind. App. 1912), with joinder not permitted, *Keary* v. *Mutual Reserve Ins. Co.,* 30 Fed. 359 (1887); *Swenson* v. *Moline Plow Co.,* 14 Kans. 387 (1875); *Tell* v. *Gibson,* 66 Cal. 247, 5 Pac. 223 (1884); *State* v. *Beasley,* 57 Mo. App. 570 (1894).

[55] Part of the opinion is omitted.

for the mill owners on the Dey race, and that the dam thus constructed under such agreement had been maintained for more than twenty years in a condition to reserve for the proprietors on the Dey race their one-half of the water flowing through said stream, who used and claimed said half as their right during all that time, but that the defendant corporation which has since acquired rights upon the Sackett & Bascom race has wrongfully raised the dam serving the Sackett & Bascom race to such an extent that more than one-half of the water is now diverted into the Sackett & Bascom race, thus depriving the plaintiff and the other proprietors on the Dey race of their due proportion of said water; and the plaintiff demands judgment that the defendant be required to restore the dam to its former condition, and be enjoined from interfering with the due and accustomed flow of water into the Dey race, and that the plaintiff have such damage as it has incurred by reason of the wrongful act of the defendant.

The defendant challenges the right to the plaintiff under the facts stated to maintain an action for himself and other proprietors of water rights injuriously affected by the act complained of.

Section 448 of the Code of Civil Procedure provides that all persons united in interest must be joined as plaintiffs or defendants, except as otherwise prescribed, but also states that "where the question is one of a common or general interest of many persons * * * one or more may sue * * * for the benefit of all." But in this respect the defendant urges first that the subject matter of this action does not involve a question of interest common or general to the owners in severalty of water rights on the Dey race in the sense in which those words are used in section 448, and also that it does not appear that there are "many persons" interested in the question; but as to the interest which the Dey race proprietors, holding their respective lands in severalty, have in common or in general respecting the invasion of their respective rights by the wrongful act of the defendant in cutting off their common source of supply, it would seem to be clear that that interest in the subject-matter of this action and in the relief sought is of a kind which would authorize them all to join as plaintiffs, if that method were chosen, or each proprietor could sue alone; and one can sue for all, provided the other condition named in section 448 requisite to the bringing of such a representative action is fulfilled, viz.: that "many persons" are so interested. *Lawrence* v. *Whitney*, 115 N. Y. 410; *Strobel* v. *Kerr Salt Co.*, 164 N. Y. 303; Pom. Code Rem. (4th ed.), §§ 183, 289, old Nos. 269, 392. In respect to the number of persons interested, the complaint does not state how many other owners of water privileges there are on the Dey race. It does state that there are "others," which would mean two, at least. In its demurrer in this respect the defendant incorporates the statement that there are three other separate proprietors of water rights on the Dey race, naming them. It was held, upon demurrer, after a review of many authorities, in *Hilton Bridge Construction Co.* v. *Foster*, 26 Misc. Rep. 338, that, where the question was one of common (but not joint) interest to the three persons, one of them might sue for the

benefit of himself and the others under section 448 above quoted, the quality of the interest and not the number interested being the controlling feature; and that construction of the expression "many persons" was sustained upon appeal by the Appellate Division of the Third Department (42 App. Div. 630); and, although it would seem at first sight that a condition requiring many persons is hardly satisfied by three, nevertheless in respect to this particular section that interpretation seems to be settled. The case of *Baer* v. *American Rapid Telegraph Co.* (36 Hun 400), cited by defendant's counsel, is not in conflict. That was an action brought to remove trustees appointed for five persons under a joint agreement, and the plaintiff, one of the five, did not make the other four parties, but stated in his complaint that he brought the action on behalf of himself and the others if they chose to come in; and it was held that the trustees could not be removed without making all of the five beneficiaries parties, as each of them had an interest in the maintenance of the trust which could not be adjudicated upon and determined without his presence as a party. Such a case is not analagous to the one at bar, where the plaintiff could maintain a perfect action and obtain a judgment adequate to his own needs without bringing in the other proprietors holding distinct water rights and a similar cause of action.

Demurrer to complaint overruled.[56]

---

[56] For the history of this provision of the code see *McKenzie* v. *L. Amoureux*, 11 Barb. (N. Y.) 516 (1851); *Platt* v. *Colvin*, 50 Ohio St. 703 (1893). The English rule is, "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." Order XVI, rule 9, *Duke of Bedford* v. *Ellis*, L. R. (1901) App. C. 1; *Taft Vale Railway Co.* v. *Amalgamated Society R. S.*, L. R. (1901) App. C. 426. Compare *Markt* v. *Knight S. Co.*, 103 L. T. (N. S.) 369 (1910).

The code permits one or more to sue or defend for all (1) where the question is one of common or general interest to many; (2) where the parties are numerous and it is impracticable to bring them all before the Court. The principal case illustrates the first class as well as *McKenzie* v. *L. Amoureux*, 11 Barb. (N. Y.) 516 (1851); *Farman* v. *Barnum*, 2 How. Pr. (N. S.) (N. Y.) 396 (1885); *Dumont* v. *Peet*, 152 Iowa 524 (1911); *Kelly* v. *Tiner*, 91 S. Car. 41 (1911); *East Atlantic Land Co.* v. *Mower*, 138 Ga. 380 (1912); *Greer* v. *Smith*, 155 App. Div. (N. Y.) 420 (1913); *Whitmore* v. *Water Co.*, 158 App. Div. (N. Y.) 178 (1913).

In the second class of cases the courts do not seem to have laid down any positive rule as to what will be regarded as an impracticable number of parties. Compare *George* v. *Benjamin*, 100 Wis. 622 (1898) with *Hodges* v. *Nally*, 104 Wis. 464 (1899), and see *Bird* v. *Lanphear*, 11 App. Div. (N. Y.) 613 (1896); *Brainerd* v. *Bertram*, 5 Abb. N. Cas. (N. Y.) 102 (1878); *Guffanti* v. *National Surety Co.*, 196 N. Y. 452 (1909); *Tobin* v. *Portland Mills Co.*, 41 Ore. 269 (1902); *Frederick* v. *Douglas County*, 96 Wis. 411 (1897); *Bronson* v. *Wilmington L. I. Co.*, 85 N. Car. 411 (1881); *Whaley* v. *Ratcliff*, 110 Ky. 154 (1901); *Penny* v. *Central Coal & Coke Co.*, 138 Fed. 769 (1905). See for the equity rule, *Scott* v. *Donald*, 165 U. S. 107 (1897). As to the right of the plaintiff in a representative action to control the suit, see *Hirshfield* v. *Fitzgerald*, 157 N. Y. 166 (1898); *Salisbury* v. *Binghamton Publishing Co.*, 92 Sup. Ct. (N. Y.) 99 (1895).

(b) Defendants.

NATIONAL BANK OF PHOENIXVILLE *v.* BUCKWALTER.

SUPREME COURT OF PENNSYLVANIA, 1906.

214 *Pa.* 289.

Appeal of plaintiff from an order of the Common Pleas of Chester County, January Term, 1905, No. 73, refusing to take off a nonsuit in the case of *The National Bank of Phoenixville* v. *E. L. Buckwalter et al.*

Assumpsit on a promissory note. Before Hemphill, P. J.

At the trial the court entered a compulsory nonsuit. On a motion to take off the nonsuit Hemphill, P. J., filed the following opinion:

Upon the trial of this case a nonsuit was entered because of the misjoinder of the parties defendant. The obligation upon which suit was brought read as follows:

"$3,500. Phoenixville, Pa., January 11, 1902.

"Six months after date we promise to pay to the order of the Tuxedo Pottery Company of Phoenixville, Pa., at the National Bank of Phoenixville, thirty-five hundred dollars, without defalcation, value received.

"It is agreed and distinctly understood, that each of the undersigned is to be liable for only one-tenth of the above amount, viz: three hundred and fifty dollars ($350). This obligation is given as collateral security for notes discounted by said bank for said Pottery Company or any renewals thereof to an amount not exceeding $3,500, and to remain in force as long as any of said notes are unpaid."

Then follow the signatures of E. L. Buckwalter and nine others, all of whom were sued jointly in this action.

The general rule of law is thus stated in 1 Parsons on Contracts, p. 11: "Whenever an obligation is undertaken by two or more or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right."

So that had the writing terminated with the words "value received," being the usual formal language of a promissory note, the presumption of law would have been that the obligation was joint. But when further on it expressly states that, "it is agreed and distinctly understood that each of the undersigned is to be liable for only one-tenth of the above amount"—$350—these are words of severance and make the responsibility of the signers several and not joint.

Consequently they could not be held liable in the present suit, as a verdict and judgment for the full amount, $3,500, against each and

all, while the liability of each is distinctly stated to be but the one-tenth of that sum. Again, if this were a joint obligation and nine of the obligors should become insolvent, the remaining obligor would be responsible for the whole amount, which would be contrary to the agreement.

A case directly in point is *Costigan* v. *Lunt* (104 Mass. 217), where Costigan agreed to build a boat for Lunt and Cummings for a certain sum, each to pay his one-half; and it was held that the contract was not joint but several, the court saying: "His contract was to build a boat for them, and when finished it was to belong to them as tenants in common. But their promise to pay for it is several and not joint. It is true that they expressed themselves in the plural number and use the expression, 'we will pay', in reference to the several installments that were to become payable at various stages and upon the final completion of the contract. But the terms of this promise must be considered as qualified by the stipulation that each of the defendants is to pay one-half of the entire price in installments. Taking the whole instrument together, it must be interpreted as providing that each defendant shall pay one-half of each installment, as it becomes due, and no more * * * It is very plain that no judgment could be rendered against the two jointly for any installment, without rendering them jointly and severally liable for the amount and making each to that extent a surety for the other, and for that reason that plaintiff is not entitled to such a judgment."

A careful consideration of the case and examination of the authorities has satisfied us that we were right in holding upon the trial that the liability of the defendants was several and not joint, and that consequently there could be no recovery against them in the present action. We must therefore refuse to take off the nonsuit and dismiss the rule.

Error assigned was refusal to take off nonsuit.

PER CURIAM: The judgment is affirmed on the opinion of the court below.[57]

---

[57] Against several promissors separate actions must be brought. *Livingston* v. *Tremper*, 11 Johns. (N. Y.) 101 (1814); *Watson* v. *Dickey*, Tappan (Ohio) 235 (1817); *Tuttle* v. *Cooper*, 10 Pick. (Mass.) 281 (1830); *Gibson* v. *Wood*, 9 Bingh. 297 (1832); *Tourtelott* v. *Junkin*, 4 Blackf. (Ind.) 483 (1838); *Register* v. *Casperson*, 3 Harr. (Del.) 289 (1840); *Fell* v. *Goslin*, 7 Exch. 185 (1852); *Taylor* v. *Pierce*, 43 Maine 530 (1857); *Rowan* v. *Rowan*, 29 Pa. 181 (1857); *Fawcett* v. *Fell*, 77 Pa. 308 (1875); *Simmons* v. *Spencer*, 3 McCrary (U. S.) 48, 9 Fed. 581 (1882); *Davis* v. *Bedford*, 70 Mich. 120 (1888); *Payne* v. *Jelleff*, 67 Wis. 246, 30 N. W. 526 (1886); *B. & O. R. Co.* v. *Gaulter*, 60 Ill. App. 647 (1895); *Battle* v. *Atlantic C. L. R. Co.*, 132 Ga. 376 (1909); *Hough* v. *State Bank*, 55 So. 462 (Fla. 1911).

In many jurisdictions by statute or code two or more persons severally liable on the same written instrument or obligation may be included as defendants in the same action at the plaintiff's option. 15 Encyc. of Pl. & Pr. 741; Pomeroy's Code Remedies (4th ed.), p. 393 et seq.; *Costigan* v. *Lunt*, 104 Mass. 217 (1870); *Champlin* v. *Sperling*, 84 Nebr. 633 (1909); N. Y. Code Civ. Proc., § 454; New Jersey Practice Act of 1912, § 6.

BRAGG *v.* WETZEL.

SUPREME COURT OF INDIANA, 1839.

5 *Blackf.* (*Ind.*) 95.

Error to the Union Circuit Court.

BLACKFORD, J.—This was an action of debt for money lent, brought by Zacheus Wetzel against Wilson Bragg. The suit originated before a justice of the peace. The justice gave judgment for the plaintiff, and the defendant appealed.

In the circuit court, the defendant moved to dismiss the cause, on the ground that one Smith ought to have been joined as a defendant in the suit. The motion was overruled. The cause was submitted to the court, and a judgment rendered for the plaintiff.

The writ issued against Bragg alone. The declaration is as follows:—"The plaintiff complains of Wilson Bragg and Seneca Smith, partners, trading under the firm name of Bragg & Smith, of a plea that they render unto him one hundred dollars, which to him they owe, and from him unjustly detain; for that whereas the defendants, heretofore, to wit, on the 27th day of June, 1837, at, etc., were justly indebted to the plaintiff in the sum of one hundred dollars, for so much money lent to the defendants by the plaintiff, and at their special instance and request; yet the defendants, though often requested, have not, nor has either of them, paid the said sum of money or any part thereof to the plaintiff; but to pay the same and every part thereof, the defendants have at all times refused, and still do refuse, to the damage," etc.

The plaintiff here shows by his declaration, that Smith, who is not sued, is a joint party to the contract with the defendant, and that Smith is living. It is impossible, under these circumstances, that the plaintiff can recover. It is true, that since the case of *Rice* v. *Shute* (5 Burrows 2611), the facts that there is a joint contractor not sued, and that he still is alive, are generally required to be pleaded in abatement; but that rule has no application to cases like the one before us. Here the plaintiff, in his declaration, admits those facts, and shows that he has no right to sue the defendant alone. The suit should have been dismissed. The nonjoinder, in such a case as this, may be taken advantage of on a motion in arrest of judgment. 1 Saund. 291, b, note 4; or it may be assigned for error. 1 Chitty's Plead. 53.

The judgment is reversed, and the proceedings subsequent to the motion to dismiss the cause set aside, with costs.[58]

---

[58] Accord: *Cabell* v. *Vaughan*, 1 Saund. 291 (1670); *Byers* v. *Dobey*, 1 H. Bl. 236 (1789); *Pike* v. *Dashiell*, 7 H. & J. 466 (1824); *Gilman* v. *Rives*, 10 Pet. (U. S.) 298, 9 L. ed. 432 (1836); *Needham* v. *Heath*, 17 Vt. 223 (1845); *Elkin* v. *Moore*, 613 B. Mon. (Ky.) 462 (1846); *Page* v. *Brant*, 18 Ill. 37 (1856); *Philadelphia* v. *Reeves*, 48 Pa. 472 (1865); *Searles* v. *Reed*, 63 Mich. 485, 29 N. W. 884 (1886); *Smith* v. *Miller*, 49 N. J. L 521, 13 Atl. 39 (1887). So, also, under the Codes joint promissors must be united as defendants, *Wooster* v. *Chamberlin*, 28 Barb. (N. Y.) 602 (1858); *Tinkum* v. *O'Neale*,

CHARLES A. BLESSING *v.* JAMES McLINDEN.

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1911.

81 *N. J. L.* 379.*

PITNEY, CHANCELLOR: The record shows that Blessing, now defendant in error, commenced suit in the Cape May Circuit Court against William H. Quigg and James McLinden (the latter now plaintiff in error), to recover the amount due upon a judgment theretofore rendered against them as co-partners in a court of record of the State of Pennsylvania. Summons against both defendants were issued to the sheriff of the county of Cape May, and to it the declaration was annexed as permitted by the practice act. Pamph. L. 1903, p. 564, 95. The sheriff returned that the summons and declaration were served personally upon McLinden, and that Quigg

---

5 Nev. 93 (1869); *Bledsoe* v. *Irvin*, 35 Ind. 293 (1871); *Jones* v. *Langhorn*, 19 Colo. 206, 34 Pac. 997 (1893); *Cox* v. *Gille Hardware & Iron Co.*, 8 Okla. 483, 58 Pac. 645 (1899); *Sharpe* v. *Baker*, 99 N. E. 44 (Ind. App. 1912) except in those states which have abolished joint contract liability or have adopted statutory modifications of the common-law procedure. Pomeroy's Code Remedies (4th ed.) p. 288; 15 Encyc. Pl. & Pr. 740; *McKee* v. *Griffin*, 60 Ala. 427 (1877); *Morgan* v. *Brach*, 104 Minn. 247 (1908).

Exceptions to the rule are recognized in some cases, as where one of the parties is an infant, married woman or bankrupt, Dicey on Parties (2d ed.) 249-51; *Chandler* v. *Parkes*, 1 Esp. N. P. 76 (1800); *Hartness* v. *Thompson*, 5 Johns. (N. Y.) 160 (1809); *Robertson* v. *Smith*, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227 (1821); *Woodward* v. *Newhall*, 1 Pick. (Mass.) 500 (1823). But the practice differs as to whether the party under disability should be omitted in the first place, or joined with the right to discontinue as to a defendant pleading a personal discharge. *Goodhue* v. *Luce*, 82 Maine 222, 19 Atl. 440 (1889); *Slocum* v. *Hooker*, 13 Barb. (N. Y.) 536 (1852).

At common law if a party to a joint contract died, his personal representatives could not be sued with the survivors, the latter were sued alone. *Grant* v. *Shurter*, 1 Wend. (N. Y.) 148 (1828); *Burgoyne* v. *Ohio L. I. & T. Co.*, 5 Ohio St. 586 (1855); *May* v. *Hanson*, 6 Cal. 642 (1856); *Fisher* v. *Allen*, 36 N. J. L. 203 (1873); *Livermore* v. *Bushell*, 5 Hun (N. Y.) 285 (1875); *New Haven & North Hampton Co.* v. *Hayden*, 119 Mass. 361 (1876); *Reed* v. *Summers*, 79 Ala. 522 (1885); *Githers* v. *Clarke*, 158 Pa. 616 (1893); *Ensminger* v. *Finkey*, 5 Pa. D. R. 358 (1896). On the death of the last survivor the action was brought against his representatives alone. *Calder* v. *Rutherford*, 3 Br. & Bingh. 302 (1822). Relief if necessary was afforded in chancery. *Burgoyne* v. *Ohio L. I. Co.*, 5 Ohio St. 586 (1855). Compare *United States* v. *Price*, 9 How. (U. S.) 83, 13 L. ed. 56 (1850). The rule has been modified by statute in many states. See *Bowman's admr.* v. *Kistler*, 33 Pa. 100 (1859); *Taylor* v. *Taylor*, 5 Hump. (Tenn.) 110 (1844); *Potts* v. *Dounce*, 173 N. Y. 335 (1903); *Hogan* v. *Sullivan*, 79 Vt. 36, 64 Atl. 234 (1905); *Lee* v. *Blodget*, 214 Mass. 374 (1913).

Where a joint debtor dies after suit is brought, statutes in most jurisdictions provide for continuing the action against the personal representatives. In Pennsylvania under the act of March 22, 1861 (P. L. 186) the plaintiff may bring in the personal representatives and proceed to judgment against them and the survivors, *Dingman* v. *Amsink*, 77 Pa. 114 (1875), or he may continue the action against the survivors alone, *Ash* v. *Guie*, 97 Pa. 493 (1881). See N. Y. Code Civ. Proc., § 758; *Gardner* v. *Walker*, 22 How. Pr. 405 (1861); *Union Bank* v. *Mott*, 27 N. Y. 633 (1863); *Mulligan* v. *O'Brien*, 53 Misc. (N. Y.) 4 (1907), affirmed 119 App. Div. (N. Y.) 355 (1907). See also *Thompson* v. *Johnsons*, 40 N. J. L. 220 (1878); Revised Statutes of United States, § 956; *Moses* v. *Wooster*, 115 U. S. 285 (1885).

* Only extracts from the chancellor's opinion are printed.

could not be found in his county, and according to the information and belief of the sheriff was a resident of the State of Pennsylvania.

The defendant, McLinden, appeared, and filed certain pleas, which, on motion of the plaintiff, were struck out upon the ground that they were sham and frivolous and did not set up any defense to the action.

Judgment by default was thereupon entered in behalf of the plaintiff, and against McLinden alone as defendant, for the amount claimed to be due upon the Pennsylvania judgment, with costs.

The grounds relied upon for reversal are—first, that the circuit court erred in striking out the pleas; and, secondly, that the court erred in rendering judgment against the defendant, McLinden, alone, whereas it is insisted that under the "Act concerning obligations", approved March 27, 1874 (Gen. Stat., p. 2336, § 2)[60], the judgment, if any judgment was lawful, should have been against both Quigg and McLinden as co-partners.

The old English practice respecting actions against joint debtors, some only of whom could be served with process, was to proceed to outlawry against the absent or absconding defendant, and having done this to prosecute the action against the defendant who was served, declaring against him alone upon a joint contract made by him and the absentee. 1 Tidd Pr. (3d Am. from 9th London ed.) *130, 131; 1 Chit. Pl. (13th Am. from 6th London ed.) *42; 2 Id. *8.

But this practice did not rest upon the ground that the joint contractor, who was within the jurisdiction, had any right to have his fellow joined as defendant if the latter were without the jurisdiction. The law did not deny a recovery against one joint contractor because his co-contractor could not be served with process. The nonjoinder of one of several joint contractors could be availed of only by plea in abatement, and such plea must inform the plaintiff of the names of the parties not joined, and must state that they were still living unless this appeared on the face of the declaration. *Rice* v. *Shute,* Burr. 2611; 1 Smith Lead. Cas. (H. & W. ed.) *645 and notes; 1 Chit. Pl. *43, 46; 2 Id. *901; *Mershon* v. *Hobensack,* 2 Zab. 372, 379; 3 Id. 580; *Lieberman* v. *Brothers,* 26 Vroom 379; Dic. Part. 11, 12.

Under the ancient practice, a plaintiff who commenced his action against one only of two joint obligors, where the other resided beyond seas, subjected himself to the risk that the action might be abated and he be put to the cost and delay of a new action with proceedings for outlawry. It was principally in order to avoid this risk, and not because of any apprehension that the right of action against the resident debtor would otherwise be in jeopardy, that a

[60] Re-enacting the act of 1771 (Allen 353) as revised by the act of 1782 (Wils. 311) which, substantially provided that where joint debtors were sued judgment might be taken against the ones served and also against the others not served. The New Jersey practice act of 1912, sec. 9, provides: "No action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require."

prudent plaintiff instituted his suit against both joint debtors and took proceedings for outlawry, in the first instance, if one of the joint debtors was absent or absconding. In some cases, no doubt, it was deemed important to join the absentee in order either to enforce a forfeiture of his property or to avoid waiving the right to proceed against him in a subsequent action. See 1 Chit. Pl. *46; per Voltman, J., in *Joll* v. *Lord Curzon,* 4 Man. Gr. & S. (C. B.) 255.

The English practice was amended by statute 3 and 4 William IV, ch. 42, § 8, which required that a plea in abatement for nonjoinder of a defendant should be accompanied by an affidavit stating the residence in England of the omitted defendant (1 Chit. Pl. *46), the practical effect of which was to prevent the resident debtor from objecting to the nonjoinder of his co-obligor unless the latter resided within the jurisdiction. Dic. Part., rule 49, 230, 232. And see our Practice act, section 38, Pamph. L., 1903, p. 545.

In our colonial times, proceedings to outlawry not being in use here, the doubt arose that is referred to in the preamble of our act of 1771, which was solved for this colony by requiring the resident debtor to answer, and permitting judgment to be taken against him and the nonresident together. (Pennsylvania adopted the simpler solution of holding that as there was no process of outlawry in civil actions, the return of non est inventus had the same effect.[61] *Dillman* v. *Shultz,* 5 S. & R. 35.) The effect of our act was to prevent the abatement of the action for failure to proceed to outlawry against the nonresident joint debtor, and to provide that the plaintiff might take judgment against him as well as against the debtor who was served with process.

Even prior to the adoption of the fourteenth amendment, however, it was well settled that if one of the debtors was not within the state, not served with process, and did not voluntarily appear, the judgment could not be enforced against him in any other jurisdiction, even though by the lex loci a service on the co-obligor resident within the jurisdiction were sufficient to authorize a judgment against all. *D'Arcy* v. *Ketcham,* 11 How. 165; *Thompson* v. *Whitman,* 18 Wall. 457; *Knowles* v. *Gas Light and Coke Co.,* 19 Wall. 58; *Hall* v. *Lanning,* 91 U. S. 160; *Hanley* v. *Donoghue,* 116 U. S. 1; *Renaud* v. *Abbott,* 116 U. S. 277; *Phelps* v. *Brewer,* 9 Cush. (Mass.) 390.

D'Arcy v. *Ketcham,* 11 How. 171, brought under consideration a New York statute that provided that "where joint debtors are sued, and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for the plaintiff, he shall have judgment and execution not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or to execute any such execution against the body or against the sole property of any person not brought into court." By the New York

[61] See 10 P. & L. Dig. of Dec. 15919, 16 P. & L. Dig. of Dec. 27807.

courts it had been held that such judgment was valid and binding on an absent defendant as prima facie evidence of the debt, reserving to him the right to enter again into the merits and show that he ought not to have been charged. It was held by the Supreme Court of the United States that the statute, and the judgment founded upon it, were not binding upon a citizen of Louisiana not served with process in New York; that the judgment was not even prima facie evidence in a Louisiana suit, and not entitled to any faith or credit outside of the state in which it was rendered.

Until the adoption of the fourteenth amendment, however, it was commonly held that a state might authorize a personal judgment, good within its own territory, against one who had not been subjected to the process of its courts by service of such process within the jurisdiction.

But by that amendment it was (among other things) provided that no state should deprive any person of life, liberty or property without due process of law, and this was construed by the Supreme Court of the United States in *Pennoyer* v. *Neff*, 95 U. S. 714, 733, to deprive a personal judgment of all validity, either within or without the state that rendered it, if it were rendered by a state court in an action upon a money demand against a nonresident served by a publication of notice or summons, but upon whom no personal service of process within the state had been made, and who had not appeared to the action.

The result is that where one of two joint debtors resides within this jurisdiction and the other is a nonresident, and is not found to be served with process in this state, the plaintiff may have his judgment against the resident debtor, omitting the other. This was the practical outcome, in ordinary cases, under the common-law practice of outlawry.

We find it unnecessary to consider whether the principle of the decision in *Pennoyer* v. *Neff* would invalidate a judgment rendered in conformity to our Joint Debtor's Act against one of the several joint debtors (the others only being served with process), he being a citizen and resident of this state. See *Moulin* v. *Insurance Company*, 4 Zab. 249, per Chief Justice Green. That precise question does not require decision in order that the present case may be disposed of. For we may properly make, and ought to make, every reasonable intendment in favor of the validity of the judgment under review, and therefore may legitimately assume, if necessary, that the defendant Quigg was not a citizen or resident of this state, and could not in any manner be rendered subject to its jurisdiction.

We, therefore, find no error in the entry of judgment against the defendant McLinden alone.

Whether the plaintiff, by taking judgment against one only of the joint debtors, debars himself from any future recovery against the other, is a question that does not now concern us.[62] There seems

[62] The New Jersey Practice Act of 1912, § 20, provides: "An unsatisfied judgment against one or some of several joint contractors, shall not discharge the other joint contractors from liability on the contract."

to be a conflict of authority upon the point. See Freem. Judg. (4th ed.), 231, 233; Big. Estop. (5th ed.) 104.

The judgment under review should be affirmed.[63]

BANGOR BANK *v.* TREAT.

SUPREME COURT OF MAINE, 1829.

6 *Maine* 207.

MELLEN, C. J.: This is an action of assumpsit, and the declaration states that the note was signed by the defendants and Allen Gilman, jointly and severally; and that a judgment had been recovered on the note against Gilman in a several action against him. The defendants have moved in arrest of judgment on account of the joinder of them in the present suit. When three persons by bond, covenant or note jointly and severally contract, the creditor may treat the contract as joint or several at his election; and may join all in the same action or sue each one severally; but he can not, except in one case, sue two of the three, because that is treating the contract neither as joint or several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined. In the present case Gilman is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead. This is not so. When they sued Gilman alone, they elected to consider the promise or contract as several and having obtained judgment they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors; but he may still consider the contract as joint, and sue the surviving two. The plaintiffs have disabled themselves from maintaining this action by their former one. 1 Saund. 291e. The objection is good in arrest of judgment, where the facts relied on by defendants appears on the records, as in the present case.

Judgment arrested.[64]

---

[63] See further *Tappan* v. *Bruner*, 5 Mass. 193 (1809); *Dillman* v. *Schultz*, 5 S. & R. (Pa.) 35 (1819); *McCall* v. *Price*, 1 McCord (S. Car.) 82 (1821); *Ivey* v. *Gamble*, 7 Port. (Ala.) 545 (1838); *Dennett* v. *Chick*, 2 Maine 191, 11 Am. Dec. 59 (1823); *Merriman* v. *Barker*, 121 Ind. 74, 22 N. E. 992 (1889); N. Y. Code Civ. Pro., §§ 1932-33.

[64] Accord: *Ward* v. *Johnson*, 13 Mass. 148 (1816); *Rhoads* v. *Frederick*, 8 Watts (Pa.) 448 (1839); *Claremont Bank* v. *Wood*, 12 Vt. 252 (1840); *Merrick* v. *Bank of Metropolis*, 8 Gill. (Md.) 59 (1849); *Stearns* v. *Aguire*, 6 Cal. 176 (1856); *Moore* v. *Rogers*, 19 Ill. 347 (1857); *Winslow* v. *Herrick*, 9 Mich. 380 (1861); *Cummings* v. *People*, 50 Ill. 132 (1869); *New H. R. Co.* v. *Hayden*, 119 Mass. 361 (1876); *Poullain* v. *Brown*, 80 Ga. 27, 5 S. E. 107 (1887); *Fay & Co.* v. *Jenks*, 78 Mich. 312, 44 N. W. 380 (1889); *Scanlon* v. *People*, 95 Ill. App. 348 (1900); *Gottfried B. Co.* v. *McDonald*, 146 Ill. App. 601 (1909); *Goff* v. *Ladd*, 161 Cal. 257 (1911). Contra: *Glasscock* v. *Hamilton*, 62 Tex. 143 (1884). The dictum of Story, J., also contra in

PAGE *v.* FREEMAN.

SUPREME COURT OF MISSOURI, 1854.

19 *Mo.* 421.

SCOTT, J.: This was an action for an assault and battery. The petition stated that the defendant conspired with, aided and abetted a certain Jesse Edwards to assault, beat and otherwise ill treat and abuse the plaintiff, and by and in consequence of such conspiracy, aiding and abetting by said defendant, he, the said Jesse Edwards, did assault, beat and otherwise ill treat and abuse the said plaintiff, to the damage, etc. A demurrer was put in to this petition, which was overruled, and the defendant answered, denying the allegations therein contained. On a trial of the issue, there was a judgment for the plaintiff for the sum of $147.50. Afterwards, the defendant moved the court to compel the plaintiff to elect between the damages recovered in this action, and those recovered against Jesse Edwards in another action, for the same assault and battery, and produced a record showing a recovery against Edwards for the same cause, for the sum of two hundred dollars. This motion was overruled, and the defendant appealed.[65]

In case of a joint trespass, the plaintiff may sue two or more of them jointly, or may sue them separately, and may recover a judgment against them. But for one trespass or wrong he can have but one satisfaction. It is like a joint promissory note. A satisfaction by one of the makers will discharge it. A trial and recovery against one trespasser will be no bar to a trial and recovery against another. But where separate actions are brought, as there can be but one satisfaction, the plaintiff is put to his election between the verdicts, and execution is sued out accordingly. If the plaintiff has received satisfaction for the wrong done from Edwards, he can not recover another satisfaction for the same wrong. If he has put himself in a situation which prevents his election, it is his own act. The court, in such case, would relieve the defendant, in the same manner as would be done, should it be made to appear that one of the judgments or executions against a defendant had been satisfied. 1 John. 290; 1 Pick. 62.

United States v. *Cushman*, 2 Sum. (U. S.) 426 (1836) is criticised in *Clinton Bank* v. *Hart*, 5 Ohio St. 33 (1855).

Where one of the promissors in a joint and several contract dies, separate actions may be brought against each of the survivors and the personal representatives, or, all the survivors may be joined, but a joint action against the survivors and the personal representatives of the deceased promissor can not be maintained. *Grant* v. *Shurter*, 1 Wend. (N. Y.) 148 (1828); *State Treasurer* v. *Friott*, 24 Vt. 134 (1852); *Morehouse* v. *Ballou*, 16 Barb. (N Y.) 289 (1853); *May* v. *Hanson*, 6 Cal. 642 (1856); *Eggleston* v. *Buck*, 31 Ill. 254 (1863); *Colt* v. *Learned*, 133 Mass. 409 (1882); *Seaman* v. *Slater*, 18 Fed. 485 (1883).

[65] Part of the opinion is omitted.

The other judges concurring, the judgment will be reversed, and the cause remanded, and the circuit court directed to proceed in conformity to this opinion.[66]

LOW *v.* MUMFORD.

SUPREME COURT OF NEW YORK, 1817.

14 Johns. (N. Y.) 426.

In error, on certiorari to a justice's court.

The plaintiff in error brought an action in the court below, against the defendant in error, "for keeping up a mill-dam on the Susquehanna river, below the lands of the plaintiff, whereby the water of the river was set back and flowed the plaintiff's lands," etc. The defendants pleaded in abatement, that the land on which the mill-dam was erected, and the mills appurtenant thereto, were held in joint tenancy by the defendants, together with several other persons, (naming them), who were not made parties to the suit. The plaintiff objected to the sufficiency of the plea, but the justice gave judgment for the defendants.

PLATT, J., delivered the opinion of the court. The general rule on this subject is, that if several persons jointly commit a tort, the plaintiff has his election to sue all, or any of them, because a tort is, in its nature, a separate act of each individual, and, therefore, in actions, in form ex delicto, such as trespass, trover, or case for malfeasance, against one only, for a tort committed by several, he can not plead the nonjoinder of the others, in abatement or in bar. (1

[66] Accord: *Mitchell* v. *Smith*, 4 Md. 403 (1853); *Daily* v. *Redfern*, 1 Mont. 467 (1872); *Fleming* v. *McDonald*, 50 Ind. 467, 19 Am. Rep. 711 (1872). As to satisfaction, see *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, 18 L. ed. 129 (1865); *Sessions* v. *Johnson*, 95 U. S. 347 (1877); *Seither* v. *Philadelphia Traction Co.*, 125 Pa. St. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. 905 (1889).

Generally, in actions *ex delicto*, the plaintiff may at his election proceed against the joint tortfeasors in one action or he may sue them severally. "One, or any, or all of several joint wrong-doers may be sued." Dicey on Parties (2d ed.), p. 448. *Peucavin* v. *Trappin*, Latch 262; *Hardyman* v. *Whitaker*, 2 East 573n (1782); *Livingston* v. *Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330 (1806); *Patten* v. *Gurney*, 17 Mass. 182, 9 Am. Dec. 141 (1821); *Orange County Bank* v. *Brown*, 3 Wend. (N. Y.) 158 (1829); *Allen* v. *Wheatley*, 3 Blackf. (Ind.) 332 (1834); *McGee* v. *Overby*, 12 Ark. 164 (1851); *Klander* v. *McGrath*, 35 Pa. 128, 78 Am. Dec. 329 (1860); *Bryant* v. *Bigelow Carpet Co.*, 131 Mass. 491 (1881); *Peoria* v. *Simpson*, 110 Ill. 294 (1884); *McMullin* v. *Church*, 82 Va. 501 (1886); *Allison* v. *Hobbs*, 96 Maine 26, 51 Atl. 245 (1901); *Mangan* v. *Hudson R. Tel. Co.*, 50 Misc. (N. Y.) 388 (1906); *Hough* v. *Southern R. Co.*, 144 N. Car. 692 (1907); *Tandrup* v. *Sampsell*, 234 Ill. 526 (1908); *Gawne* v. *Bicknell*, 162 Fed. 587 (1908); *Goldstein* v. *Tunick*, 59 Misc. (N. Y.) 516 (1908); *Cole* v. *Roebling Construction Co.*, 156 Cal. 443 (1909); *Helberg* v. *Hosmer*, 143 Wis. 620 (1910); *Lynch* v. *Chicago*, 152 Ill. App. 160 (1909); *Sparrow* v. *Bromage*, 83 Conn. 27 (1910); *Johnson Co.* v. *Philadelphia*, 236 Pa. St. 510 (1912); *Webber* v. *Jonesville*, 94 S. Car. 189 (1912); *Rogers* v. *Ponet*, 21 Cal. App. 577 (1913); *Chicago G. W. R. Co.* v. *Hulbert*, 205 Fed. 248 (1913).

Chitty's Plead. 75.) There is a distinction, however, in some cases, between mere personal actions of tort, and such as concern real property (1 Chitty Plead. 76). In the case of *Mitchell v. Tarbutt*, (5 Term Rep. 65), Lord Kenyon recognizes this distinction and says: "Where there is any dispute about the title to land, all the parties must be brought before the court." A case in the year books (7 Hen. IV, 8) shows that a plea in abatement may be well pleaded for this cause, to an action on the case, for a tort. An action of trespass on the case was brought against the abbot of Stratford, and the plaintiff counted that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall, his meadows were drowned. To which Skrene said, "It may be that the abbot had nothing in the land, by cause whereof he should be charged, but jointly with others, in which case the one can not answer without the other."

But in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction, viz., between nuisances arising from acts of malfeasance, and those which arise from mere omission, or nonfeasance. The case of the abbott of Stratford was that of a nuisance, arising from neglect of duty in not repairing the wall, which was by law enjoined on the proprietor or proprietors of the land on which the wall stood. The gist of the action, therefore, was, that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land, on which the nuisance existed, was, therefore, directly in question; for if the abbot was not the owner of the land, he was not chargeable with neglect, nor liable for the nuisance. But in this case, the action is for a nuisance arising from an act of misfeasance the "keeping up a milldam on a stream below the plaintiff's land." Here needs no averment that the defendant owned the land on which the dam was kept up. The title to that land can not come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages, whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it. "Keeping up" the dam implies a positive act of the defendants; it is a malfeasance, and therefore the plaintiff has a right of action against all or any of the parties who keep up that dam. Unless the title comes in question, there is no difference, in this respect, in cases arising ex delicto, between actions merely personal, and those which concern the realty. The plaintiff, in such an action, is always bound to join his cotenants, because his title must come in question as the foundation of his claim; but he may sue any or all who have done the tortious act. The justice, therefore, erred in deciding against the demurrer to the plea, in abatement; and the judgment must be reversed.

Judgment reversed.[67]

[67] Accord: *Sumner* v. *Tileston*, 4 Pick. (Mass.) 308 (1826) and see *Elliott* v. *McKay*, 49 N. Car. 59 (1856); *Karren* v. *Rainey*, 30 Utah 7, 83 Pac. 333 (1905); *Baker* v. *Fritts*, 143 Ill. App. 465 (1908).

CHAMBERLAINE *v.* WILLMORE.

IN THE KING'S BENCH, 1622.

Palmer's Reports 313.[68]

An action on the case was brought against two for these words: "Thou hast stolen plate from Cambridge of J. S. and we do arrest thee of flat fellony." and upon the general issue it was found for the plaintiff; and moved in arrest of judgment that it does not lie against the two jointly, because the words of one are not the words of the other; but there should have been several actions, just as two can not bring a joint action for words. Dy. 19. And so it was resolved by the court, that these several causes could no more produce a joint action, than their words and tongues and tort can be said to be one; and for this reason the judgment was arrested by the court."[69]

HENRY NIERENBERG AND EMIL ZUKUGMAN *v.* JAMES WOOD.

SUPREME COURT OF NEW JERSEY, 1896.

59 *N. J. L.* 112.

On certiorari to the Court of Common Pleas of Passaic County.

GUMMERE, J.: This action was brought by Wood, the plaintiff below, against the prosecutors, Nierenberg and Zukugman, jointly, to recover compensation for damages done by two dogs, one owned by Nierenberg and the other by Zukugman, in trampling down and destroying cabbage plants, beans, etc., which were growing in Wood's close. The property was all destroyed at the same time, the two dogs uniting in committing the mischief, and a judgment was entered in the court below against the prosecutors by which each was made responsible for the whole of the injury done.

[68] S. C. *sub nom. Chamberlain* v. *White*, Cro. Jac. 647.

[69] Accord: *Burcher* v. *Orchard*, Style 349 (1652) *semble*; *Glass* v. *Stewart*, 10 S. & R. (Pa.) 222 (1823); *Webb* v. *Cecil*, 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423 (1848); *Carvill* v. *Cochran*, 1 Phila. (Pa.) 399 (1852); *Forsyth* v. *Edminston*, 6 Duer. (N. Y.) 653 (1856); *Buzzard* v. *Guest*, 7 Montgomery Co. L. Rep. (Pa.) 197 (1891); *Blake* v. *Smith*, 19 R. I. 476 (1896); *Gattis* v. *Kelgo*, 125 N. Car. 133, 34 S. E. 246 (1899); *Harriott* v. *Plimpton*, 166 Mass. 585, 44 N. E. 992 (1896); *Singer M. Co.* v. *Taylor*, 150 Ala. 574 (1907); *Smith* v. *Agee*, 59 So. 647 (Ala. 1912); *Nunnamaker* v. *Smith*, 80 S. E. 465 (S. Car. 1914). Otherwise in libel. *Thomas* v. *Rumsey*, 6 Johns. (N. Y.) 26 (1810); *Miller* v. *Butler*, 60 Mass. 71, 52 Am. Dec. 768 (1850); *Leidig* v. *Bucher*, 74 Pa. 65 (1873).

Green v. *Davies*, 182 N. Y. 499, 75 N. E. 536 (1905) holds that if two slanders are uttered in pursuance of a common agreement between the parties that such slanders shall be uttered, then each is jointly liable with the other for the utterance.

The theory upon which the suit was tried and judgment rendered seems to have been that, as the loss suffered by the plaintiff was the result of the joint act of two dogs, their respective masters stood in the same position, so far as liability to respond for the damage done was concerned, as if they personally had broken and entered the plaintiff's close and destroyed his growing plants.

But the reason which makes one who personally aids in or abets the wrong done by another liable for the whole amount of the injury done, does not apply in a case like that under consideration.

In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional, and the law, as a punishment for his wrongdoing as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has, therefore, always been held, when the question has come before the courts, that a joint action will not lie against separate owners of dogs which unite in committing mischief. One of the earliest cases on this subject is *Russell* v. *Tomlinson and Hawkins,* 2 Conn. 206, in which the plaintiff sought to hold the defendants jointly liable for injuries done to his sheep by their dogs. Chief Justice Swift, in delivering the opinion of the court, said: "Owners are responsible for mischief done by their dogs, but no man can be liable for the mischief done by the dog of another, unless he has had some agency in causing the dog to do it. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog, and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining together in doing mischief, could make the owners jointly liable. This would be giving them a power of agency which no animal was ever supposed to possess."

A similar view is expressed in *Van Steenburgh* v. *Tobias,* 17 Wend. 562; *Auchmuty* v. *Ham,* 1 Denio 495; *Partenheimer* v. *Van Order,* 20 Barb. 479; *Adams* v. *Hall,* 2 Vt. 9; *Buddington* v. *Shearer,* 20 Pick. 477, and *Denny* v. *Correll,* 9 Ind. 73.

Nor does the fact that there may be difficulty in ascertaining the quantum of damage done by each dog afford any ground for holding their owners jointly liable. As was said in *Van Steenburgh* v. *Tobias, supra,* the difficulty of such ascertainment is not an argument of sufficient strength to warrant the injustice of punishing a man who is entirely innocent.

The liability of the prosecutors in this case, for the mischief done by their respective dogs, was a separate and not a joint one, and the plaintiff, in order to recover for the loss which he had sustained, should have brought actions against each of them for so much of the injury as was caused by the dog which he owned. By doing so he would have been fully indemnified, for the recovery in

an action against one owner would have been no bar to the action against the other.

The judgment of the court of common pleas should be set aside.[70]

ANTOINE FENEFF *v.* BOSTON AND MAINE RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1907.

196 *Mass.* 575.

Tort for personal injuries received by the plaintiff in the collision of two engines, upon one of which he was riding, in the yards of the New York, New Haven and Hartford Railroad Company in Worchester. Writ in the Superior Court for the county of Worchester dated June 13, 1906.

It appeared that, at the point in the yards where the collision occurred, there were five tracks, three of which were controlled by the defendant, New York Central and Hudson River Railroad Company, and two by the New York, New Haven and Hartford Company, which was not a party to this action. Across these tracks a switch engine operated by the defendant, Boston and Maine Railroad, ran from time to time. Near at hand was a switching tower. No trains or engines could pass on the tracks at the place in question unless they were permitted to by the man in charge of the switching tower. That man was an employe of the defendant, New York Central and Hudson River Railroad Company.

At the time of the collision, the plaintiff, under the circumstances stated in the opinion, was riding upon a passenger engine of the New York, New Haven and Hartford Railroad Company from the south station to go to the union station, when that engine was run into by a switching engine of the defendant, Boston and Maine Railroad. The plaintiff contended that the collision occurred be-

---

[70] Accord: *Russell* v. *Tomlinson*, 2 Conn. 206 (1817); *Adams* v. *Hall*, 2 Vt. 9, 19 Am. Dec. 690 (1829); *Van Steenburgh* v. *Tobias*, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310 (1837); *Buddington* v. *Shearer*, 20 Pick. (Mass.) 477 (1838); *Auchmuty* v. *Ham*, 1 Den. (N. Y.) 495 (1845); *Partenheimer* v. *Van Oder*, 20 Barb. (N. Y.) 479 (1855); *Denny* v. *Correll*, 9 Ind. 72 (1857); *Cogswell* v. *Murphy*, 46 Iowa 44 (1877). Otherwise where the animals are in the joint possession of the defendants. *Jack* v. *Hudnall*, 25 Ohio St. 255, 18 Am. Rep. 298 (1874); *Ozburn* v. *Adams*, 70 Ill. 291 (1873) and see *McClain* v. *Lewistown, etc., Assn.*, 17 Idaho 63 (1909). See also, for the principle that for separate torts separate actions must be brought, *Blaisdell* v. *Heister*, 14 Nev. 17 (1879); *Strawbridge* v. *Stern*, 112 Mich. 16, 70 N. W. 331 (1897); *Millard* v. *Miller*, 88 Pac. 845 (Colo. 1907); *Breaux B. Co.* v. *Hebert*, 121 La. 188, 46 So. 206 (1908); *Wise* v. *Tube Bending M. Co.*, 194 N. Y. 272 (1909); *Courtney* v. *Louisiana Ry. N. Co.*, 131 La. 575 (1912); *Dickey* v. *Willis*, 15 Mass. 292, 102 N. E. 336 (1913); Pomeroy, Code Remedies (4th ed.), p. 303; 38 Cyc. 484. In *Gunder* v. *Tibbitts*, 153 Ind. 591, 55 N. E. 762 (1899) a joint action was sustained against plaintiff's seducer and an abortionist; *quære tamen.*

cause of negligence both of the persons operating the switching engine and of the person operating the switching tower. At the close of the evidence, the presiding judge directed a verdict for both of the defendants, and the plaintiff excepted.[71]

BRALEY, J.: In avoidance of this liability the defendant New York Central and Hudson River Railroad Company urges that two or more wrongdoers can not be held jointly, unless, either in fact or by intendment of law, they co-operate in the perpetration of the wrong, as otherwise there would be a misjoinder of separate causes of action. Undoubtedly this is the general rule where two or more persons voluntarily unite in the act which constitutes the wrong, or the act is committed under such circumstances that they reasonably may be charged with intending the injurious consequences which follow. We refer only to a few illustrative cases.[72]

It has been said by an eminent legal author that "in respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities." 1 Cooley on Torts (3d ed.) 246. See Pollock on Torts (7th ed.) 194. But whatever diversity of opinion there may be elsewhere, the law here must be considered as settled, that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable. *Boston and Albany Railroad* v. *Shanly*, 107 Mass. 568, 579; *Bryant* v. *Bigelow Carpet Co.*, 131 Mass. 491, 503; *Corey* v. *Havener*, 182 Mass. 250; *Oulighan* v. *Butler*, 189 Mass. 287, 293; *Flynn* v. *Butler*, 189 Mass. 377. A corresponding liability under similar conditions has been sustained in other jurisdictions.[73] The cases of *Parsons* v. *Winchell*, 5 Cush. 592; *Mulchey* v. *Methodist Religious Society*, 125

---

[71] Only so much of the case is printed as relates to the joinder of defendants.

[72] *Brown* v. *Perkins*, 1 Allen (Mass.) 89 (1861); *Stone* v. *Dickinson*, 5 Allen (Mass.) 29, 81 Am. Dec. 727 (1862); *Barden* v. *Felch*, 109 Mass. 154 (1872); *Levi* v. *Brooks*, 121 Mass. 501 (1876); *Bath* v. *Metcalf*, 145 Mass. 274, 14 N. E. 133, 1 Am. St. 455 (1887); *Martin* v. *Golden*, 180 Mass. 549, 62 N. E. 977 (1902); *Parsons* v. *Winchell*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745 (1850); *Hawkesworth* v. *Thompson*, 98 Mass. 77, 93 Am. Dec. 137 (1867); *Banfield* v. *Whipple*, 10 Allen (Mass.) 27, 87 Am. Dec. 618 (1865); *Mulchey* v. *Methodist R. Soc.*, 125 Mass. 487 (1877); *White* v. *Sawyer*, 16 Gray (Mass.) 586 (1860); *Pervear* v. *Kimball*, 8 Allen (Mass.) 199 (1864); *Swain* v. *Tennessee C. Co.*, 111 Tenn. 430, 78 S. W. 93 (1903); *Hill* v. *Goodchild*, 5 Burr. 2790 (1771).

[73] *Colegrove* v. *New York, N. H. & H. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418 (1859); *Barret* v. *Third Ave. R. Co.*, 45 N. Y. 628 (1871); *Lynch* v. *Elecktron Mfg. Co.*, 94 App. Div. (N. Y.) 408 (1904); *Tompkins* v. *Clay Street Hill R.*, 66 Cal. 163, 4 Pac. 1165 (1884); *Cuddy* v. *Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178 (1881); *Mathews* v. *Del. L. & W. R. Co.*, 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261 (1893); *Electric R. Co.* v. *Shelton*, 89 Tenn. 423, 14 S. W. 863 (1890); *Wilder* v. *Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479 (1893); *McClellan* v. *St. Paul, M. & M. R. Co.*, 58 Minn. 104, 59 N. W. 978 (1894); *Allison* v. *Hobbs*, 96 Maine 26, 51 Atl. 245 (1902); *Wabash R. Co.* v. *Shacklet*, 105 Ill. 364, 44 Am. Rep. 791 (1883); *Graves* v. *City & S. Tel. Assn.*, 132 Fed. 387 (1904).

Mass. 487; *Harriott* v. *Plimpton,* 166 Mass. 585; *Mooney* v. *Ediston Electric Illuminating Co.,* 185 Mass. 547, and *Fletcher* v. *Boston and Maine Railroad,* 187 Mass. 463, upon which the defendant relies as establishing a different rule, are to be distinguished. The first two decided that a master can not be held responsible jointly with his servant nor a principal with his agent, for a tort committed by the servant or agent, when acting within the scope of their employment.[74] In the third case, the joint action failed because no proof appeared of any co-operation between the defendants to procure a breach of the plaintiff's contract of marriage, while in the fourth, the measure of damages as well as the degree of liability being different and distinct as to the different defendants, the liability was said to be several. If, in the remaining case, it could have been said that the accident was chargeable solely to the railroad company, upon whom primarily rested the contractual duty of safely transporting the plaintiff and whose breach of this duty was the proximate cause of the injury, yet the decision in favor of the defendants well might rest, as the opinion states, upon his contributory negligence. In the present case the wrongful act was unintentional and arose solely from the concurrent negligence of the defendants, and, while it can not be said that there was any concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties produced a single injury to the plaintiff. It thus becomes impossible to ascertain whether one defendant rather than the other was the efficient cause of the wrong to which each contributed.

The plaintiff, therefore, is entitled to prosecute his suit to final judgment against both defendants, although he can have but one satisfaction in damages. *Oulighan v. Butler,* 189 Mass. 287, 293, and cases cited.

The verdict in their favor having been improperly directed, in accordance with the agreement of the parties judgment is to be entered for the plaintiff in the sum of $600.[75]

So ordered.

---

[74] See note to *French* v. *Central Construction Co.,* 12 L. R. A. (N. S.) 669 (76 Ohio 509).

[75] Accord: *Matthews* v. *Del. L. & W. R. Co.,* 56 N. J. L. 34, 27 Atl. 919, 22 L. R. A. 261 (1893); *Downey* v. *Railroad,* 161 Pa. 588, 29 Atl. 128 (1894); *Brown* v. *Coxe Bros. & Co.,* 75 Fed. 689 (1896); *Corey* v. *Havener,* 182 Mass. 250, 65 N. E. 69 (1902); *Weathers* v. *Railroad,* 111 Mo. App. 315, 86 S. W. 908 (1904); *Stranhal* v. *Asiatic S. Co.,* 48 Ore. 100 (1906); *Walton* v. *Miller's Admr.,* 109 Va. 210 (1909); *Sweet* v. *Perkins,* 196 N. Y. 482 (1909); *Pacific T. Co.* v. *Parmenter,* 170 Fed. 140 (1909); *Maumee Valley R. & L. Co.* v. *Montgomery,* 81 Ohio 426 (1910); *Fortmeyer* v. *National B. Co.,* 133 N. W. 461 (Minn. 1911); *Spear* v. *United Railroads,* 117 Pac. 956 (Cal. 1911); *Jones* v. *Spokane R. Co.,* 124 Pac. 142 (Wash. 1912); *Louisville R. Co.* v. *Allen,* 65 So. 8 (Fla. 1914). In other cases a more restricted rule is given. Thus in *Mason* v. *Copeland Co.,* 27 R. I. 232 (1905), it is said: "The case does not present the concurrence of intention in the commission of a tort which is necessary to make a joint tort." In *Sturzebecker* v. *Inland Traction Co.,* 211 Pa. 156, 60 Atl. 583 (1905), it is said: "There can be no recovery upon the joint action where it appears that there was no community of fault by the two defendants in the act which occasioned

ELIZABETH G. CHIPMAN *v.* JOHN PALMER.

COURT OF APPEALS OF NEW YORK, 1879.

77 N. Y. 51.

Appeal by the plaintiff from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 9 Hun 517.)

This action was brought to recover damages alleged to have resulted from a nuisance.

It appeared from the evidence that plaintiff, in 1874, kept a boarding-house in the village of Saratoga Springs, near which flowed a small natural stream of water. Defendant kept a boarding-house higher up on the same stream, the sewerage from which ran into the stream. The sewerage from a large number of hotels and other boarding-houses was also discharged into the stream before it reached plaintiff's premises. In consequence the water of the stream became corrupt and offensive, and by reason of the stench some of plaintiff's boarders left.

The court charged the jury that they could not hold the defendant liable beyond the extent of the wrong which he had himself done. That if sewers from private houses and large hotels had all contributed to produce the damage the jury might apportionate it, and the rule of damage was the rental value. The plaintiff excepted to that part of the charge relating to damages. The jury rendered a verdict for the plaintiff for five dollars.[76]

MILLER, J.: The charge of the judge upon the trial in reference to the damages embraced two propositions: First: That the defendant was not liable beyond the extent of the wrong which he had committed, nor for the injury which other parties had contributed to produce, and Second: That as to the amount of injury, the rental value of the premises was the true test. A general exception was taken to this portion of the charge.

The first proposition contained in the charge was clearly correct. The right of the plaintiff to recover of the defendant all the damages which he had sustained by reason of the nuisance I think can not be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences

---

the injury." See also, *Bard* v. *Yohn*, 26 Pa. 482 (1856); *Howard* v. *Union Traction Co.*, 195 Pa. 391 (1900); *Rahenkamp* v. *United Traction Co.*, 14 Pa. Super. Ct. 635 (1900).

[76] The arguments of counsel and that part of the opinion which discusses the measure of damages is omitted.

with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard for the act of others. The defendant's act, being several when it was committed, can not be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true, that it is difficult to separate the injury; but that furnishes no reason why one tort feasor should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among the different parties. So also proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others, who severally and independently may have contributed to the injury. Such a rule can not be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from the other furnishes no reason for holding that one tort feasor should be liable for the acts of others with whom he is not acting in concert. The authorities relied upon to sustain such a doctrine come far short of establishing any such rule and have no application. (*Barrett* v. *The Third Ave. R. R. Co.*, 45 N. Y. 628; *Webster* v. *H. R. R. R. Co.*, 38 N. Y. 260; *Sheridan* v. *B. & N. R. R. Co.*, 36 N. Y. 39; *Chapman* v. *N. H. R. R. Co.*, 19 N. Y. 341; *Colgrove* v. *N. Y & H.* and *N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Creed* v. *Hartman*, 29 N. Y. 591.) Each of the cases cited was disposed of upon a different principle. They merely hold that where a direct personal injury is occasioned by the separate and concurring negligence of two parties at one and the same time, an action against one or all of them will lie. The distinction is plain between the cases last cited and one where the injury is remote from the act and consequential, and the result of separate acts of different parties at different times, without any association and independent of each other. *Slater* v. *Merserean*, 64 N. Y. 138, was a case where the separate and independent acts of negligence of two parties was the cause of a single injury to a third person, and as was said in the opinion, was somewhat analogous to a case where the injury was caused by the concurrent negligence of the trains of two railroad corporations. That case was well decided, and in no way upholds the doctrine contended for by the plaintiff's counsel, and is not in point.

The appellant's counsel cites from Wood on Nuisances (§§ 821, 822), claiming that the text upholds the doctrine that where one contributes to the production of a nuisance, he is chargeable with all the damages, although many others contributed thereto, and that where several persons drain in the same ditch, and an injury is produced thereby, any of the persons so using the drain are liable jointly or separately. The cases cited by the author do not sustain the principle contended for, as will be seen by an examination of the same. In *Duke of Buccleugh v. Connan*, 5 Macph. 214, the action

was a declaration or interdict, in the Court of Sessions of Scotland, which is in the nature of a bill in equity, to prevent the pollution of the river North Esk, which flowed through the lands of the complainants, by paper mills erected on the stream by the defendants. It was held that the action could be maintained; that no question of damage was raised, but merely the question whether the parties had committed the nuisance sought to be redressed. While an action in equity may be maintained in favor of different parties, who were the owners of property upon the same stream, against the owners of different properties, to restrain the nuisance, they may not be jointly or severally liable for the entire injury occasioned thereby. In *Crossley v. Lightowler,* (3 L. R. Eq. 279,) it was held that it was no answer to plaintiff's complaining of a private nuisance that a great many other persons are committing the same sort of nuisance, and that plaintiff has admitted the fact by buying up the rights of some who had acquired rights against him, provided that a definite amount of injury could be traced to the defendant. This case also was a bill in equity to restrain the defendants from suffering the foul water from their dye works to flow into and foul the water of the stream and thus interfering with the plaintiff's enjoyment and use of the water. There was no question as to a separate or joint liability for damages in the case. *Thorpe* v. *Brumfitt,* 8 L. R. Ch. App., 650,) was a bill for an injunction to restrain defendants from obstructing a roadway, and holds that the acts of several persons may together constitute a nuisance which the court will restrain, although the damage occasioned by the acts of any one, if taken alone, would be inappreciable. *McAuley* v. *Roberts,* (13 Grant Ch. [U. C.], 565,) holds that an injunction will lie to compel the defendant to stop or divert a drain which had been built on the plaintiff's lot. In *The Chenango Bridge Co.* v. *Lewis,* (63 Barb., 111,) the erection and the illegal use of the bridge afterwards was a continuous act; and hence, it was properly held that the liability attached not only to those who were engaged in the use, but also to those who erected the structure with the knowledge or intent that it should be put to the illegal use. None of the cases uphold the doctrine contended for.[77]

While, as we have seen, an equitable action will lie to restrain parties who severally contribute to a nuisance, the general rule is well settled that where different parties are engaged in polluting or obstructing a stream, at different times and places, the whole damage occasioned by such wrongful acts can not be collected of one of the parties. This was also distinctly held in *Wallace* v. *Drew,* (59 Barb. 413.) There must be concert of action and co-operation to make several persons jointly liable. (*Williams* v. *Sheldon,* 10 Wend. 654; *Guille* v. *Swan,* 19 J. R. 381.) In *Wood* v. *Sutcliffe,* (8 Eng. L. & Eq. 217,) which was a motion for an injunction to prevent the pollution of a stream by dye wares and matters of that descrip-

[77] See further on codefendants in equity *People* v. *Gold Run D. & M. Co.,* 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80 (1884); *Warren* v. *Parkhurst,* 186 N. Y. 45 (1906); *Laden* v. *Tennessee Copper Co.,* 179 Fed. 245 (1910); *Milchsack* v. *Dexter Cement Co.,* 14 Northampton Co. Rep. 177 (Pa. 1914).

tion, the vice chancellor states that where one wrongdoer does more harm than another by a separate act, "the plaintiff must pursue each of the wrongdoers separately, unless they are acting in partnership or in concert together, as they are separate acts." The same rule is upheld in the State of Pennsylvania in several cases where the question was presented: (*Little Schuylkill Nav. R. R. & Coal Co.* v. *Richards*, 57 Penn. 142; *Seely* v. *Alden*, 61 Pa. 302; *Bard* v. *Yohn*, 26 Pa. 482.)

As the portion of the charge which we have considered was clearly right, and the exception was general, so as to include both propositions, it is not material whether the last one was correct in that connection.

Judgment affirmed.[78]

PRICE *v.* VIRGINIA-CAROLINA CHEMICAL CO.

SUPREME COURT OF GEORGIA, 1911.

136 *Ga.* 175.

Complaint. Before Judge Rawlings. Johnson Superior Court. March 23, 1910.

The Virginia-Carolina Chemical Company filed its petition against W. D. Price & Company and the Citizens Bank of Kite, Georgia, alleging as follows: that on May 1, 1908, W. D. Price & Company executed and delivered to petitioner their note for $648.11, due November 1, 1908, and payable at the Citizens Bank of Kite; petitioner discounted the note before maturity, and, in due course of trade, it became the property of the Corn Exchange National Bank of Chicago; that the Corn Exchange Bank, shortly before maturity of the note, sent same for collection to the Citizens Bank of Kite,

---

[78] Accord: *Lull* v. *Fox & W. Imp. Co.*, 19 Wis. 100 (1865); *Sellick* v. *Hall*, 47 Conn. 260 (1879); *Sloggy* v. *Delworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. 656 (1888); *Martinowsky* v. *Hannibal*, 35 Mo. App. 70 1889); *Miller* v. *High Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. 254 (1891); *Ames* v. *Dorset Marble Co.*, 64 Vt. 10, 23 Atl. 857 (1891); *Gallagher* v. *Kemmerer*, 144 Pa. 509, 22 Atl. 970, 27 Am. St. 673 (1891); *People* v. *Oakland Water F. Co.*, 118 Cal. 234, 50 Pac. 305 (1897); *Boute* v. *Postel*, 109 Ky. 64, 22 Ky. L. 583, 58 S. W. 536, 51 L. R. A. 187 (1900); *Swain* v. *Tennessee Copper Co.*, 111 Tenn. 430, 78 S. W. 93 (1903); *Watson* v. *Colusa-Parrott M. & Smelting Co.*, 31 Mont. 513 (1905); *Mansfield* v. *Bristor*, 76 Ohio St. 270 (1907); *Tackaberry* v. *Sioux City Service Co.*, 154 Iowa 358 (1911); *Eckman* v. *Lehigh & W. C. Co.*, 50 Pa. Super. Ct. 427 (1912); *Brose* v. *Twin Falls L. & W. Co.*, 24 Idaho 266 (1913); *Standard Phosphate Co.* v. *Lunn*, 63 So. 429 (Fla. 1913). Contra: *South Bend M. Co.* v. *Liphart*, 12 Ind. App. 185, 39 N. E. 908 (1844); *Valparaiso* v. *Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. 522 (1894); *West Muncie S. Co.* v. *Slack*, 164 Ind. 21, 72 N. E. 879 (1904); *Day* v. *Louisville, C. & C. Co.*, 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167 (1906). Parties who co-operate in maintaining a nuisance may be held jointly. *Commings* v. *Stevenson*, 76 Tex. 642, 13 S. W. 556 (1890); *Rogers* v. *Stewart*, 5 Vt. 215, 26 Am. Dec. 296 (1833); *Irvin* v. *Wood*, 4 Rob. (N. Y.) 138 (1866); *Blanton* v. *Kincheloe I. Co.*, 102 S. W. 744 (Tex. 1907).

but never received any remittance from that bank, nor was the note ever returned; that W. D. Price & Company claim that they paid the note in full to the Citizens Bank of Kite on the 3d of November, 1908, which is denied by that bank, which also denies that it ever received such note for collection; that petitioner has paid the Corn Exchange Bank the amount of the note, but has never been able to obtain possession of the note; that if this note was paid by W. D. Price & Company to the Citizens Bank of Kite, then that bank is indebted to petitioner for the amount of the note, but if it was not so paid as claimed by Price & Company, then the note has been lost, if it was never received by the Citizens Bank of Kite for collection, or, if it was received by the bank, the latter has appropriated and converted it to its own use; and that either W. D. Price & Company or the Citizens Bank of Kite is indebted to petitioner in the amount of the note. The prayer of the petitioner was that W. D. Price & Company and the Citizens Bank of Kite be required to interplead, whether W. D. Price & Company had paid the note to the Citizens Bank of Kite, as they claimed, or whether said note had never been received by the bank, as claimed by it; and that petitioner have judgment against whichever of the defendants it should appear owed the amount of its note. It was alleged by amendment that petitioner was without any adequate remedy at law, and that in order to prevent a multiplicity of suits and settle the contentions of the parties by one decree it was necessary that a court of equity should take jurisdiction. Price & Company demurred to the petition, on the grounds, that no cause of action was set out, that the petitioner is not entitled to the relief sought, either legal or equitable, and because separate and distinct actions against separate and distinct defendants are joined in the petition and there is a misjoinder of parties defendant. The court overruled the demurrer, and Price & Company excepted.

EVANS, P. J.: Under the allegations of the petition, the plaintiff is not entitled to have the defendants engage in any internecine legal battle to settle which one of them should pay the money which it claims to be due from one or the other. The code declares that "whenever a person is possessed of property or funds, or owes a debt or duty, to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity or compel the claimants to interplead." Civil Code (1910), § 5471. Instead of alleging that he has funds belonging to one or the other of the defendants, whom he invites to settle their respective rights to the same, the plaintiff alleges that he is entitled to recover of one of the defendants a certain sum of money on an alternative state of facts, and asks that they litigate between themselves which state of facts presents the truth and which one of the defendants is liable to him. This is not permissible. If the bank collected the note, it is accountable to the plaintiff, and that is one cause of action. If the makers have not paid the note they are liable thereon to the plaintiff, and that is an altogether different cause of action against different defendants, and violates the fundamental principle of pleading which

prohibits the inclusion of separate and independent controversies against different parties in the same action.[79]

Judgment reversed.

TOWN OF FAIRFIELD *v.* SOUTHPORT NATIONAL BANK.

SUPREME COURT OF CONNECTICUT, 1904.

77 Conn. 423.

The town of Fairfield brought an action against the Southport National Bank, and four other banks, averring in the complaint that the selectmen of the town had borrowed money from time to time of the Southport National Bank and had given twenty promissory notes therefor. These notes were paid in full to the Southport National Bank, but were not cancelled or surrendered as the bank had promised they should be, and through its fraudulent transfer three of said notes had passed into the possession of the Connecticut National Bank, ten into the possession of the Peoples Savings Bank, five into the possession of the City Savings Bank, and one into the possession of the Bridgeport Savings Bank. Each of the banks claimed to be a bona fide holder of said notes for value. The Southport National Bank was insolvent. The prayer was for a decree determining what rights the several defendants had in the instruments claimed by them, and what sum they would be entitled to receive from the plaintiff; to compel the Southport National Bank to pay the other banks and procure the instruments to be cancelled and delivered up and for a recovery of damages against the Southport National Bank. To the complaint the Southport National Bank demurred on the ground that the complaint was bad for misjoinder of parties and causes of action. The court below sustained the demurrer and entered judgment for the bank. The plaintiff appealed.[80]

---

[79] Two or more persons can not be joined as defendants upon the ground that one or some are liable in the alternative. *Oglesby's Sureties* v. *State*, 73 Tex. 658, 11 S. W. 873 (1889); *Brown* v. *Ill. Cent. R. Co.*, 100 Ky. 525, 18 Ky. L. 974, 38 S. W. 862, (1897); *L. & N. R. Co.* v. *Fort Wayne E. Co.*, 108 Ky. 113, 21 Ky. L. 1544, 55 S. W. 918 (1900); *Thorndale M. Co.* v. *Evens*, 146 S. W. 1053 (Tex. 1912); *Casey P. M. Co.* v. *Booth F. Co.*, 124 Minn. 117 (1913); 30 Cyc. 131.

In England, under the rules of the Supreme Court, order xvi, rule 7, where a plaintff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any, of them is liable may be determined. *Bennetts* v. *McIlwraith*, L. R. (1896), 2 Q. B. Div. 464; *Thompson* v. *London County Council*, L. R. (1899), 1 Q. B. Div. 840; *Sanderson* v. *Blyth Theater Co.*, L. R. (1903), 2 K. B. Div. 533; *Compania Sansinena* v. *Houlder*, L. R. (1910), 2 K. B. Div. 354. This practice has been adopted by statute in Rhode Island. *Phoenix Iron Foundry* v. *Lockwood*, 21 R. I. 556, 45 Atl. 546 (1900); in New Jersey by the Practice Act of 1912, § 6 and rule 8, and in Connecticut by rule of court, 58 Conn. 561.

[80] The statement of facts is abridged from the opinion of the court, portions of which are omitted. The section of the practice act referred to by the court is in the General Statutes, Revision of 1902. Similarly the New

TORRANCE, C. J.: The question is whether, under our Practice Act, the complaint is bad for misjoinder as claimed. That act provides (Gen. Stat., § 618) as follows: "Any person may be made a defendant who has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or whom it is necessary, for a complete determination or settlement of any question involved therein, to make a party." If then, any of the defendants "has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff," such defendant was properly made a party in the cause. What, then, is the "controversy" in this case, within the meaning of the statute? That controversy relates to the ownership of, the liability upon, and the right to the possession of, the twenty written instruments described in the complaint, each purporting on its face to be a promissory note made by the plaintiff. These instruments may be said to be the subject-matter of the controversy. Each of the defendants holds one or more of said notes, and they each make certain claims with regard to the said notes held by each, which are adverse to certain claims made by the plaintiff with regard to said notes. The plaintiff is one of the towns of this state, and with reference to each and all of said notes, it claims: (1) that it never executed them and is not legally bound by them; (2) that they were paid in full, with its money, long before they came into the hands of the defendants, other than the Southport National Bank; and (3) that all of said notes held by said last-named defendants, are held by transfer from said Southport National Bank; that said transfer was made by said bank in fraud of the plaintiff's rights; and that this fraud may affect the rights of the defendants other than the Southport National Bank. The Southport National Bank denies all of these claims; and the other defendants deny the first, and the other two also, so far as they affect or may affect the right of said defendants. The defendants thus have each an interest in having these claims of the plaintiff decided adversely to the plaintiff, and their interest is a pecuniary one. The word "controversy" is exceedingly broad and comprehensive, and for that reason not easily susceptible of any precise general definition and no attempt will be made here to give it any such definition. It is enough to say that we think that words, as applied to the present case, means the adverse claims of the parties with respect to the ownership of, liability upon, and possession of, said twenty notes set forth in the complaint. If this be so, it follows that each defendant, as between such defendant and the plaintiff, has an interest adverse to the plaintiff in the whole or in some part of the controversy, and thus in terms at least comes within the class who may be made defendants under the statute.

York Code of Civil Procedure, § 447, provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act." The New York Code of 1848, § 118, was copied into most of the other codes with slight modifications. New Jersey Practice Act of 1912, § 6; Ohio Gen. Code, § 11255; Burns' Ann. Stat. Ind. (1914), § 269; Pomeroy's Code Remedies (4th ed.), p. 266.

It must be conceded, however, as claimed by the Southport National Bank, that with respect to each other, the interest of the defendants in the controversy, or any part of it, is a several and not a joint or mutual one. It is true they each obtained the notes they respectively hold from a common source, the Southport National Bank; but there is no privity between them. They each obtained and hold their notes by a several title, by means of transactions with which the others had and have no concern whatever. The defendants, as between themselves, have no "joint" or "mutual" interest in the claims of each against the plaintiff, nor in the claims of the plaintiff against each; and because of this the Southport National Bank contends that they can not properly be joined as defendants.

In the old equity practice it was undoubtedly the rule, at least in the case of "bills of peace," that a single plaintiff could not join numerous defendants in one suit unless there existed among them "a common right, a community of interest in the subject-matter of the controversy, or a common title from which all their separate claims and all the questions at issue arise; it is not enough that the claims of each individual being separate and distinct, there is a community of interest in the question of law or of fact involved, or in the kind and form of remedy demanded and obtained by or against each individual." I Pomeroy's Eq., § 268. The author quoted, however, says in the next section (§ 269) that this rule has long been abandoned, and then proceeds to state the matter as follows: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials of some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title', nor 'community of right', or of 'interest in the subject-matter', among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." The cases cited in the foot notes in the book above referred to amply bear out the author's statements. In the following cases the later rule thus announced has been recognized and applied. *Sheffield Waterworks* v. *Yeomans,* L. R. 2 Ch. App. 8; *New York & N. H. R. Co.* v. *Schuyler,* 17 N. Y. 592; *Carlton* v. *Newman,* 77 Me. 408; *Woodruff* v. *North Bloomfield G. M. Co.,* 8 Saw. (U. S. C. C.) 628; *Black* v. *Shreeve,* 3 Halst. Ch. (N. J. Eq.) 440; *McHenry* v. *Hazard,* 45 N. Y. 580; *Board of Supervisors* v. *Deyoe,* 77 N. Y. 219; *Commonwealth* v. *Scott,* 112 Ky. 252, 23 Ky. L. Rep. 1488, 55 L. R. A. 597; *DeWolf* v. *Sprague Mfg. Co.,* 49 Conn. 282; *Evergreen Cemetery Assn.* v. *Beecher,* 53 Conn. 551.

We think the case at bar comes within this principle. The respective rights which the defendants claim against the plaintiff, under the notes held by each, depend substantially and for all practical purposes upon the decision of the same questions of law and of fact; and no good reason appears why these rights can not be protected and enforced in one comprehensive proceeding. Of such a proceeding this court has said: "We think that it is in harmony with our practice in analogous proceedings and with the spirit of the Practice Act, and that it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights." *Evergreen Cemetery Assn.* v. *Beecher,* 53 Conn. 551, 552.

Judgment set aside and cause remanded.[81]

SECTION 4. PERSONAL DISABILITY.

(a) Infants.

GUILD *v.* CRANSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1851.

62 *Mass.* 506.

SHAW, C. J.: This case presents a question somewhat novel and interesting. The suit is for the recovery of land, in usual form, in the name of the plaintiff, by her next friend. The plaintiff now comes into court by her petition or written motion, signed by herself in proper person, and prays that the suit may be discontinued, and all further proceedings thereon stayed. Upon a suggestion by the court, that it would be proper to appoint some person as a commissioner to inquire and report the facts, it was conceded by counsel, acting upon the application of the next friend in prosecuting this suit, that the plaintiff is over twenty years of age, and that the suit was commenced and is prosecuted without her authority and against her consent.

---

[81] Compare *Patterson* v. *Kellogg,* 53 Conn. 38 (1885).

Under the codes: "The test to determine whether two parties can be joined as defendants is, whether they have one connected interest centering in the point in issue, or one common point of litigation." *Harris* v. *Elliott,* 29 App. Div. (N. Y.) 568 (1898); *Corcoran* v. *Mannering,* 10 App. Div. (N. Y.) 516 (1896); *Brady* v. *Linehan,* 5 Idaho 732 (1898); *Demarest* v. *Holderman,* 157 Ind. 467 (1901); *Oyster* v. *Iola Mining Co.,* 140 N. Car. 135, 52 S. E. 198 (1905); *Mayer* v. *Home Insurance Co.,* 108 N. Y. S. 711 (1908). On the other hand the cases permitting the joinder of defendants are limited by the rule that a joint action can not be maintained where the liabilities of the defendants are distinct and several. *Trowbridge* v. *Forepaugh,* 14 Minn. 133 (1869); *Iowa Lillovet Gold M. Co.* v. *Bliss,* 144 Fed. 446 (1906). This distinction is particularly marked in the cases where an injury arises out of the acts of many defendants without common design. Where the claim is for damages alone a joinder is improper. *Swain* v. *Tennessee Copper Co.,* 111

A prochein ami or next friend is said to be "any person who will undertake the infant's cause." 1 Bl. Com. 464. It is not limited to any particular relative designated by being nearest of kin. It seems to be clear, on general principles, that there must be an authority somewhere, to allow or prohibit a suit to be brought in the name of a minor, by any person assuming to be his next friend; otherwise, the rights of the minor might be put at hazard, inasmuch as he will be bound by the judgment. But in theory of law, we think a prochein ami is appointed by the court. It is stated in *Miles* v. *Boyden*, 3 Pick. 219, that this practice of a minor suing by prochein ami commenced with St. West. 1, ch. 48, enlarged by St. West. 2, ch. 15; and this is confirmed by other authorities. And it appears that originally the practice was, for the person intended to act as prochein ami, who is usually some near relative, to go with the infant before a judge at chambers or for a petition to be presented in behalf of the infant stating the nature of the action, praying that, in respect of his infancy, the person intended may be assigned as his prochein ami. This was accompanied with an affidavit, on which the judge granted his fiat, and on this a rule was drawn up by the clerk of the rules, admitting the person designated to sue as the prochein ami of the infant. Tidd's Pract. (1st Amer. ed.) 69; Com. Dig. Pleader, 2 ch. 1.[82]

In one case, error being brought to reverse a judgment, because no such previous order was shown, the court above refused to reverse, because the recital in the writ, stating that the infant was prosecuting by his next friend allowed for that purpose, should be taken as conclusive that an order had been made. *Archer* v. *Frowde*, 1 Stra. 304.

The probability is, that like many other such requisites, the practice of obtaining such previous order, from inconvenience, fell into disuse; probably in the confidence that the authority would not be called in question, or, if called in question, could be supplied, when all was right and well intended, by an order nunc pro tunc; and if the defendant appeared and pleaded, it would be too late then to question the authority of the prochein ami. It was put on the footing, in this respect, of a power of attorney, which is always

---

Tenn. 430 (1903). But where it is merely sought to restrain the defendants from continuing the injury all may be joined. *Draper* v. *Brown*, 115 Wis. 361 (1902); *Montecito Valley W. Co.* v. *Santa Barbara*, 144 Cal. 578 (1904); *Warren* v. *Parkhurst*, 186 N. Y. 45 (1906).

In England the rules of the Supreme Court, order xvi, rule 4, provide: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." Under this rule a single action will not lie for several torts. *Sadler* v. *Great Western R. Co.*, L. R. (1896), App. Cas. 450; *Gowen* v. *Coulbridge*, L. R. (1898), 1 Q. B. Div. 352. But where the right to relief against both defendants arises out of a common transaction an action may be brought against both. *Frankenburg* v. *Great Horseless Carriage Co.*, L. R. (1900), 1 Q. B. Div. 504; *Bullock* v. *London G. Omnibus Co.*, L. R. (1907), 1 K. B. Div. 264; *Compania S. D. C. C.* v. *Houlder*, L. R. (1910), 2 K. B. Div. 354.

[82] "At the common law, infants were required to sue and to defend by

presumed to exist, and which can not be questioned unless seasonably challenged, and may then be supplied.[83]

Such seems to have been the view taken by this court at an early day, by a rule requiring a prochein ami permitted to prosecute, etc., to give bond. *Parsons* v. *Jones*, 9 Mass. 106, note. So, it has been held, that the name of a person, as next friend, may be introduced, by way of amendment, in a writ sued out in the name of a minor. *Blood* v. *Harrington*, 8 Pick. 552.

We think this power of the court, to appoint or allow a next friend to prosecute, is recognized by R. S. ch. 79, which after providing for the appointment of testamentary and probate guardians, and guardians ad litem, adds: "§ 8. Nothing contained in this chapter shall impair or affect the power of any court of common law, probate court, or court of a justice of the peace," "to appoint or allow any person, as next friend for a minor, to commence, prosecute or defend any suit in his behalf." It presupposes an allowance and appointment of the next friend; but, like a power of attorney to prosecute, it is not inquired into unless specially called in question. And so we suppose is the form of setting forth in the writ, according to the form stated in the case of *Trask* v. *Stone*, 7 Mass. 241, where both the attorneys were very good pleaders. The plaintiff was an infant, and sued this action "by A. B., the next friend of the said William, who is admitted by the court here to prosecute for the said William, in a plea of trespass," etc. But it is one of those formal averments which is not traversable.[84]

In practice, we know, it is not now the course for the minor or next friend to procure an appointment or allowance previously to the actual commencement of a suit, because usually it is not necessary; yet the case presupposes that the authority is with the court to allow, they may of course disallow the nomination, and we think, as a necessary consequence, they may revoke the authority. Com. Dig. Pleader, 2 C. 1. Where the proceedings appear to be fair

---

guardian; by whom was meant not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. By the statute of Westminster, 2 C. 15, infants were authorized to sue by *prochein ami* in all actions; and this remedy was held to be cumulative, leaving it optional for suit to be brought by guardian or next friend." Coke Litt, 135 b. note 1; *Young* v. *Young*, Cro. Car. 86; *Goodwin* v. *Moore*, Cro. Car. 161. Per Waterman, J., in *Chadleigh* v. *Chicago, R. I. & P. R. Co.*, 51 Ill. App. 491 (1893).

The father has the first and best right to act as next friend of his infant child. *Rue* v. *Meirs*, 43 N. J. Eq. 377, 12 Atl. 369 (1887); *Woolf* v. *Pemberton*, L R. (1877), 6 Ch. Div. 19; *Gulf &c. R. Co.* v. *Lemons*, 152 S. W. 1189 (Tex. 1913). Unless his interest is adverse. *Patterson* v. *Pullman*, 104 Ill. 80 (1882).

[83] Accord: *Judson* v. *Blanchard*, 3 Conn. 579 (1821); *Barwick* v. *Rackley*, 45 Ala. 215 (1871); *Butler* v. *Winchester Home*, 216 Mass. 567 (1914).

[84] *Paul* v. *Frierson*, 21 Fla. 529 (1885). Although joined in the suit the next friend is not the real party in interest. The infant is the real party. *Duffy* v. *Pinard*, 41 Vt. 297 (1868); *Morgan* v. *Potter*, 157 U. S. 195 (1894). When the infant comes of age, the fact should be noted of record and thereafter the suit should be conducted in his own name. *Holmes* v. *Adkins*, 2 Ind. 398 (1850).

and regular, the court would be slow to interfere and revoke the authority, during the progress of a suit.[85] But when the authority has been assumed by one to act as next friend, contrary to the apparent interest of the minor, or against the express will and consent of a minor old enough to be capable of judging, and the attention of the court is called to it, especially where an application is made by or in behalf of the minor, and proper cause shown, we think it is competent for the court to revoke the authority of the next friend, and stay proceedings, or appoint another. Such next friend is the appointee and officer of the court, as an instrument for the advancement of justice, and not with a view to any rights or interests of his own. It seems to follow, as a legal consequence, that his authority is revocable.[86]

2. The next question is, whether sufficient cause is shown in the present case.

It is said that the prosecution of this suit can not operate injuriously to the minor, because it is to recover land, which, if recovered, must be to the use of the minor, and the next friend can not aliene it. But this is far from being conclusive. He may so conduct the suit as to fail, and she may have a judgment against her; and, being a suit rightly prosecuted in her behalf, she would be concluded by it. The prochein ami is a volunteer, and gives no bonds. The suit was commenced and prosecuted without her knowledge or consent, and against her will, and, as it appears, contrary to her own convictions of her own interest. She is approaching the age of majority, and it does not appear that any right will be lost by a postponement of legal proceedings to that time. The law recognizes the capacity of a minor of such age to act; for many purposes. She may nominate and, with the concurrence of the judge of probate, appoint a guardian. It would be competent for such a minor to apply originally with a next friend to have him allowed. Applying by petition, signed by her in person, avoids the technical objection, that she can not constitute an attorney.

It is an appeal to the judicial discretion of the court upon all the circumstances; and, on the facts discolsed, the court are of opinion that there is sufficient ground shown to sustain the application.

The authority of Samuel Guild, as next friend, withdrawn, and all proceedings stayed, by consent of defendant, without costs to either party.[87]

[85] *Archer* v. *Frowde*, 1 Strange 308 (1733). It is not necessary to the prosecution of a suit by a *prochein ami* that the infant authorized or consented thereto. *Morgan* v. *Thorne*, 7 M. & W. 400 (1841); *McCarrick* v. *Kealy*, 70 Conn. 642 (1898); *Pyne* v. *Wood*, 145 Mass. 558 (1888).

[86] *Fulton* v. *Rosevelt*, 1 Paige N. Y. Ch. 178 (1828); *O'Donnell* v. *Broad*, 149 Pa. 24 (1892); *Ruffel* v. *Police B. Assn.*, 9 Pa. D. R. 182 (1900).

[87] An infant is capable of suing and being sued, but, for the protection of his interests, he is not permitted to sue or defend alone, the suit must be conducted on his behalf by a guardian *ad litem* or next friend. *Miles* v. *Boyden*, 3 Pick. (Mass.) 213 (1825); *Wilson* v. *Vandike*, 2 Harr. Del. 29 (1835); *Hardy* v. *Scanlin*, Miles Pa. 87 (1835); *Heft* v. *McGill*, 3 Pa. 256 (1846); *Caveder* v. *Smith*, 5 Iowa 157 (1857); *Clark* v. *Platt*, 30 Conn. 282 (1861); *Bush* v. *Linthicum*, 59 Md. 344 (1882); *Boynton* v. *Clay*, 58 Maine 236 (1870); *Winer* v. *Mast*, 146 Ind. 177 (1896); *Lawson* v. *Kuchner*, 50

LEVYSTEIN *v.* O'BRIEN.

SUPREME COURT OF ALABAMA, 1894.

106 *Ala.* 352.

The bill in this cause was filed on September 12, by the heirs, mother, sister and brothers of Archie O'Brien, Jr., deceased, against Levystein Bros., and avers the following facts: That about the 28th of April, 1894, Levystein Bros. obtained a judgment against the said Archie O'Brien, Jr., in a justice of the peace court of Montgomery county, upon which an execution was duly issued and levied upon the interest of said Archie in certain real estate in the city of Montgomery, and on motion of plaintiffs therein, in the circuit court of said county, to which these papers were transmitted, an order was made for the sale of said property so levied upon. After this, and before the sale, the said Archie O'Brien died. At the time said judgment was rendered in the justice court, and at the time of his death, the said Archie was a minor. No guardian ad litem was appointed to act for him, and no notice given to his regularly appointed guardian; and complainants averred in their bill that for failure to appoint such guardian ad litem, the judgment is void. It is not denied in said bill that the said Archie had due notice of said proceedings, nor is it averred that any plea of infancy was interposed to any of said proceedings. It is not denied, that the debt for which said judgment was rendered, was valid and binding upon said Archie, nor one on which he should, in equity and good conscience, pay; neither is it averred, that the said Archie, or the complainants in said bill, could prove a valid defense to said action. The only averment upon this question is, "that if suit were properly and legally brought on said claim against him, there is a full and legal defense thereto." There is no offer in said bill to pay the said Levystein Bros. any amount that might be found due them. The prayer is, that said judgment be declared void, and the collection thereof perpetually enjoined.

To this bill respondents interposed several grounds of demurrer,

---

W. Va. 344 (1901); *Hurst* v. *Goodwin*, 114 Ga. 585 (1901); *Clasen* v. *Pruhs*, 69 Neb. 278 (1903); *Williams* v. *Cleveland*, 76 Conn. 426 (1904); *Bancroft* v. *Bancroft*, 85 Atl. 561 (Del. 1911). A judgment obtained by a next friend is not open to collateral attack by the infant on the ground of fraud and collusion, he must seek to have the judgment itself set aside. *Chudleigh* v. *Chicago R. I. & P. Co.*, 51 Ill. App. 491 (1893). In some jurisdictions the suit must be by a guardian *ad litem* not a next friend. New York Code of Civil Procedure, § 469. *Hoftaiing* v. *Teel*, 11 How. (N. Y.) 188 (1855); *Colvin* v. *Hauenstein*, 110 Mo. 575 (1892), in partition; *Blair* v. *Henderson*, 49 W. Va. 282 (1901). As a defendant, an infant must be represented by a guardian *ad litem* and not by a next friend. *Swain* v. *Fidelity Ins. Co.*, 54 Pa. 455 (1867); *Bush* v. *Linthicum*, 59 Md. 344 (1852); *Spencer* v. *Robbins*, 106 Ind. 580, 5 N. E. 726 (1886), statute; *Mitchell* v. *Spaulding*, 206 Pa. 220 (1903); *McNaughton's Will*, 136 Wis. 179 (1909).

In England under the rules of the Supreme Court, Order XVI, rule 16, infants may sue as plaintiffs by their next friend and defend by their guardians appointed for that purpose. See *Wolf* v. *Pemberton*, L. R. (1877), 6 Ch. Div. 19; *In re Duke of Somerset*, L. R. (1887); 34 Ch. Div. 465.

The guardian *ad litem* or next friend is usually the nearest relation not concerned, in point of interest, in the matter in question. *United States*

and also moved to dismiss same for want of equity. The chancellor overruled the demurrers and the motion to dismiss the bill for the want of equity; and from said decree the present appeal is prosecuted and the same is here assigned as error.[88]

McCLELLAN, J.: In an action against infants, service of summons must be had upon the defendant, as upon defendants who are sui juris; and such service is as efficacious in the former as in the latter case to give the court jurisdiction of the cause. Having thus acquired jurisdiction of the person of an infant defendant, it is the court's duty to appoint a guardian ad litem to make defense for him; but a failure to discharge this duty does not oust the court's jurisdiction, which has already attached; but, to the contrary, if the case proceeds to judgment against the infant without such appointment, whether upon issue joined and trial had or upon the default of the defendant, such judgment though irregular and erroneous, and to be so declared upon appeal, is not void, and is therefore, not open to impeachment upon collateral attack. 1 Freeman on Judgments, § 151; 2 ib. § 487; 10 A. & E. Ency. of Law, pp. 692-697; Brown on Jurisdiction, p. 113; *Drake* v. *Hanshaw*, 47 Iowa 292; *Joyce* v. *McAvoy*, 31 Cal. 273, 89 Am. Dec. 172, and notes pp. 185 et seq.; *Simmons* v. *McKay*, 5 Bush. (Ky.) 25. This doctrine has been recognized by this court in the analogous case of a lunatic defendant. *Walker* v. *Clay*, 21 Ala. 797, 807. And there is, we take it nothing in the suggestion that, because of the mandatory terms of section 2579 of the Code, a judgment against an infant without the appointment of a guardian ad litem is not merely erroneous and irregular but void. This section is equally mandatory in respect of suits by infants—they "must sue by next friend," yet it would scarcely be insisted that a judgment at the suit of an infant in his own name against one sui juris would be void. The succeeding section—2580—is equally mandatory in form in respect of lunatics, but, as we have seen, judgments against lunatics are not void though this mandate has been disregarded. And a reference to the authorities cited above shows that under equally mandatory statutes in other states, the ruling has been that a failure to appoint a guardian to defend for the infant is, at most, reversible error and

---

Bank v. *Ritchie*, 8 Pet. (U. S.) 1281 (1834); *Jarvis* v. *Crozier*, 98 Fed. 753 (1899).

The next friend or guardian *ad litem* of an infant plaintiff is generally held liable for costs. *Bligh* v. *Tredgett*, 5 De G. & S. 74 (1851); *Waring* v. *Crane*, 2 Paige Ch. (N. Y.) 79 (1830); *Wead* v. *Cantwell*, 36 Hun (N. Y.) 528 (1885), under § 469 of the code; *Wainwright* v. *Wilkinson*, 62 Md. 146 (1884); *Rauche* v. *Blumenthal*, 4 Penn. (Del.) 521 (1904); *Burbach* v. *Milwaukee E. R. Co.*, 119 Wis. 384 (1903); *Reynolds* v. *Great Northern R. Co.*, 206 Fed. 1003 (1913). Contra *Crandal* v. *Slaid*, 52 Mass. 288 (1846); *Soule* v. *Winslow*, 64 Maine 518 (1874); *Albee* v. *Winterink*, 55 Iowa 184 (1880). And, even where not liable generally, the next friend may be taxed with costs when guilty of mismanagement or bad faith. *Smith* v. *Smith*, 108 N. Car. 365 (1891). The guardian *ad litem* of an infant defendant will not, ordinarily, be charged with costs. *Berryman* v. *Burgster*, 6 Porter (Ala.) 99 (1837); *Morgan* v. *Morgan*, 12 L. T. (N. S.) 199 (1865), and see 59 Univ. of Pa. L. Rev. 407.

[88] Arguments of counsel and part of opinion omitted.

not matter for impeachment of the judgment except upon direct assault.

In chancery, infant defendants can only be brought in by service upon their parents or either of them, if in life, or upon their general guardian, in case the parents are dead; provided such parents or guardian are not adversely interested, and in this latter case, or if there be no parent or guardian, then upon the infant personally if over fourteen years of age, etc. Code, p. 814, R. 23. Hence, what is said in *Daily's admr.* v. *Reid*, 74 Ala. 415, 417, as to the invalidity of a decree pro confesso against an infant has no application to a judgment at law on personal service against an infant defendant, especially in view of the doctrine there announced that the chancery court "is the guardian of all infant litigants before it, and will permit no such irregularity and error [as the taking of a decree pro confesso against an infant] to pass unredressed." Nor was it intended by this language of the court in that case, as counsel insist, to convey the idea that the substantive rights of an infant stood upon a plane different from and higher than the rights of persons sui juris, or were to be adjudged by a different standard, but only that the court would so far act as his guardian as to see it that his abstract rights were properly presented to and represented before the forum of conscience, but this is not to say that a court of equity, any more than a common law court, when the claim of the infant is fully presented, would grant any other relief on the merits thereof than an adult litigant would be entitled to on the same facts. It is, therefore, quite an error to suppose that chancery will enjoin a judgment at law against an infant which is not void and merely irregular and erroneous on the theory that it is the guardian of all infant litigants, when it is without competency to enjoin such a judgment against a person of full age. The well settled law is that chancery has no jurisdiction to enjoin any judgment at law for irregularities attending, and errors committed by the court in, the rendition thereof unless such irregularities or errors were of a character to avoid the judgment ipso facto; a merely erroneous and irregular judgment whether against infants or adults will not be enjoined; a void judgment against either will be. We have seen that the judgment sought to be enjoined here was of the former class; it was irregular and erroneous but not void. This appears by the bill. And this is the only ground upon which relief by injunction is sought; no surprise, accident, mistake or fraud is alleged. The bill was, therefore, without equity. The court erred in overruling the motion to dismiss for want of equity, and also in overruling those assignments of demurrer which went to the point we have been considering. 2 Freeman on Judgments, §§ 489, 513; 10 A. & E. Ency. of Law, pp. 889 et seq.; 12 Ib. p. 147a; *Collier and Wife* v. *Falk*, 66 Ala. 223, 228; *Murphree* v. *Bishop*, 79 Ala. 404; *Preston* v. *Dunn*, 25 Ala. 507.

Reversed and remanded.[89]

---

[89] As an infant can only appear and defend by a guardian *ad litem* the omission to appoint such a guardian is reversible error in all cases unless it

(b) Married Women.

SYBELL BELKNAP'S CASE.

IN THE KING'S BENCH, 1400.

Year Book, 1 Henry IV, 1, Pl. 2.

Our lord the King brings a writ of ward against Sybell Belknap and the writ brought by the King was held good. Cokeine. Judgment of the writ, since she is covert of a husband at the time of the writ, etc. Skrene. Your husband for a crime which he committed against the King and divers of his peers was banished to Gascony to remain there until pardoned by the King.

Wherefore Gascoigne, ex assensu sociorum, said to the defendant, answer.

And after that she pleads in bar.[90] M. 10 Ed. III, 53.

---

appears that the judgment is for the infant and not to his prejudice. *Langston* v. *Bassette,* 104 Va. 47 (1905); *Weaver* v. *Glenn,* 104 Va. 443 (1905); *Sliver* v. *Shelback,* 1 Dall. (Pa.) 165 (1786); *Duncan* v. *Sandford,* 14 Johns. (N. Y.) 417 (1817); *Moore* v. *M'Ewen,* 5 S. & R. (Pa.) 373 (1819); *Foulkes* v. *Young,* 21 N. J. L. 438 (1848); *McMurray* v. *McMurray,* 60 Barb. (N. Y.) 117 (1870); *Wells* v. *Wells,* 144 Mo. 198 (1898); *White* v. *Kilmartin,* 205 Ill. 525 (1903); *Winterroth* v. *Cox,* 75 Misc. (N. Y.) 467 (1912). But such omission does not render the judgment or decree void. It is merely voidable and not open to collateral attack. *Austin* v. *Charleston F. Seminary,* 49 Mass. 196 (1844); *Keller* v. *Wilson,* 90 Ky. 350 (1890); *Millard* v. *Marmon,* 116 Ill. 649 (1886); *Childs* v. *Lanterman,* 103 Cal. 387 (1894); *Smith* v. *Blood,* 106 App. Div. (N. Y.) 317 (1905), unless obtained by fraud or collusion, *McMurray* v. *McMurray,* 66 N. Y. 175 (1876); *Wettrick* v. *Martin,* 181 Ill. App. 94 (1913). On the other hand the failure to appoint a guardian *ad litem* for an infant plaintiff before bringing suit is not a jurisdictional defect but a mere irregularity which may be cured or waived. *Rima* v. *Rossie Iron Works,* 120 N. Y. 433 (1890); *Foley* v. *California Horseshoe Co.,* 115 Cal. 184 (1896); *Chrisman* v. *Divinia,* 141 Mo. 122 (1897); *Parkins* v. *Alexander,* 105 Iowa 74 (1898).

[90] In a case reported in the following year, Y. B. 2. Hen. IV., 7, pl. 26: "It was testified by the justices that the wife of Sir Robert Belknap, who was exiled, sued a writ alone, her husband not being named in the writ, and, by their award in that suit, the said suit was sufficient because her husband was attainted at law." Markham, J. said:

Ecce modo mirum, quod foemina fert breve Regis,
Non nominando virum conjunctum robore legis.

The lady was the wife of the former chief justice of the court of common pleas banished in the reign of Richard II. 4 Foss' Judges 35.

"If an action be brought against a husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution: but, if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband. Yet, if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehavior of the wife during her coverture, the *capias* shall issue against the husband only: which is one of the many great privileges of English wives." III Blackstone's Commentaries 414.

HATCHETT *v.* BADDELEY.

COURT OF COMMON PLEAS, 1776.

2 William Blackstone's Reports, 1079.

Case against the defendant Sophia Baddeley [without any addition] by John Hatchett and William Boyse, coachmakers on indebitatus assumpsit, for work and labor done, and finding and providing materials and other necessary things for the defendant's use. She pleads nonassumpsit and also that at the time "when", etc., she was married to one Robert Baddeley, her husband, who is still alive; the plaintiff replies, protestando as to the marriage, that the defendant, before the cause of action accrued, eloped from the said Robert Baddeley, and hath ever since lived separate from him, and that the work was done on her credit only. The defendant did not rejoin in due time, and judgment was signed by the plaintiffs on the 5th of February, 1776, for want of a rejoinder. On the 7th of February in last term, Walker moved in arrest of final judgment (having meant to demur to the replication, but by accident slipped his time) that the replication was bad; because, 1. Supposing the facts to be true, it does not therefore follow that she is liable to be sued alone. 2. It should not have been alleged that she eloped, but that she lived in adultery. So in Rast. 230, pl. 9 in bar of dower, and Robins. Entr, 260. 3. It should have stated the cause of action to have been for necessaries. And now in this term.

Hill and Glyn showed for cause, that the replication is good. Elopement is a well known term in the law, and signifies a wife's departing from her husband, and dwelling with the adulterer. Terms de la Ley; Co. Litt. 32a. If the wife elopes, the husband is not liable to pay for what she takes up on credit. *Lungworthy* and *Hackmore*, Ld. Raym. 444. No, not even for necessaries. Stra. 647, 706. S. P. resolved in *Manby* and *Scott,* if they are separated, though not for adultery. And in *Deerley* and *Duchess of Mazarine,* Salk. 116. whose husband was abroad, the court intended, that they were divorced, and refused to relieve her against a verdict.

Glyn also cited *Child* and *Hardyman* (Mr. *Nott's* Case.) Stra. 875.

Walker in support of the rule, insisted, that the very admission of the fact of coverture destroys the action. If a feme covert appears as a feme sole, and has judgment against her, she and her husband may set it aside by writ of error, alleging the coverture, 1 Roll. Abr. 759. Styl. 254, 280. The elopement mentioned in the books, is merely a cause of losing the wife's dower, introduced by the statute of 13 Ed. 1. ch. 34, and did not exist at common law. It is not incumbent on me to maintain that an action lies against the husband for this coachmaker's bill; it is enough that it does not lie against the wife alone. It is the creditor's folly to trust her, and (as is said in Stra. 875) he does it at his own peril.

DEGREY, C. J.: The word elopement is not a legal term, nor has any express meaning in the law. It is not to be found in Bracton, Britton or Fleta; nor is used in the statutes of Westm. 2. The Mirror indeed has the word elopa; but in a different sense. And none of the dictionaries, or etymologists explain the word, except Blount and Jacob. Lord Coke is the first that I remember to have mentioned it, and he speaks 2 Inst. 435 of a wife's eloping and remaining with an adulterer. The modern books never speak of elopement, but in a criminal view.

But it is quite indifferent, as to forming my opinion on this case, in what sense the word is to be taken. The present case is not that of a woman having separate maintenance, and living apart from her husband by his express permission; but of a wife departing from her husband's house, or if you please eloping without his consent. She is in every view, even in respect of dower (unless adultery be proved) a feme covert; and as such can neither sue or be sued alone. This is the general law. The exceptions to this are:

1. Local customs, as in the city of London, where a feme covert, being a sole trader, may be sued. But there the husband must be joined in the action at the outset, for conformity.

2. The wife of an exile, one abjuring the realm, or perhaps one professed; who are looked upon as dead in law.

3. The same law has been extended to cases somewhat like the former, as the Duchess of Mazarine's case, whose husband lived in France.

All these are by the acts of the husband, but no act of the wife can ever make her liable to be sued alone. If she can be sued, she can sue, acquire property, release actions, execute deeds, etc., which would overturn first principles. On the whole, therefore, I am clearly of opinion the defendant is not in a capacity to be sued alone.

GOULD, J.: I think this case is not ripe for a general determination upon principles, because in my opinion the replication is ill pleaded. Elopement is a word of too vague and uncertain a meaning. If adultery is intended by it, it should not be thus insinuated, but plainly expressed. 6 Edw. III 39. Rastel. Dower t. Bar. e. It is on this I found my opinion.

BLACKSTONE, J.: It seems to be supposed by the argument, that if the husband is not bound to pay this debt, it follows that the wife may be compelled alone. But this is no legal consequence. I think in the present case, that it can not be recovered of either. And I see no hardship in a man's losing his money, that avows upon the record, that he furnished a coach to the wife of a player whom he knew to have run away from her husband. If this were universally known to be law, it would be difficult for such women to gain credit; and this would consequently reduce the number of wanderers. But, be this as it may, I am clearly of the opinion that in no case can any feme covert be sued alone, except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow or else as divorced a vinculo. Co.

Lit. 133. And therefore Elizabeth Wilmet, whose husband was abroad, when she attempted to sue alone, Moor 851, did it with the addition of widow. The contrary doctrine militates against the first principles of the English law, which considers the woman's powers, nay almost her very being, as suspended during the coverture. Her contract is merely void so as to bind herself, say all the judges in *Manby* and *Scot.* 1 Sid. 120. She and her husband may plead non est factum to her bond. Salk. 7. 6 Mod. 311. 2 Wms. 144. If judgment be had against her, or she be outlawed, her husband and she may reverse it by writ of error. Bro. Abr. Error. 173. The very forms of the action demonstrate the same thing. If sued alone she can have no addition (as in the case at bar) which is in the teeth of the statute of 1 Hen. V, c. 5. If sued by her maiden name it is misnomer, 6 Mod. 311. She can not put in bail without her husband. Cro. Jac. 445. If by her husband's name and as widow it is the like. And as the previous steps are thus embarrassed, so after judgment the remedy must prove defective. No elegit can go against her lands, else this would be a mode of alienation by a feme covert without a fine. It would be endless to pursue this idea through all its legal absurdities. And therefore I am clearly of opinion for arresting the judgment.

NARES, J., concurred in opinion, that no action would lie against a feme covert without her husband. Therefore,

Judgment arrested per tot. Cur.[91]

---

[91] At common law a married woman could not sue or be sued as a *feme sole* unless her husband was an alien who had always resided abroad or was civilly dead. *Marsh* v. *Hutchisson,* 2 B. & P. 226 (1800); *Marshall* v. *Rutton,* 8 Term Rep. 545 (1800); *Carrol* v. *Blencon,* 4 Espin. N. P. 27 (1801); *Kay* v. *Duchesse De Pienne,* 3 Camp. 123 (1811); *Lewis* v. *Lee,* 3 B. & C. 291 (1824); *Barden* v. *Keverbery,* 2 M. & W. 61 (1836); *Gregory* v. *Paul,* 15 Mass. 30 (1818); *Perry* v. *Boilean,* 10 S. & R. (Pa.) 208 (1823); *Stockton* v. *Farley,* 10 W. Va. 171 (1877). In Equity too, the rule was to join the husband as the natural protector of her interests. *Bein* v. *Heath,* 6 How. (U. S.) 228 (1848); *Burns* v. *Lynde,* 88 Mass. 305 (1863). Where, however, the equity of the wife is adverse to her husband a next friend should be joined as complainant and the husband made a defendant. *Johnson* v. *Vail,* 14 N. J. Eq. 423 (1862); *Porter* v. *Bank of Ruthland,* 19 Vt. 410 (1847). See *Roberts* v. *Evans,* L. R. (1878) 7 Ch. Div. 830. As at law, the equity rule has been modified in modern practice under the statutes enlarging the married women's rights. *Forbes* v. *Tuckerman,* 115 Mass. 115 (1874); *Heckman* v. *Heckman,* 215 Pa. 203 (1906). In matrimonial cases the wife sued or defended without a next friend. *Van Orden* v. *Van Orden,* 58 N. J. Eq. 545 (1899).

It was formerly held that where the husband was a native, the wife could not sue or be sued as a *feme sole* although deserted by the husband who had gone abroad. *Bogget* v. *Frier,* 11 East 301 (1809); *Robinson* v. *Reynolds,* 1 Aiken (Vt.) 174 (1826). In America the rule was relaxed and it has been frequently held that where a husband has permanently abandoned his wife, the latter may sue or be sued as a *feme sole. Arthur* v. *Broadnax,* 3 Ala. 557 (1842); *Love* v. *Moyneham,* 16 Ill. 277 (1855) and cases there cited; *Osborn* v. *Nelson,* 59 Barb. (N. Y.) 375 (1871); *Wolf* v. *Baureis,* 72 Md 481 (1890). This is frequently a matter of statutory provision. *Matterson* v. *Dederkey,* 12 R. I. 68 (1879); *Heath* v. *Morgan,* 117 N. Car. 504, 23 S. E. 489 (1895); *Muller* v. *Hale,* 138 Cal. 163 (1902); *Koch* v. *Williamsport,* 195 Pa. 488 (1900); *Schmelzer* v. *Chester Traction Co.,* 218 Pa. 29 (1907).

STARR *v.* ANN TAYLOR, alias TAYLOR & CO.

COURT OF APPEALS OF SOUTH CAROLINA, 1828.

4 *McCord L.* (*S. Car.*) 413.

This was a suit by sum. pro. brought on a note signed Taylor & Co. against Ann Taylor, a sole-trader, without joining her husband.

The defendant pleaded that she was feme covert, and although a sole-trader, yet that her husband's name should have been joined for conformity sake. The plaintiff replied, that by the Act of Assembly of 1744, (Pub. Laws 190, 2d Brev. Dig. 348,) it was enacted that a feme covert, a sole-trader, might be sued as a feme sole, without joining her husband. Gaillard, J., presiding, overruled the objection of the defendant, and gave a decree for the plaintiff. McCord for the defendant appealed on the ground that the husband should have been joined.[92]

COLCOCK, J.: The clause of our act is in the following words: "That any feme covert being a sole-trader in this province, shall be liable to any suit or action to be brought against her for any debt contracted as a sole-trader, and shall also have full power and authority to sue for and recover, naming the husband for conformity, from any person whatsoever, all such debts as have or shall be contracted with her as a sole-trader. And that all proceedings to judgment and execution, by or against such feme covert, being a sole trader, shall be as if such woman was sole and not under coverture, any law or custom to the contrary thereof in anywise notwithstanding."

If we had no other guide to direct us in this case than the act, the opinion of the presiding judge might be supported; for it would appear from the construction of the clause, that the joining of the husband for conformity relates only to the power which is given to her to sue. It does seem to have declared in the first part of the clause, that she may be sued for debts contracted as sole trader, without the necessity of the husband being joined. But when we trace this departure from the law, which relates to husband and wife to its source, we can not but perceive the meaning of the legislature although somewhat ambiguously expressed. This partial dissolution of the contract of marriage originated in a custom of London, and upon turning to the authorities, it will be found to be expressed in language very similar to that of our act, and that even in the city courts there the husband must be joined, (as it is said for conformity) whether she sue or be sued; and as Lord Eldon says, in the case of *Beard* v. *Webb*, 2 Bos. & Pul. 99, it will be difficult to show that the right to sue, and the liability to be sued, do not stand upon the same footing. In that case, the first question was, whether a feme covert, sole-trader in London, is liable to be sued as such at Westminster, and whether the husband ought not to be joined in the action? On the first, Lord Eldon decides that she

[92] Arguments of counsel and part of the opinion are omitted.

could not be sued in that court; and, on the second, he goes into a most elaborate argument, and refers to all the authorities that can be found on the subject. And, since his decision in that case, which was in 1800, I do not find that the point has been questioned, but seems to be spoken of as settled. * * *

In this elaborate opinion, Lord Eldon adverts to what may be considered as the only argument against this rule of law, which is, that it is absurd to join a party in an action against whom there can be no judgment. But, he says, "the question is, whether upon the authority of this single dictum we are to overturn the series of decisions which I have traced from 1st Edw.—, to the present day."— He concludes by examining some cases of settlements, in which there appear to have been some doubts at least, entertained on this point. But the case of *Marshall* v. *Rutton*, 8 Term Rep. 545, had not been at this time decided, but was pending before the twelve judges, in which it is decided that a feme covert can not contract and be sued as a feme sole, even though she be living apart from her husband, having a separate maintenance secured to her by deed.

I am of the opinion, therefore, that when the legislature introduced by act this custom of London, they meant to introduce it as practiced there; and I feel no disposition, nor do I think it comports with the sacred contract of marriage, or the good of the community, to extend this partial dissolution of the husband's authority over the wife, and to subject her to be torn from her family by the rude hands of unfeeling bailiffs, at a moment when, perhaps, they may most need her assistance.

Motion granted.[93]

---

[93] By the custom of London "where a woman exerciseth a trade wherein her husband doth not intermeddle, she shall have all advantages, and shall be sued as a *feme sole* merchant," Bohun's Privileges of London, 187. But a *feme sole* trader of London was not liable to be sued as such in the courts at Westminster and even in the city courts the husband was joined for conformity. Y. B. 9 Edward IV. 35, *Caudell* v. *Shaw*. 4 T. R. 361 (1791); *Beard* v. *Webb*, 2 B. & P. 93 (1800), where the cases are reviewed. South Carolina seems to have adopted the custom more completely than the other states. *Megrath* v. *Robertson*, 1 Desaussure's S. Car. Eq. 445 (1795); *Newbiggin* v. *Pillans*, 2 Bay (S. Car.) 162 (1798); *McDaniel* v. *Cornwall*, 9 Hill S. Car. L. 277 (1833); *Dial* v. *Heuffer*, 3 Richardson S. Car. 78 (1846); *Hobart* v. *Lenton*, 3 Richardson S. Car. L. 131 (1846). The existence of the custom has been denied in other states. *Etterville* v. *Barber*, 52 Miss. 168 (1876); *Carey* v. *Burruss*, 2 W. Va. 571 (1882). In Pennsylvania by the act of February 22, 1718, 1 Sm. L. 99, § 1, where mariners or others went to sea leaving their wives at shop-keeping or other trades, such wives were deemed *feme sole* traders and authorized to sue and be sued without naming their husbands as parties. *Burke* v. *Winkle*, 2 S. & R. (Pa.) 189 (1816); *Jacobs* v. *Featherstone*, 6 W. & S. (Pa.) 346 (1843). By the act of May 4, 1855, P. L. 430, §§ 2, 4, where a husband neglects to provide for or deserts his wife, she shall have the privileges of the act of 1718 and, on petition, will be granted a certificate to that effect. *Winternitz* v. *Porter*, 86 Pa. 35 (1877); *Ewing's Appeal*, 101 Pa. 371 (1882); *Ellison* v. *Anderson*, 110 Pa. 486 (1885) and P. & L. Dig. of Pa. Dec., vol. 8, col. 13902.

In other states similar statutes authorizing married women to engage in trade also provide that they may sue and be sued alone in respect to matters incidental to the business. *Young* v. *Gori*, 13 Abb. Pr. (N. Y.) 13 note (1861); *Klen* v. *Gibney*, 24 How. Pr. (N. Y.) 31 (1862); *Foster* v. *Conger*, 61 Barb. (N. Y.)

LUMLEY *v.* TORSIELLO.

SUPREME COURT OF NEW YORK, 1902.

69 *App. Div.* (*N. Y.*) 76.

INGRAHAM, J.: The action is brought to recover for the conversion of a United States bond of the par value of $1,000 and $165 in money delivered by the plaintiff to the defendant as her agent. The answer denied each of the allegations of the complaint. Upon the trial the court submitted the case to the jury with a charge to which there was no exception, and the jury found a verdict for the plaintiff. The question upon this appeal is presented upon the denial of a motion to dismiss the complaint at the end of the plaintiff's case, renewed at the end of the defendant's case, to which rulings the defendant excepted.[94]

The defendant based his motion to dismiss the complaint upon the ground that the plaintiff being a married woman could not maintain an action to recover this bond and money delivered to the defendant without proving that she had a separate estate, but this contention is based upon an evident misconception of the rights of a married woman under the law of this state. By section 21 of the Domestic Relations Laws (Laws of 1896, ch. 272) it is provided that "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, * * * as if she were unmarried"; and by section 450 of the Code of Civil Procedure it is provided that "in an action or special proceeding a married woman appears, prosecutes or defends alone, or joined with other parties, as if she was single." There can be no question but what, if the plaintiff was a single woman, upon evidence that she delivered money or property to the defendant upon his promise to return them to her, she could maintain an action to recover such property without proof of other facts as to ownership. How she obtained possession of this money or property would be entirely immaterial to the defendant. As a married woman now sues in respect to such property as if she were single, a defendant who receives from a married woman

---

145 (1871); *Parker* v. *Symonds*, 93 Mass. 258 (1861); *Todd* v. *Clapp*, 118 Mass. 495 (1875); *Rockwell* v. *Clark*, 44 Conn. 534 (1877); *Meyers* v. *Rahte*, 40 Wis. 655 (1879); *Camden* v. *Mullen*, 29 Cal. 564 (1866); *Trieber* v. *Stover*, 30 Ark. 727 (1875); *Wallace* v. *Rowley*, 91 Ind. 586 (1883). As to farming compare *Snow* v. *Sheldon*, 126 Mass. 332 (1879) with *In re Long*, Ir. Rep., 2 K. B. 343 (1905).

In England the married woman's property act of 1882 (45 & 46 Victoria, ch. 75, §§ 1, 5) provides that a married woman carrying on a trade separately from her husband shall, in respect to her separate estate, be subject to the bankruptcy laws. *In re Gardiner*, L. R. (1888) 20 Q. B. Div. 249. In the United States a married woman can be declared a bankrupt if she has the requisite capacity under the state law to contract debts in trade. *MacDonald* v. *Teft Weller Co.*, 128 Fed. 381 (1904).

[94] Part of the opinion is omitted.

money or property with a promise to return it to her, can no more object to her suing to recover possession of it on the ground that the source of her title to the property is not proved than he could if she were single.

Upon the whole case we think there was no substantial dispute as to the plaintiff's right to recover; that the verdict of the jury was amply sustained by the evidence and that no error was committed which would justify a reversal of the judgment.

The judgment and order appealed from are, therefore, affirmed, with costs.

Van Brunt, P. J., O'Brien and Hatch, JJ., concurred.[95]

---

[95] The removal of the disabilities of coverture has been accomplished gradually by successive statutes; in some states the process is still incomplete. Hence it is impossible to state any general rules on this subject, but in each case the statutes of the particular state must be consulted. The progress of the law may be illustrated by the New York codes. Under the earlier code (§ 114) it was provided that where a married woman was a party, her husband must be joined except, (1) where the action concerned her separate property, (2) where the action was between herself and her husband. *Palmer* v. *Davis*, 28 N. Y. 242 (1863). This section has been followed in the codes of other states, for example California Code of Civil Procedure § 370. In other states statutes have conferred similar rights so that in nearly all jurisdictions a married woman may sue or be sued alone in reference to her separate property. *Emerson* v. *Clayton*, 32 Ill. 493 (1863); *Spencer* v. *Sioux City R. Co.*, 22 Minn. 29 (1875); *Van Cleve* v. *Rook*, 40 N. J. L. 25 (1878); *Stevenson* v. *Morris*, 37 Ohio St. 10 (1881); *Weldon* v. *De Bathe*, L. R. (1884), 14 Q. B. Div. 339; *Wolfe* v. *Underwood*, 91 Ala. 523 (1890); *Norfolk R. Co.* v. *Dougherty*, 92 Va. 372 (1895); *Hutton* v. *Wilmington C. R. Co.*, 3 Penn. (Del.) 159 (1901).

The Code of Civil Procedure of New York § 450 as amended in 1890 and 1909, provides: "In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation." *Janinsky* v. *Heidelberg*, 21 Hun (N. Y.) 439 (1880); *Quilty* v. *Battie*, 135 N. Y. 201 (1892). In the words of Vann, J.: "All courts are open to her and she can enter them with the freedom of a man." *Winter* v. *Winter*, 191 N. Y. 462 (1908).

In Pennsylvania, the Act of June 8, 1893 (P. L. 345, § 3) provides: "Hereafter a married woman may sue and be sued civilly in all respects and in any form of action and with the same effect and results and consequences as an unmarried person." But she may not sue her husband, nor he her, except in a proceeding for divorce, or in a proceeding to protect or recover her or his separate property where there has been desertion without sufficient cause. Nor may she be arrested or imprisoned for her torts. 3 P. & L. Dig. (2d ed.) 4879. *Littster* v. *Littster*, 151 Pa. 474 (1892); *Stahr* v. *Brewer*, 186 Pa. 623 (1898); *Gustine* v. *Westenberger*, 224 Pa. 455 (1909). The act of 1893 does not deprive a married woman of the right to invoke the aid of a court of equity to secure the possession of her separate property against the fraud of her husband. *Heckman* v. *Heckman*, 215 Pa. 203 (1906). See also Laws of New Jersey, May 17, 1906 (P. L. 525); Iowa Code (1897) §§ 3162, 3164; Revised Laws of Minnesota Supplement (1907) § 3607. Bliss on Code Pleading (3d ed.) § 34.

Where the action is in respect to the wife's separate property it has,

HARRIS *v.* WEBSTER.

SUPREME COURT OF NEW HAMPSHIRE, 1878.

58 *N. H.* 481.

Case for slanderous words spoken of Mrs. Harris by Mrs. Webster. The defendants demurred.

FOSTER, J.: By the doctrine of the English common law, husband and wife have always been required to sue jointly for injuries to the person or character of the wife, committed during coverture. Dicey on Parties 389; 1 Ch. Pl. 73. The wrongful act—for example, an assault upon the wife—may involve two distinct wrongs, and afford two distinct causes of action. The first is the assault upon the wife; and the second is the damage occasioned thereby (through loss of service) to the husband. The husband can not sue alone merely for the injury done to the wife, but he may sue alone for the damage occasioned thereby to himself.[96] In like manner, at common law, in an action for the slander of the wife, if the words are actionable *per se*, the husband and wife must join in a suit for the direct injury to her (*Dengate* v. *Gardiner*, 4 M. & W. 5), but the husband must sue alone for consequential damage to him; and so, also, if the words are not actionable in themselves, but only because they cause damage to the husband, he must sue alone; the wife can not join. Dicey on Parties 391, 392.[97] So, also, at common law, husband and wife must be sued jointly for all torts committed by the wife during coverture, unless the tort be committed in the presence and by the direction of the husband, in which case he alone is liable. Dicey on Parties, 476; 1 Starkie on Slander 349; 1 Ch. Pl. 93; *Carleton* v. *Hayward*, 49 N. H. 314.[98]

---

in some jurisdictions, been held that she should sue alone. *Ackerly* v. *Tarbox*, 31 N. Y. 564 (1864); *Whidden* v. *Coleman*, 47 N. H. 297 (1867); *Donahue* v. *Hubbard*, 154 Mass. 537 (1891); *Powells Estate*, 3 Pa. D. R. 508 (1894); but not if the husband has any marital rights therein. *Swerdferger* v. *Hopkins*, 67 Vt. 136 (1894). In some cases it has been held that, if the wife so elects, she may join her husband as a co-plaintiff. *Van Maren* v. *Johnson*, 15 Cal. 308 (1860); *Atkinson* v. *Mott*, 102 Ind. 431 (1885); *Clay* v. *St. Albans*, 43 W. Va. 539 (1897).

[96] *Lewis* v. *Babcock*, 18 Johns. (N. Y.) 443 (1821); *Barnes* v. *Martin*, 15 Wis. 240 (1862); *Berger* v. *Jacobs*, 21 Mich. 215 (1870).

[97] *Beach* v. *Ranney*, 2 Hill (N. Y.) 309 (1842); *Smith* v. *Smith*, 45 Pa. 403 (1863); *Enders* v. *Beach*, 18 Iowa 86 (1864); *Harper* v. *Pinkston*, 112 N. Car. 293 (1893). Compare *Garrison* v. *Sun Pub. Co.*, 207 N. Y. 1 (1912); *Kovacs* v. *Mayoras*, 175 Mich. 582, 141 N. W. 662 (1913).

[98] *Hawk* v. *Harman*, 5 Binney (Pa.) 43 (1812); *Catterall* v. *Kenyon*, 3 Ad. & El. (N. S.) 310 (1842); *Marshall* v. *Oakes*, 51 Maine 308 (1864); *Davis* v. *Taylor*, 41 Ill. 405 (1866); note to *Chicago B. & R. Co.* v. *Honey*, 12 C. C. A. 190 (1894). As to slander, *Fitzgerald* v. *Quann*, 109 N. Y. 441 (1888); *Jackson* v. *Williams*, 92 Ark. 486 (1909), and 30 L. R. A. 521.

In *Hess* v. *Heft*, 3 Pa. Super. Ct. 582 (1897), an action for malicious prosecution was brought against a husband and wife. It appeared that the complaint which led to the arrest was signed by both the defendants. Held that the husband alone was liable. In *Smith* v. *Machesney*, 238 Pa. 538 (1913) it was held improper to join the husband as defendant with his wife

At common law the wife alone can neither sue nor be sued. The reason of this is founded upon the general doctrine of conjugal union expressed by "the father of the English common law," in the emphatic and sacred phrase, "Man and wife are the same flesh." *Sunt idem corpus et eadem caro, vir et uxor.* Bracton, f. 31. *Sunt quasi unica persona, quis caro una et sanguis unus.* Bracton, f. 430. And herein, says an old writer, "The common law shaketh hands with divinitie"—an illustration of the habit of presenting every established fact which is too bad to admit of any other defense, as an injunction of religion. Mill on the Subjection of Women 84. All persons are either free of serfs. Also, some are under the rod (*sub virga*), as wives, etc. Bracton, f. 46.

"By marriage, husband and wife become one person in law; that is, the very being or legal existence of the wife is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called in our law-French, a *feme-covert, foemina viro co-operta;* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her coverture. * * * For this reason a man can not grant anything to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself." 1 Bl. Com. 442. "It is a well established maxim of the law, that husband and wife are one person. For many purposes, this is a mere figure of speech; for other purposes, it must be understood in its literal sense." Lush, J., in *Phillips* v. *Barnet,* L. R. 1 Q. B. Div. 436, 440.

By the common law, the married woman's contracts were absolutely void,—not merely voidable, like those of infants and lunatics; and this, not because of the theory that, like an infant or a lunatic, she required the protection of the law (for, in legal theory, a wife needed the protection of the law no more than a single woman), but because of the theory of the utter absorption of the existence of the wife in that of the husband; or the other theory, of her subjection and slavery. Both theories compelled the same practical result: her legal personality was extinguished, and her social personality was that of a slave, "under the rod." The social condition and legal status of woman was the natural condition of the age of feudalism which produced it—an age when every social relation was governed by feudal analogies. It is not surprising, therefore, that in such an age a theory of conjugal life should have gained ground in England which seemed to reproduce at every fireside the bond of lord and vassal, and to place the lord in the attitude of Petruchio:

---

where the action was to recover damages for injuries resulting from lack of care in the maintenance of a freight elevator in a building owned by the wife. The negligence charged being that of the wife's employes.

"I will be master of what is mine own:
She is my goods, my chattels; she is my house
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything."

Kenny on Married Women's Property 8.

The wife being thus *sub potestate viri,* with the sanction of the law and of public opinion, the law was consistent in holding that "if a man beat an outlaw, a traitor, a pagan, his villein, or his wife, it is dispunishable, because, by the law common, these persons can have no action." Brooke, J., 12 Hen. VIII 4.[99] And the woman being thus utterly within her husband's control, his chattel, his "ox," he became personally and solely answerable for her torts, as for the trespasses of his other domestic cattle; and, of course, the law could pursue no other consistent system than that which declared all her contracts absolutely void.

Such was the social and legal status of a married woman centuries ago; and the change of her condition before the law seems to be much less in England than in New Hampshire. *Phillips* v. *Barnet,* L. R. 1 Q. B. Div. 436, 440.

But feudalism exists no longer, and the social and legal conditions which the system produced have likewise passed away. The benign influences of Christianity, and a more diffused as well as a higher system of moral and intellectual education, have gradually ameliorated the hardships of woman's social condition, and have elevated her to the state of dignity and importance she possesses to-day—a social position of honor and respect. The change has been gradual but it has been as marked as any other step in the course of advancing civilization, for it has been nothing less than a slow but steady march from slavery to freedom. It has been uniform in one respect: "Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place." Maine's Ancient Law 163.

The movement has been "from *status* to *contract.*" 18 Alb. Law J. 26. And if it be true, as maintained by Spencer, that in the United States "women have reached a higher status in the social structure than anywhere else" (1 Principles of Sociology 764), it is equally true that in many of the states, certainly in New Hampshire more than anywhere else, have the legal distinctions between the sexes been swept away.

The law of servitude in marriage is repealed in this state. In 1842 the Revised Statutes empowered a deserted wife to hold and convey property without the interference of her husband. Rev. St., ch. 149, sec. 1. Successive steps in the direction of a larger liberty and a corresponding responsibility, * * * resulted finally in the Act of 1876 (Laws, ch. 32). As the result of all this legislation, it is now settled that a wife may hold to her own use, free

[99] Compare *State* v. *Rhodes,* 61 N. Car. 453, 98 Am. Dec. 78 (1866), with Edmond's Appeal, 57 Pa. 232 (1868); 1 Hawkin's P. C. 130.

from the interference or control of her husband, all property at any time earned, acquired, or inherited by, bequeathed, given, or conveyed to her, either before or after marriage, and may make contracts, and may sue and be sued in all matters, whether in law or in equity, in the same manner as if she were sole and unmarried. Thus by progress in the same direction, by changes religious, social, customary, legislative, and judicial, the rule of the common law has been abolished and obliterated; and it is no longer possible to say that in New Hampshire a married woman is a household slave or chattel, or that in New Hampshire the conjugal unity is represented solely by the husband. By custom and by statute the wife is now joint master of the household, and not a slave or a servant. The rule now is, that her legal existence is not suspended. So practically has the ancient unity become dissevered and dissolved, that the wife may not only have her separate property, contracts, credits, debts, wages, and causes of separate action growing out of a violation of her personal rights, but she may enter into legal contract with her husband and enforce it by suit against him. *Clough* v. *Russell*, 55 N. H. 279.[1] And since the wife's property is no longer her husband's nor her earnings his, by mere force of law, and since he has no more legal power of physical control over her than she has over him, no more reason seems to remain for holding him liable for her torts than for holding her liable for his. And there remains "not a reason, nor the semblance of a reason, growing out of the condition and wants of society, the progress of civilization, the exigencies of trade, or the analogies of the law," why the rules and forms adapted to a condition which has ceased to exist, and inapplicable to the conditions which have succeeded, should be longer retained. *Cessante ratione legis, cessat ipsa lex. Hammond* v. *Corbett*, 50 N. H. 501, 507; *Cole* v. *Lake Co.*, 54 N. H. 242, 279, 285.

Why, then, should the husband of Mrs. Harris be joined in this suit as a party plaintiff, any more than any stranger? None of his legal rights have been invaded by the act of Mrs. Webster; and, since his wife is entitled to hold to her separate use the fruits of the judgment that may be rendered in this action, he can have no right to or interest in the damages which may be recovered.

---

[1] In some states the statutes enlarging the rights of married women expressly save the common law inability of husband and wife to sue each other. *Lombard* v. *Morse*, 155 Mass. 136 (1891); *Kennedy* v. *Knight*, 174 Pa. 408 (1896); *Drum* v. *Drum*, 69 N. J. L. 557 (1903); *Thompson* v. *Thompson*, 218 U. S. 611 (1910); *Perkins* v. *Blethen*, 78 Atl. 574 (Maine 1911); *Hunt* v. *Koehler*, 236 Pa. 13 (1912); *Lawler* v. *Lawler*, 107 Ark. 70 (1913). In other states actions at law may be maintained. *Mathewson* v. *Mathewson*, 79 Conn. 23 (1906); *Winter* v. *Winter*, 191 N. Y. 462 (1908). If an action at law will not lie recourse may be had to equity. *Woodward* v. *Woodward*, 148 Mo. 241 (1898); *Frankel* v. *Frankel*, 173 Mass. 214 (1899); *Heckman* v. *Heckman*, 215 Pa. 203 (1906); *In re Hoffman*, 199 Fed. 448 (1912); *Fitcher* v. *Griffiths*, 216 Mass. 174 (1913). As to separate property, see *Larner* v. *Larner*, L. R. (1905) 2 K. B. Div. 539; *Gillespie* v. *Gillespie*, 64 Minn. 381 (1896). As to torts, see *Peters* v. *Peters*, 42 Iowa 182 (1875); *Abbot* v. *Abbot*, 67 Maine 304 (1877); *Smith* v. *Smith*, 20 R. I. 556 (1898); *Decker* v. *Kedly*, 79 C. C. A. 305 (1906) and note.

And why should the husband of Mrs. Webster be joined in this suit as a party defendant? He has done no wrong, and neither he nor his property can be holden for any damages or costs which may be recovered. We are unable to discover any reason why the husband of either party should be permitted to interfere in this controversy, except so far as to persuade his wife to cease litigation. Under recent statutes, antecedent to the law of 1876, it has been held that a husband could not properly be joined as plaintiff in a suit to recover his wife's earnings, nor in an action to recover a debt which accrued to his wife before marriage, nor in a writ of entry to recover possession of her land, nor in an action for trespass upon her estate; and, as we have seen, in matters pertaining to her own property, she may sue her husband and be sued by him. *Albin* v. *Lord*, 39 N. H. 196; *Bank* v. *Clark*, 46 N. H. 134; *Whidden* v. *Coleman*, 47 N. H. 297; *Cooper* v. *Alger*, 51 N. H. 172; *Alexander* v. *Goodwin*, 54 N. H. 423; *Clough* v. *Russell*, 55 N. H. 279; *Cahoon* v. *Coe*, 57 N. H. 556. The statute of 1876 is so broad and sweeping in its terms as to preclude the supposition that it could have had reference to matters of contract only.

We are therefore of the opinion, that, as at common law, so no less under the operation of the statute, the rule of pleading must prevail, which requires that an action at law must be brought in the name of the party whose legal right has been affected, against the party who committed or caused the injury (1 Chitty Pl. 1; Dicey on Parties 380-382); that the husbands of these female parties are strangers, in law, to this proceeding, and that the demurrer should be sustained.

Case discharged.[2]

---

[2] Accord: *Martin* v. *Robson*, 65 Ill. 129 (1872); *McCarthy* v. *Best*, 120 Mass. 89 (1876); *Story* v. *Downey*, 62 Vt. 243 (1890).

In actions for personal injuries the right of the husband to sue for consequential damages is distinct from the right of the wife to sue for her injuries. *Smith* v. *City of St. Joseph*, 55 Mo. 456 (1874); *Kelly* v. *New York, N. H. & H. R. Co.*, 168 Mass. 308 (1897); *Southern R. Co.* v. *Crowder*, 135 Ala. 417 (1902). In Pennsylvania under the act of May 8, 1895, P. L. 54, personal injuries to a wife are redressed in one suit brought in the names of the husband and wife. *Doneghue* v. *Consolidated Traction Co.*, 201 Pa. 181 (1902). Where the right of action is in the wife, it has been held in some cases that she should sue alone. *Hennesy* v. *White*, 84 Mass. 48 (1861); *Norfolk & W. R. Co.* v. *Dougherty*, 92 Va. 372 (1895); *Long* v. *Pennsylvania R. Co.*, 149 Fed. 598 (1907). In other cases the joinder of the husband is held permissible. *Brockett* v. *Fair Haven R. Co.*, 73 Conn. 428 (1900); *Normile* v. *Wheeling Traction Co.*, 57 W. Va. 132 (1905).

While there are cases to the contrary, and while there is a conflict of opinions as to the basis for the rule, it is now generally held that for the alienation of the affections of her husband a married woman may sue alone. *Bennett* v. *Bennett*, 116 N. Y. 584 (1889); *Gerrard* v. *Gerrard*, 185 Pa. 233 (1898); *Nolin* v. *Pearson*, 191 Mass. 283 (1906); *Eliason* v. *Draper*, 2 Boyce (Del.) 1 (1910).

In England a married woman may sue or be sued alone, the remedy against her being confined to her separate property. *Countess of Aylesford* v. *Great Western R. Co.*, L. R. (1892) 2 Q. B. 626; *Larner* v. *Larner*, L. R. (1905) 2 K. B. Div. 539. Nevertheless her husband remains liable for her torts, and he and she may be sued jointly or she may be sued separately for

(c) Insane Persons.

WIESMANN *v.* DONALD.

SUPREME COURT OF WISCONSIN, 1905.

125 *Wis.* 600.[1]

Appeal from a judgment of the Circuit Court for Racine county; E. B. Belden, Circuit Judge. Reversed.

Action brought in March, 1903, upon a money demand for professional services rendered by plaintiff to defendant. Defendant served answer, merely alleging that the plaintiff was adjudged to be insane by the county court in November, 1901, and that said plaintiff, at the time of the commencement of the suit and of the answer, was insane and incompetent to institute or maintain the action, and had no general guardian, nor any guardian ad litem appointed for the action. Plaintiff moved to strike out the answer as frivolous, irrelevant, redundant and scandalous, and for judgment according to the demand of the complaint, which motion was denied April 17, 1903, and exceptions duly reserved. Whereupon the action was noticed for trial, and, despite the protest of the plaintiff against the trial of his sanity, that question seems to have been tried on evidence of some sort, including a certified copy of the order of the county judge adjudging said plaintiff insane and ordering that he be committed to the Northern Hospital. No bill of exceptions was served. Thereupon the court entered an order reciting that the issue had been tried and a decision in writing filed, which does not appear in the record, and ordering judgment dismissing the plaintiff's complaint. Whereupon judgment to that effect was entered, from which the plaintiff appeals.

DODGE, J.: The absence of any bill of exceptions informing us what evidence was presented to the trial court precludes us from reviewing the question of plaintiff's sanity as a fact, and from considering the validity of the county judge's order, earnestly argued by him. By reason of this omission the case must be considered as if his insanity had been fully proved.

The drastic action of the trial court in dismissing plaintiff's complaint upon a fully admitted cause of action because of his mental incompetency, thereby, for the time at least, relieving the defendant from payment of money which he, by not denying, admitted he owed to the plaintiff, seems to be in complete negation of the duty owed by all courts to protect and care for the rights of the mentally incompetent. We are given very little aid, either by the record or by the respondent's brief, in ascertaining the reasons which led to such action. The respondent informs us, without citation of authority, that "the principle that an insane person can not appear as plaintiff and prosecute a case in his own behalf is elementary." Perhaps he

---

her tort after marriage. *Seroke* v. *Kattenburg*, L. R. (1886) 17 Q. B. Div. 177; *Earl* v. *Kingscote*, L. R. (1900) 2 Ch. Div. 585; *Cuenod* v. *Leslie*, L. R. (1909) 1 K. B. 880.

[1] Part of the opinion of the court is omitted.

told the circuit court the same thing, and that court believed him. This proposition has, however, been directly negatived by this court in *Menz* v. *Beebe*, 95 Wis. 383, 70 N. W. 468, where it was held that no obstacle exists, either by common law or under our statute, to the maintenance of an action by an incompetent person. Among the supporting authorities cited in that case was *Chicago & P. R. Co.* v. *Munger*, 78 Ill. 300, where it is pertinently said:

"This note was due and unpaid, and somebody was entitled to sue upon it and enforce its collection. If appellee [the incompetent] was not, who was?"

Again, in *Rankin* v. *Warner*, 2 Lea (Tenn.) 302, it is said:

"The law mainly designs to protect the weak and dependent, and if the courts, seeing a suitor has rights or property entitled to their consideration and judgment, turn him out because no one will or does assume the role of guardian or next friend for him, they will certainly be guilty of a strange perversion of the object of their creation."

The common law right of a lunatic to maintain a suit was declared as long ago as Lord Coke's time, in *Beverly's Cases*, 2 Coke's Rep. pt. 4, 568. And the distinction in this respect between an incompetent and an infant has always been recognized (1 Freem. Judgm. sec. 152), and is fully preserved in our own statutes, which provide (§ 2613, Stats. 1898) that an infant must appear by guardian, but omit any such requirement with reference to the insane plaintiff. The rule in *Menz* v. *Beebe* is supported not only by the authorities there cited, but also by *Allen* v. *Ransom*, 44 Mo. 263; *Rankin* v. *Warner, supra; Amos* v. *Taylor*, 2 Brev. (S. C.) 20; *Stigers* v. *Brent*, 50 Md. 214; *Looby* v. *Redmond*, 66 Conn. 444, 34 Atl. 102; *Skinner* v. *Tibbitts*, 13 Civ. Proc. R. (N. Y.) 370.[4]

[4] It is said that at the early common law idiots, madmen and such as were deaf and dumb naturally were disabled from suing because they wanted reason and understanding. Bracton lib. 5 Chap. 20, fol. 420 b, but later they were permitted to sue and the suit was required to be brought in their own names. Coke on Littleton 135 b. Hence, following the later common law, it is generally held that the name of the lunatic should appear on the record as the plaintiff and that, in the absence of a statute, an action at law in the name of the committee or guardian alone is improper. *Coke* v. *Darston*, Brown. & Gold. 197 (1618); *Caneron's Committee* v. *Pottinger*, 3 Bibb (Ky.) 11 (1813); *Steel* v. *Young*, 4 Watts (Pa.) 459 (1835); *Lane* v. *Schermerhorn*, 1 Hill (N. Y.) 97; *Reed* v. *Wilson*, 13 Mo. 28 (1850); *Riggs* v. *Zaisiki*, 44 Conn. 120 (1870); *Rankin* v. *Warner*, 2 Lea (Tenn.) 302 (1879); *Dixon* v. *Cardoso*, 106 Cal. 506 (1895). In ejectment compare *Petrie* v. *Shoemaker*, 24 Wend. (N. Y.) 85 (1840) with *Warden* v. *Eichbaum*, 14 Pa. 121 (1850). Contra *Chavannes* v. *Priestley*, 80 Iowa 316 (1890). If there is a guardian or committee appointed the practice is to sue in the name of the insane person "by" the guardian or committee, *Lang* v. *Whidden*, 2 N. H. 435 (1822); *Uberoth* v. *Union N. Bank*, 9 Phila. (Pa.) 83 (1872). In England the Committee must now be added as a co-plaintiff. *Lord Townsend's Settlement* L. R. (1908) 1 Ch. Div. 201. If no guardian is appointed and the insane person sues alone this is no reason for dismissing the suit. *Chicago & P. R. Co.* v. *Munger*, 78 Ill. 300 (1875); *Koenig* v. *Union Depot R. Co.*, 194 Mo. 564 (1905); *McKenna* v. *McArdle*, 191 Mass. 96 (1906). Contra *Pelham* v. *Moore*, 21 Tex. 755 (1858). See N. Y. Code Civ. Pro. § 2340 and *Dupignac* v. *Quick*, 27 Misc. (N. Y.) 500 (1899); *Callahan* v. *New York C. H. R. Co.*, 99 App. Div. (N. Y.) 56 (1905).

Our statutes evince a policy to confer upon courts full power to protect the interests of insane persons who are in court without the protection of their guardians, by authorizing that in any case when a party shall appear to be insane the court or judge may appoint a guardian for the action, as the case may require, and by requiring that, in case of a defendant, he shall be protected by a guardian. § 2615, Stats. 1898. The proper course for courts to pursue when it becomes apparent that a plaintiff, by reason of his insanity, can not safely protect his rights in the litigation, is illustrated by *Weismann* v. *Daniels,* 114 Wis. 240, 90 N. W. 162, where, upon suggestion of such a situation, this court, instead of dismissing the case and denying all hearing to the unfortunate, appointed a guardian ad litem and directed the case to proceed. For the reasons above stated it is obvious that the circuit court erred, to the grievous prejudice of the plaintiff, in dismissing this action, and that the judgment to that effect must be reversed.[5]

JOHN VAN HORN *v.* HANN, Administrator of SARAH SEARCH.

SUPREME COURT OF NEW JERSEY, 1877.

39 *N. J. L.* 207.

This is an action originally brought in the Common Pleas of Warren, against the administrator of a lunatic. The claim was for board, lodging, etc., of the lunatic from June 9th, 1873, to October 22d, 1873. There was offered in evidence, on the trial, proceedings upon a commission of lunacy, the return to which was a finding, dated October 14th, 1873, that said Sarah Search was a lunatic and had been such for three and a half months previous to that date. It appeared also that upon the 10th of November following upon transmission of the proceedings to the Orphan's Court of Warren county, a guardian was appointed. Sarah Search subsequently died,

---

[5] In Beverly's case, 4 Coke's Reports, 124 (1603) it is said "an idiot in an action brought against him shall appear in proper person, and he who pleads best for him, shall be admitted, as appears in 33 Hen. VI 18 b. Otherwise it is of him who becomes non compos mentis, for he shall appear by guardian if he is within age, and by attorney if he is of full age." *Amos* v. *Taylor,* 2 Brev. (S. Car.) 20 (1809); *Buchanan* v. *Rout,* 2 T. B. Mon. (Ky.) 114 (1825). Although there is some conflict of authority, in some instances due to local statutes, the majority of decisions permit an action at law or in equity to be conducted by the next friend of one who is actually insane but not judicially declared so. *Didisheim* v. *London & W. Bank,* L. R. (1900) 2 Ch. Div. 15; *Pennington* v. *Thompson,* 5 Del. Ch. 328 (1880); *Reese* v. *Reese,* 89 Ga. 345 (1892); *King* v. *McLean Asylum,* 12 C. C. A. U. S. 139 (1894); *Isle* v. *Canby,* 199 Ill. 39 (1902), S. C. 64 L. R. A. 513 and note; *Kroehl* v. *Taylor,* 69 N. J. Eq. 525 (1905). Compare *Rankert* v. *Rankert,* 105 App. Div. (N. Y.) 37 (1905).

Where there has been a judicial finding of insanity and the appointment of a guardian or committee, then suits should be brought by the guardian or committee, either in the name of the lunatic by the committee or by the

under guardianship, and the defendant was appointed administrator. After a year had elapsed, this action was brought.

On the trial, the court charged the jury "that the plaintiff was entitled to recover from the 9th day of June until the 29th of the same month." The three and a half months reached back to the last date. That after the time when she was declared a lunatic, her administrator was not liable for any debt for her support. That the plaintiff must look to the guardian for her support from June 29th until her decease. A verdict was found in accordance with such charge. An exception was sealed to this charge.

REED, J.: There is no contention in this case that no right at all to recover, accrued to the party who furnished the food and lodging to the lunatic. The claim seems to be for necessaries fairly furnished, and affords an exception to the general rule as to the inability of a lunatic to bind himself by contract. *Baxter* v. *Earl of Portsmouth,* 5 Barn. & Cress. 170; *Ewell's Lead. Cas.* 635, note; *Am. Law. Reg.,* Vol. II (N. S.) 22, notes. The ruling of the court touches the manner in which this claim may be secured. The idea of the court below was, that for any claim against the lunatic, arising after the beginning of the period of derangement found by the inquisition, recovery must be sought only through the guardian; but for a claim accruing previously, an action would lie against the lunatic himself.

It is difficult to understand upon what principles this claim can be severed at that point of time, and a different method of redress suggested for each portion. Each part is a debt of equal obligation upon the lunatic and his estate. No provision is made by law for the payment of one class of debts and not of another. This claim is all admittedly a debt of the lunatic, and a single method of redress should obviously be afforded to the creditor. The question is, was this action at law against the administrator of the lunatic, the correct method? Has the creditor a right of action at law for this claim?

That the lunatic was suable at law for his debts, was a well-established rule of the common law. Broom on Parties 182; Dicey on Parties 2. Nor did the fact that a writ de lunatico had gone, and a finding had been returned upon it that the defendant was insane, change the rule. Anonymous, 13 Ves. 590. It appears from the statement in *Baxter* v. *Earl of Portsmouth,* that there had been

committee alone, according to the local statutes or practice. Compare *Ortley* v. *Messere,* 7 Johns. Ch. (N. Y.) 139 (1823) with *Lombard* v. *Morse,* 155 Mass. 136 (1836); *Looby* v. *Redmond,* 66 Conn. 444 (1895); *Equitable Trust Co.* v. *Garis,* 190 Pa. 54 (1899). But unless the interests of the committee are adverse to those of the lunatic, a next friend is not permitted to sue for the lunatic. *Dorsaeimer* v. *Roorback,* 18 N. J. Eq. 438 (1867); *Palmer* v. *Sinnickson,* 59 N. J. Eq. 530 (1900); *Bird* v. *Bird,* 21 Gratt. (Va.) 712 (1872); *Row* v. *Row,* 53 Ohio St. 249 (1895); *Tiffany* v. *Worthington,* 96 Iowa 560 (1896). So also a suit by a next friend has been allowed where the lunatic was a nonresident. *Thierry* v. *Chalmers,* L. R. (1900) Ch. Div. 80, 81 L. T. (N. S.) 511; *Pelham* v. *Moore,* 21 Tex. 755 (1858); *Plympton* v. *Hall,* 55 Minn. 22 (1893). But as to nonresident insane defendants, compare *Sturgis* v. *Longworth,* 1 Ohio St. 544 (1853) with *Michigan Trust Co.* v. *Ferry,* 175 Fed. 221 (1910).

such a finding in that case. Nor did the fact that a committee had been appointed by the chancellor, operate to prevent the bringing or arrest the progress of such an action. When actions were commenced against a lunatic, so found by inquisition, the lord chancellor, on petition of the committee of the lunatic, showing that there were grounds for defending, would refer it to a master to inquire whether it would be proper to make any and what kind of defense. Shelford on Lunacy 408.

It was not only well settled that an action lay against a lunatic, whether he was or was not under guardianship, but it was the only method open for the recovery of a contested claim against him by suit. No action at law or suit in equity could be maintained against the committee. The committee was the mere curator of the property of the lunatic. He could make no contracts which bound the latter in any manner. The committee was appointed by the chancellor. He made the appointment not ex virtute officio, but by delegation of power from the crown. The king, by the statute de praerogativa regis, (17 Ed. II., st. 2, ch. 610,) was bound to provide for the safe keeping of the property and the maintenance of the lunatic. He was compelled to do this by agents, and he delegated the appointment of these agents to the holder of the great seal. These agents were termed committees, and were merely the receivers or bailiffs of the crown. As such, they were controllable by and accountable to the chancellor as keeper of the king's conscience. They had no title in the property of the lunatic. They could not contract for the lunatic. They could not sue or be sued as the representative of the lunatic.[6]

Nor could a suit in equity be sustained for such a claim. It is true that where there was a debt against the lunatic admittedly owing, the chancellor would entertain a petition to establish it, and provide for its payment out of the proceeds of the lunatic's estate not needed for his maintenance. Even to accomplish this, the chancellor had no right to sell any real estate of the lunatic until that authority was given him in 1803, by the statute of 43 Geo. III. The collection of debts or the establishment of such as were the subject of controversy, was not within the scope of equity jurisdiction.

We therefore will see that the court of chancery, either before or after the statute of Geo. III, would not retain a petition to establish any alleged debt against the lunatic which was controverted, or concerning which there was a doubt, but would send the matter to a common-law tribunal. *Ex parte McDougal*, 12 Ves. 384.

While the chancellor would not order a debt, although undisputed, to be paid without reserving sufficient to maintain the lunatic, and would not take cognizance of a contested matter of debt at all, yet the right of action against the debtor himself in a court of law, was constantly admitted. In instances where the court refused to apply property to the lunatic's debts, on account of the insufficiency of the remainder for his support, the court admitted that all the lunatic's property could be reached by the process of the common-

[6] *Crane* v. *Anderson*, 3 Dana (Ky.) 119 (1835); *Lane* v. *Schermerhorn*, 1 Hill (N. Y.) 97 (1841).

law courts, and that equity would not restrain. *Ex parte Dikes,* 8 Ves. 79; *Ex parte Hastings,* 14 Ves. 182.[7]

And the right to sue the lunatic himself, at law, is, in all the cases at common law, alluded to as a settled practice, and as not presenting a matter for discussion. *Ibbotson* v. *Lord Galway,* 6 T. R. 133; *Steel* v. *Alan,* 2 Bos. & Pul. 362; *Cock* v. *Bell,* 13 East 355.

This was, then, the method of procedure at common law. Nor is there any marked departure from that method discoverable in this country. The schemes for the care of the person and property of the lunatic vary somewhat in the different states, but very generally the character of the committee or guardian here is assimilated to that of the committee under the English system. In New York, there is a departure by force of the construction given to their statute. Chancellor Kent decided that in that state, the estate in the hands of the committee was, by their statute, placed in the possession of the court, not only for the maintenance of the lunatic, but for the payment of creditors. *Brashsear* v. *Cortland,* 2 Johns Ch. 401. So courts of equity will there restrain actions at law. *Matter of Hiller,* 3 Paige 199; *Soverhill* v. *Dickson,* 5 How. Prac. Rep. 109. The courts of law there, however, take no notice of this, but leave the equity side to deal with the party. In an action at law, the status of the defendant, as a lunatic, can not be urged against the proceeding. *Robertson* v. *Lain,* 19 Wend. 650.[8]

---

[7] At law actions could be maintained against insane persons and they could be arrested and imprisoned upon civil process. *Kernot* v. *Norman,* 2 T. R. 390 (1788); *Nutt* v. *Verney,* 4 T. R. 121 (1790); *Ex parte Leighton,* 14 Mass. 207 (1817); unless otherwise provided by statute. *Bush* v. *Pettibone,* 4 N. Y. 300 (1850); Penna. Act of June 16, 1836, P. L. 610 § 44. While, however, Chancery has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the court. *Ex parte Dikes,* 8 Vesey Jr. 79 (1803); *Salter* v. *Salter,* 6 Bush. (Ky.) 624 (1869); *In re Farnham,* L. R. (1896) 1 Ch. Div. 836; *In re Clarke,* L. R. (1898) 1 Ch. Div. 336, a court of equity will not allow property of a lunatic in its custody to be applied in paying creditors without first providing for his maintenance. *Ex parte Hastings,* 14 Vesey Jr. 182 (1807). Such property is regarded as *in custodia legis* and no creditor can reach it by execution. There must be an order of court for payment which will not be made until a sum sufficient for the maintenance of the lunatic is first provided. *Eckstein's Estate,* 1 Parson's Eq. Pa. 59 (1842); *Guthrie's Appeal,* 16 Pa. 321 (1851); *Adams* v. *Thomas,* 81 N. Car. 296 (1879). Pending an inquisition Chancery has appointed an *interim* receiver of the estate of an alleged lunatic against whom executions were pending. *In re Pountain,* L. R. (1888); 37 Ch. Div. 609; *In re Kenton,* 5 Binn. (Pa.) 613 (1813).

[8] *Sternbergh* v. *Schoolcraft,* 2 Barb. (N. Y.) 153 (1848); *Ingersoll* v. *Harrison,* 48 Mich. 234 (1882). In New York since the adoption of the code the courts have enforced their prior equity rule and the committee of an incompetent person is regarded as an officer of the court against whom, as well as his ward, no action will be permitted without leave of court. *Smith* v. *Keteltas,* 27 App. Div. (N. Y.) 279 (1898). But leave to sue is not necessary unless the incompetent person has been judicially declared insane and a committee appointed. *Grant* v. *Humbert,* 114 App. Div. (N. Y.) 462 (1906). As to service of process, see *American Mortgage Co.* v. *Dewey,* 94 N. Y. S. 808 (1905).

. Generally, in this country, the character of the committee or guardian as a mere curator without title in the property of the lunatic, his immunity from liability to an action and the liability of the lunatic himself to such an action, is recognized by the courts. *Ex parte Leighton*, 14 Mass. 207; *Tomlinson* v. *Devore*, 1 Gill (Md.) 345; *Warden* v. *Eichbaum*, 3 Grant's Cas. 42; *Bolling* v. *Turner*, 6 Rand. 584; *Allison* v. *Taylor*, 6 Dana 87; *Aldrich* v. *Williams*, 12 Vt. 413; *Walker* v. *Clay*, 21 Ala. 797; *Cameron's Committee* v. *Pottinger*, 3 Bibb. (Ky.) 11.[9] Nor does it matter whether the person appointed as curator of the person and property of the lunatic is styled committee or guardian. *Symmes* v. *Major*, 21 Ind. 443.

In this state, there is nothing in the policy of our law or in our statutes which renders a different rule obligatory or desirable. The determination of the status of the alleged lunatic is here, as in England, upon a writ from chancery. Upon the return to that writ, it is true, the chancellor does not appoint the guardian. That duty, by statute, is thrown upon the orphans' court, as in England for a time it was upon the court of wards, and now, in most of the states, upon their probate courts. Supervision of the guardian's accounts is vested in the orphans' court, with an appeal to the ordinary. The chancellor may order the sale of lands where the interest of the lunatic requires it. Rev., p. 602, § 7. By the fourth section of this act, the orphans' court may sell real estate to pay debts.

This confers the same, and no greater power upon the orphans' court than the statute 43 Geo. III upon chancery. There is no power to compel either to investigate and settle a questioned claim against the lunatic. Neither should assume the settlement of such a question. Where the guardian chooses to present a debt against which there are no objections, the orphans' court can decree an allowance. Where the guardian refuses to notice it, there is no power in the courts to compel him to do so. His position, in every respect, is substantially the same as the committee, and he is equally free from any liability to an action. In such case, the only remedy afforded is an action against the lunatic himself. It was in recognition of this doctrine that the conclusion was reached in *Coombs* v. *Janvier et al.*, 2 Vroom 241, that the guardian of an habitual drunkard could not be sued. The chief justice said: "The statute places the drunkard in regard to his relations to his guardian, very much on the same footing with the lunatic, and the legal status of the latter is well defined. Lunatics can sue and be sued, and the suits must be prosecuted in their own names." In that case, the inconveniences arising from such an anomalous proceeding as an action against the guardian is forcibly presented, and attention is called to the section (12) of the act concerning lunatics, which recognizes

[9] In Pennsylvania under the act of June 13, 1836, the status of a lunatic is established by proceedings in the court of common pleas on writ *de lunatic inquirendo*. Upon a finding of lunacy the same court appoints the committee. In New York the proceedings are by petition in the supreme court or a county court under the code of civil procedure, § 2320 *et seq.* See generally 22 Cyc. 1120. For England, Lunacy Act of 1890 (53 and 54 Victoria, ch. 5), § 90 *et seq.*

the liability of the lunatic himself, by providing for his exemption from imprisonment for want of bail. The conclusion, then, is reached, that for any legally contracted debt, incurred before or after his derangement, the lunatic is liable to an action at law.

A question arises, incidentally, as to the manner in which such a defendant should be brought into court, and how he should defend. A word as to the practice may be of use, as it seems untouched by any previous intimation of our courts. The common-law rule is, that a lunatic defends in the same manner as ordinary persons. Process is served upon him personally; then, if an infant, he appears by guardian, and if of full age, by attorney. This rule seems as old as *Beverly's case*, 4 Coke 124, b. See *Tidd's Prac.*, Vol. I, p. 93, note b; 1 *Arch Prac.* 25; 2 Saund. 333, n. 4, and cases cited in *Coombs* v. *Janvier, ante.* This was the rule in actions at law.[10]

In suits in equity, the practice is different. In those, the lunatic defends by guardian ad litem, and his committee is appointed such guardian as of course, (*Westcomb* v. *Westcomb*, 1 Dick. 233,) unless there is no committee, or the committee is, in interest, adverse to him in the suit. *Shelford* *425; *Morgan's case*, 2 Bland. 184. There a third party is appointed.[11]

A failure to notice this diversity of procedure, or the blending of the two in the same courts, has caused, in one or two states, an allusion to a practice of defending by guardian ad litem in all cases—notes to *Leach* v. *Marsh*, Am. L. R., vol. II, (N. S.) 31—and in one

[10] *Justice* v. *Ott*, 87 Cal. 530 (1891); *Oldrich* v. *Williams*, 12 Vt. 413 (1841); *King* v. *Robinson*, 33 Maine 114 (1851); *Johnson* v. *Pomeroy*, 31 Ohio St. 247 (1877); *Stiggers* v. *Brent*, 50 Md. 214 (1878); *Atwood* v. *Lester*, 20 R. I. 660 (1898).

In the absence of a statute authorizing service of process on the committee or guardian service must be made on the lunatic. *Potts* v. *Hines*, 57 Miss. 735 (1880); *Scott* v. *Winningham*, 79 Ga. 492 (1887); *Redmond* v. *Peterson*, 102 Cal. 595 (1894); *State* v. *District Court*, 38 Mont. 166 (1908); *Cecil* v. *Cecil*, 149 Ky. 605 (1912). Compare *Shoemaker* v. *Smith*, 80 Iowa 655 (1890); *Jones* v. *Crowell*, 143 Ind. 218 (1895); *Burger* v. *Bordman*, 254 Mo. 238 (1913); N. Y. Code Civ. Proc., §§ 426, 429. In Pennsylvania the Act of June 13, 1836, P. L. 601, § 45, provides for service of writs on the committee of the estate of the lunatic. Before the writ issues there should be a suggestion on record of the inquisition of lunacy and the name of the committee. *Hulings* v. *Laird*, 21 Pa. 265 (1853). By the Act of June 10, 1901, P. L. 554, § 1, service is made on the next of kin where no committee has been appointed. If no committee be appointed then it is the duty of the plaintiff to apply for the appointment of a committee ad litem. In Massachusetts it is said that the guardian of a lunatic should have notice of proceedings and if he does not appear and defend in the name of his ward a guardian ad litem should be appointed. *Taylor* v. *Lovering*, 171 Mass. 302 (1898); *Mitchell* v. *Kingman*, 22 Mass. 431 (1827); *King* v. *Stowell*, 211 Mass. 246 (1912).

[11] In equity the guardian or committee must be made a defendant Daniel's Chancery Practice *175, *Wilson* v. *Grace*, 14 Vesey Jr. 172 (1807); *Harrison* v. *Rowan*, 4 Wash. C. C. 202 (1819); *Andrews* v. *O'Reilly*, 22 R. I. 362 (1901). Where there is no committee a guardian ad litem should be appointed. *Nelson* v. *Duncombe*, 9 Bevans 211 (1846); *Denny* v. *Denny*, 90 Mass. 311 (1864). To proceed without the appointment of such a guardian is reversible error. *Eakin* v. *Hawkins*, 52 W. Va. 124 (1902). So where the interests of the guardian are adverse to those of the ward. *Marx* v. *Rowlands*, 59 Wis. 110 (1883). N. Y. Code Civ. Proc. § 428.

state he so defends by statutory direction. *Symmes* v. *Major*, 21 Ind. 443. The common-law method, however, was uniform and unquestioned, and has never been departed from in this country,wherever the courts have had occasion to consider it directly. *Faulkner* v. *McClure*, 18 Johns. 134; *Buchanan* v. *Rout*, 2 T. B. Monroe 114; *Amos* v. *Taylor*, 2 Brev. S. C. 20; Barbour on Parties.[12]

Who can appear as his attorney? It is manifest that the lunatic himself has no capacity to appoint. His want of natural ability, as well as the implied prohibition in section 15 of the practice act, forbids it. It naturally follows that the person who appears as the attorney should be selected or approved by the court. This was the rule adopted by the Supreme Court of New York, in the case of *Faulkner* v. *McClure*, 18 Johns. 134. In that case, the court granted a rule appointing the attorneys of the defendant. I think this is the correct practice, and I think that where the defendant is under guardianship, the rule should never be granted until notice to such guardian has been given of the application for the rule, and an opportunity for hearing him afforded.[13]

In this case, this question does not directly arise. The decease of the lunatic, before the institution of the present action, rendered the course of procedure plain. Upon her death, any exceptional treatment which she or her estate was entitled to or subject to as a lunatic, ceased. The duty of the guardian, beyond accounting and paying over the balance to her personal representatives, ceased. 1 Collinson 310; *In re Colvin*, 3 Md. Ch. 278. By statute 32 Hen. VIII, all personal property of the lunatic was then payable to his executor or administrator. 1 Collinson 320, section 11.[14] The personal representative of the lunatic was suable, as the deceased herself was, subject to the statutory regulations. She, herself, was liable. The action was for a debt legally incurred.

The instruction to the jury, that a part could not be recovered in this action, was erroneous, and the judgment must be reversed.[15]

---

[12] "It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee except as may be required by statute." Burns' Ann. Stat. Ind. (1914). See also California Code Civ. Pro. § 372; Code of Iowa (1897) § 3485. In England a lunatic appears and defends by his committee who must obtain the sanction of the court before suing or defending. Annual Practice (1914) 249, Order XVI, rule 17.

[13] *Ex parte Nothington*, 37 Ala. 496 (1861); *Cunningham* v. *Davis*, 175 Mass. 213 (1900); *Stoner* v. *Riggs*, 128 Mich. 129 (1901). Contra: *Ex parte Roundtree*, 51 S. Car. 405 (1897). See also *Gill* v. *Gill*, L. R. (1909) Prob. Div. 157.

[14] *Ex parte McDougal*, 12 Vesey Jr. 384 (1806); *Paxton* v. *Stuart*, 80 Va. 873 (1885); *Reando* v. *Misplay*, 90 Mo. 251 (1886); *Findley* v. *Cowles*, 93 Iowa 389 (1895); *Stobert* v. *Smith*, 184 Pa. 34 (1898); *In re Hunt*, L. R. (1906) 2 Ch. Div. 295.

[15] For the statutory law referred to by the court, and amendatory acts, see 2 Comp. Stat. N. J. 2780.

(d) Aliens.

TAYLOR *v.* CARPENTER.

UNITED STATES CIRCUIT COURT, FIRST CIRCUIT, 1846.

2 Woodb. and M. (U. S.) 1.

This was an action on the case, brought by the plaintiffs, citizens of Great Britain, against the defendant, a citizen of Massachusetts, for imitating and using from January, 1842, to January, 1845, in this State, the trade-marks of the plaintiffs, on thread of the defendant, and selling great quantities thereof, as and for the plaintiffs' thread, to his damage in the sum of $20,000. The defendant pleaded the general issue, and at the trial here at an adjournment of the October Term, 1845, a verdict was found for the plaintiffs for $800. The defendant moved the court to set aside this verdict, and to grant a new trial for the reasons assigned in a motion, embracing various alleged misdirections and omissions by Judge Sprague, before whom the case was tried.[16]

WOODBURY, J.: The eighth objection is, that the court refused to instruct the jury that the plaintiffs could not recover, because citizens and residents of Great Britain, are foreigners. This seems to be the point most labored and most relied on.

The first inquiry under this head is, whether the subject-matter here is one over which this court has jurisdiction, and can be prosecuted here at all by an alien friend.

Being an action for a tort or wrong to a foreigner, gives to this court general jurisdiction.

But being an action for a particular kind of wrong, an injurious deceit to the damage of the plaintiffs, practiced here, though they live abroad, is said to give them no cause of action.

The exceptions to this position, as to the rights of foreigners, I take to be twofold, if no more. One is, that it is not reciprocal, no such right being granted to exist, and which may be prosecuted by our citizens in Great Britain where this plaintiff resides. But this might be a good reason for legislation by Congress, not allowing aliens to have any rights, or to prosecute them in this court, unless they are reciprocal and allowed to our people in their respective countries. But no such discrimination has ever been made by Congress, and no court could make it by mere construction, without an exercise of judicial legislation. The cannibal of the Fejees may sue here in a personal action, though having no courts at home for us to resort to.

It is contended, that no property exists here in mere words or marks, and that they are unlike the good will in a trade or store for business. And it is further urged, that if a foreigner can obtain no redress in such a case, and a citizen might, he should not complain,

[16] Portions of the opinion of the court are omitted. See generally, Borchard's Diplomatic Protection of Citizens Abroad.

and may remain at home, as in many things he is not allowed here all the rights and privileges of a citizen, and ought not to be.

He can not by the Constitution be President. He can not in many states vote. He can not hold land in many or take by descent though in others he can. He can not take out patents and copyrights in all cases, and under like rules with a citizen. He can not own vessels here. He can not engage in the coasting trade here. He can not in the conflict of laws enforce some rights, in cases of discharges in insolvency, which citizens may. Story, Confl. of Laws, 33, 415; *Towne* v. *Smith*, 1 Woodb. & Minot, 115.[17]

But an alien is not now regarded as "the outside barbarian," he is considered in China, and the struggle in all commercial countries for some centuries, has been to enlarge his privileges and powers as to all matters of property and trade. It was one of the grievances in Magna Charta, as well as the Declaration of Independence, that the naturalization of foreigners had been too much obstructed.

So too heavy taxation of alien merchants was guarded against in Magna Charta, allowing them "to go, and come, and buy, and sell, without any evil tolts." 1 Statutes at Large, art. 30; Thompson on Charters, p. 55.

It is hence, undoubtedly, that Montesquieu observed, "that the English have made the protection of foreign merchants an article of their national liberty;" and Thompson on Charters, p. 232, says, that once they enjoyed it even in war, "in common with the clergy and husbandmen, in order that those who prayed, ploughed, and trafficked, might be at peace."

For many years it has been held, that pleas of alienage are to be discouraged; and are a defense not favored in the law. 8 D. & E. 71, 166; 2 Bl. R. 1326; 13 East, 332; 10 East, 326; 1 Bos. & Pul. 163, 170; 9 East, 321; Stephen, Pl. 67; *Soc. for Prop. Gosp.* v. *Wheeler et al.*, 2 Gall. 127.

Even as long ago as the time of Lord Ch. J. Hale, he "saith, that the law of England rather contracts than extends the disability of aliens, because the shutting out of aliens tends to the loss of people, who, when laboriously employed are the true riches of any country." Bac. Ab. "Aliens" C. note; Went. 427; 2 Rol. R. 94.

An alien may bring an action for slander of his character. Bac. Ab. "Aliens" D.; Yelv. 198.[18] And by 31 Hen. VI, ch. 4, he may sue for any injury on sea or in the realm. Personal actions

---

[17] See generally II Kent's Commentaries *53. As to land, *Doe* v. *Robertson*, 11 Wheat. (U. S.) 332 (1826); *McKinley Co.* v. *Alaska Co.*, 183 U. S. 563 (1902); *Haley* v. *Sheridan*, 190 N. Y. 331 (1907); *Doe* v. *Roe*, 55 Atl. 341 (Del. 1903). Compare *Jele* v. *Lemberger*, 163 Ill. 338 (1896); *Connolly* v. *Reed*, 22 Idaho 29 (1912); *Donaldson* v. *State*, 182 Ind. 615 (1913). As to insolvency, *Letchford* v. *Convillon*, 20 Fed. 608 (1884); *Judd* v. *Lawrence*, 1 Cush. (Mass.) 531 (1848). Bankruptcy, *Cutter* v. *Foleom*, 17 N. H. 140 (1845); *In re Boynton*, 10 Fed. 277 (1882); *In re Clisdell*, 2 Am. Bank. R. 424 (1899); *Ex parte Blain*, L. R. (1879) 12 Ch. Div. 522.

[18] Accord: *Pisani* v. *Lawson*, 6 Bingham's New Cases 90 (1839); *Sidgreaves* v. *Myatt*, 22 Ala. 617 (1853); *Crashley* v. *Press Publishing Co.*, 179 N. Y. 27 (1904).

being transitory, are not limited to any particular country. Story Confl. of Laws, p. 450; 3 Bl. C. 249.[19] And "the laws of a sovereign rightfully extend over persons, who are domiciled within his territory, and even property which is there situate." Ib. section 539.

Our duties are such to redress wrongs to foreigners, that they are by the Constitution allowed to sue in the United States' Courts, so as to secure greater exemption from local partialities or prejudices against them; and a refusal of justice to them in judicial tribunals is one just cause of war. 4 Elliott, Deb. 167. The 11th section of the Judiciary Act confers the same power on this court to sustain suits where an alien is a party, as where a citizen is.[20] Aliens may sue here as extensively as in the state courts. 19 Pick. 214.

In Barry's case, so notorious for eight or ten years past in both the courts of New York and of the Union, he, though an alien, has been allowed as to regaining the custody of his child from his wife and her connections, the same remedies and principles as are granted to citizens. *Barry's Case*, 2 How. 65; *Mercein* v. *The People*, 25 Wend. 64; *Barry's Case*, 5 How. 103.

An alien gets the right of protection, from his obedience, industry, and care while here, and the usefulness of his capital and skill employed here, when he resides abroad. In Story's Confl. of Laws, section 565, he says: "It may be laid down, as a general rule, that all foreigners, *sui juris*, and not otherwise specially disabled by the law of the place where the suit is brought, may there maintain suits tot vindicate their rights and redress their wrongs." 2 Bligh 31; 1 Dow. & Clark 169; 1 Clark & Fin. 333; 2 Sim. 94; 8 Barn. & Cress. 427; 9 Ves. 347; 4 John Ch. 370; and 13 Peters, 519; extends comity of suits to corporations out of a state.

A person from abroad suing in this country is to enjoy no greater nor less rights than citizens. "He is to have the same rights which all the subjects of this kingdom are entitled to." Ld. Tenterden in *De la Vega* v. *Vianna*, 1 Barn. & Adol. 284; 2 Cow. 626; 1 Peters, C. C. 317; 1 Wash. C. C. 376; 2 John. 345; 10 Wheat. 1; Henry on For. Laws, 81-86.[21]

---

[19] One alien may sue another alien if the subject-matter of the action is within the jurisdiction of the court. *Barrell* v. *Benjamin*, 15 Mass. 354 (1819); *Peabody* v. *Hamilton*, 106 Mass. 217 (1870); *The Jerusalem*, 2 Gall. U. S. C. C. 191 (1814). Contra: *Dumonssay* v. *Delvit*, 3 H. & H. Md. 151 (1793), and compare *Dewitt* v. *Buchanan*, 54 Barb. (N. Y.) 31 (1868).

[20] See U. S. Judicial Code, Act of Mar. 3, 1911, ch. 231, § 24, 36 Statutes at Large U. S. 1187. The federal courts are without jurisdiction where both parties are aliens and no federal question is involved. *Montalet* v. *Murray*, 4 Cranch (U. S.) 19 (1807); *Petrokins* v. *Stuart*, 14 Phila. (Pa.) 412 (1879); *Laird* v. *Indemnity Co.*, 44 Fed. 712 (1890); although one is a consul of a foreign nation, *Pooley* v. *Luco*, 72 Fed. 561 (1896), but see Judicial Code § 233.

[21] Accord: *Ramkissenseat* v. *Barker*, 1 Atk. 51 (1737), contract; *Pugh* v. *Gillam*, 1 Cal. 485 (1851), seamen's wages; *Palmer* v. *DeWitt*, 47 N. Y. 532 (1872) insurance; *Johnston* v. *Trade Ins. Co.*, 132 Mass. 432 (1882) insurance; *United States* v. *O'Keefe*, 78 U. S. 178 (1870); *Squilache* v. *Tidewater C. Co.*, 64 W. Va. 337 (1908) personal injuries. At common law an alien could not maintain a real or mixed action although he could defend his title against all persons but the state. *Waugh* v. *Riley*, 49 Mass. 290 (1844);

Foreign contracts, as well as laws, are respected and enforced only from comity, not *proprio vigore,* but almost invariably enforced. Story Confl. of Laws, section 244. Much more should we allow to persons protection and redress by comity, than to contracts and laws, made abroad, as we do daily, in every appropriate case.[22]

The whole system of modern facilities for intercourse through consuls and ambassadors, through less rigid exclusions, through improved roads and steamships, through free trade and lower duties, and the greater brotherhood caused by the art of printing, the mariner's compass, and Christianity, all tend to connect nations closer, and equalize their rights and privileges in business. The progress of civilization and commerce, and the whole character of our institutions and laws, are more and more friendly to foreigners, regarding them more as brethren, of one blood and origin, and hope, rather than barbarians and enemies.

So as to permitting them to trade here, to sell and buy, to recover for conversions, or injuries, or sales of their property, to sue for frauds and deceits in relation to it as well as contracts, this has been the law ever since the Constitution empowered congress to have courts to try suits, where an alien was a party, and ever since congress confirmed that power in 1789 in the circuit court. We, as well as the state courts, have yearly sustained alien friends in vindicating their personal rights, as fully as we do citizens, in all analogous cases.[23]

Comity and courtesy are due to all friendly strangers, rather than imposition or pillage. Taking their marks and using them, as and

---

Siemssen v. *Bofer,* 6 Cal. 250 (1856); *White* v. *Sabariego,* 23 Tex. 243 (1859); *Jele* v. *Lemberger,* 163 Ill. 338 (1896). The right to hold land, however, ordinarily carries with it the right to maintain actions therefor. *Den* v. *Brown,* 7 N. J. L. 305 (1879); *Bradstreet* v. *Oneida Supervisors,* 13 Wend. (N. Y.) 546 (1835); *Scharpf* v. *Schmidt,* 172 Ill. 255 (1898).

[22] Comity will not allow a nonresident alien creditor to obtain by garnishment an advantage over a resident creditor, although the lien of the home creditor is junior to that of the alien. *Disconto Gesselschaft* v. *Umbreit,* 127 Wis. 651 (1906).

[23] There is a conflict of authority as to whether a nonresident alien can maintain an action for wrongful death under the statutes conferring that right upon the relatives of a decedent. Among the cases upholding the right of action are *Davidson* v. *Hill,* L. R. (1901) 2 K. B. Div. 606; *Philpott* v. *Missouri P. R. Co.,* 85 Mo. 164 (1884); *Chesapeake & O. R. Co.* v. *Higgins,* 85 Tenn. 620 (1887); *Muhall* v. *Fallon,* 176 Mass. 266 (1900); *Szymanski* v. *Blumenthal,* 3 Penn. (Del.) 558 (1902); *Kellyville Coal Co.* v. *Petraytis,* 195 Ill. 215 (1902); *Renlund* v. *Commodore M. Co.,* 89 Minn. 41 (1903); *Romano* v. *Capital City B. Co.,* 125 Iowa 591 (1904); *Pittsburg, etc., R. Co.* v. *Naylor,* 73 Ohio St. 115 (1905); *Hirchkovitz* v. *Pennsylvania R. Co.,* 138 Fed. 438 (1905, N. J. Stat.); *Low Moor T. Co.* v. *La Bianca,* 106 Va. 83 (1906); *Alfson* v. *Bush Co.,* 182 N. Y. 393 (1905); *Atchison, etc., R. Co.* v. *Fajardo,* 74 Kan. 314 (1906); *Kaneko* v. *Atchison, etc., R. Co.,* 164 Fed. 263 (1908 Cal. Stat.); *Mascitelli* v. *Union C. Co.,* 151 Mich. 693 (1908); *Ferara* v. *Auric M. Co.,* 43 Colo. 496 (1908); *Mahoning Ore Co.* v. *Blomfelt,* 163 Fed. 827 (1908 Minn. Stat.). Among the cases denying the right are *Adam* v. *Brittish & F. S. Co.,* L. R. (1898) 2 Q. B. Div. 430; *Deni* v. *Pennsylvania Co.,* 181 Pa. 525 (1895); *McMillan* v. *Spider Lake Co.,* 115 Wis. 332 (1902); *Roberts* v. *Great Northern R. Co.,* 161 Fed. 239 (1904, Wash. Stat.); *Maioramo* v. *Baltimore & O. R. Co.,* 216 Pa. 402 (1907). Affirmed, 213 U. S. 268, now changed by Pa. Act of June 7, 1911, P. L. 678.

for theirs, to their damage, is like preying on a visitor, or inhospitably plundering a wreck on shore. To elevate our own character as a nation, and the purity of our judicial tribunals, it seems to me we ought to go as far in the redress and punishment of these deceptions as can be vindicated on any sound principle.

Some of the statutes, passed in what we consider a comparatively barbarous age, are not without admonitory lessons on this subject. Beside, one before referred to, the 9 Edw. 3 d. st. 2, ch. 1, empowers alien merchants to sell and buy freely any where, and to have redress if disturbed and damages. 1 Stat. at Large, 212. And 27 Ed. III, st. 2 ch. 18, 19, provides, that as such merchants "can not often long tarry in one place we will and grant that speedy right be to them done from day to day and from hour to hour, according to the laws," etc. 1 Stat. at Large 281.

Again, in the 3d article of our Treaty of 1794 with England, each power is authorized in America "freely to carry on trade and commerce with each other." So we are under treaty obligations to Great Britain and most other European powers to admit their merchandise on favorable terms, and to allow their merchants to trade here as those of favored nations. But it would be a mockery of such provisions and engagements, if we prevented them from selling their goods after arriving here (Ch. J. Marshall in *Brown* v. *State of Maryland,* 12 Wheat. 447); unless noxious to health or morals; or if we made onerous discriminations against them, or prevented their receiving the proceeds of their goods, or abstained from yielding protection against injuries to them, or to their marks. See *Taylor* v. *Carpenter,* 3 Story, R. 461.

I am not satisfied, then, that the judge at the trial did wrong in not charging on this point as desired by the defendants. Nor am I dissatisfied with the verdict in law or fact, in this respect.

New trial refused and judgment on the verdict.[24]

CLARK *v.* MOREY.

SUPREME COURT OF NEW YORK, 1813.

10 *Johns.* (*N. Y.*) 69.

This was an action of assumpsit, on a promissory note made by the defendant to the plaintiff, dated the 5th June, 1811, for $209.50, payable on demand. The declaration was filed in May term, 1812. In August term last the defendant pleaded, 1. Non assumpsit; 2. that the plaintiff ought not to have and maintain his action, etc.,

---

[24] Accord: *Collins Co.* v. *Brown,* 3 K. & J. 423 (1875); *Palmer* v. *De Witt,* 47 N. Y. 532 (1872). See *Frohman* v. *Ferris,* 238 Ill. 430 (1909).

As an alien may sue, so also he may be sued, provided the court has acquired jurisdiction of his person or property. *Field* v. *Kennedy,* 7 Md. 209 (1854); *Russ* v. *Mitchell,* 11 Fla. 80 (1864); *Roberts* v. *Knights,* 89 Mass. 449 (1863); *Olcott* v. *MacLean,* 73 N. Y. 223; *McHenry* v. *New York P. & O. R. Co.,* 25 Fed. 65 (1885); *Vestal* v. *Ducktown Sulphur, etc., Co.,* 210 Fed. 375 (1911).

because the defendant says, that the plaintiff is an alien, born in foreign parts, out of the allegiance of the United States of America, and within the allegiance of a foreign state, to wit, of the united kingdom of Great Britain and Ireland, and not made a citizen of the United States of America, by naturalization or otherwise, to wit, at, etc. And that the persons exercising the powers of government in the said foreign state, the united kingdom of Great Britain and Ireland, aforesaid, are at war with, and enemies of, the United States of America, to wit, at, etc., and that the said plaintiff, so being such alien born, etc., and an enemy of the United States of America, and not made a citizen by naturalization, or otherwise, entered and came into the United States of America, and still remains therein, without any letters of safe conduct from the President of the United States of America, or any license to be, reside or remain in these United States of America. And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him," etc.

To this plea there was a demurrer, and joinder in demurrer.

KENT, C. J.: The second plea states that the plaintiff is an alien, born out of the allegiance of the United States, and under the allegiance of the King of the United Kingdom of Great Britain and Ireland, and not naturalized, and that war exists between the United States and the said kingdom; and that the plaintiff came into the United States and remains here without any letters of safe conduct from the President of the United States, or any license to remain here.

This plea is not without precedent in the English books; (Rast. Ent. 252, b. 605 b; *Denier* v. *Arnaud,* 4 Mod. 405, the record of which plea Lord Kenyon, in 8 Term Rep. 167, says he had examined;) but there are many and weighty reasons why it can not be supported. To render the plea of alien enemy good, it seems now to be understood to be the law of England that the plea must not only aver that the plaintiff was an alien enemy, but that he was adhering to the enemy. The disability is confined to these two cases: 1. Where the right sued for was acquired in actual hostility, as was the case of the ransom bill in *Anthon* v. *Fisher;* (Doug. 649, note;) 2. Where the plaintiff, being an alien enemy, was resident in the enemy's country; such was the form of the plea in *George* v. *Powell* (Fortesc. 221,) and in *Le Bret* v. *Papillon;* (4 East, 502;) and such was the case with the persons in whose behalf, and for whose benefit the suit was brought upon the policy, in *Brandon* v. *Nesbitt.* (6 Term Rep. 23.)

It was considered in the Common Pleas, at Westminster, as a settled point, (Heath, J., and Rooke, J., in *Sparenburg* v. *Bannatyne,* 1 Bos. & Pull. 163,) that an alien enemy under the king's protection, even if he were a prisoner of war, might sue and be sued. This point had long before received a very solemn decision in the case of *Wells* v. *Williams,* (1 Ld. Raym. 282, 1 Lutw. 34 S. C., 1 Salk. 46.) It was there decided that if the plaintiff came to England before the war, and continued to reside there, by the license and

under the protection of the king he might maintain an action upon his personal contract; and that if even he came to England after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract; and that the distinction was between such an alien enemy, and one commorant in his own country. The plea, in that case, averred that the plaintiff was not only born in France, under the allegiance of the French king, then being an enemy, but that he came to England, without any safe conduct, and the plea was held bad on demurrer. It was considered, that if the plaintiff came to England in time of peace, and remained there quietly, it amounted to a license, and that if he came over in time of war, and continued without disturbance, a license would be intended. It is, therefore, not sufficient to state that the plaintiff came here without safe conduct. The plea must set forth, affirmatively, every fact requisite to prove that the plaintiff has no right of action. It is not to be favored by intendment. This was the amount of the decision in *Casseres* v. *Bell;* (8 Term Rep. 166;) and one of the judges in that case referred to the decision in *Wells* v. *Williams,* as authority, and so it has uniformly been considered in all the books; and all the former precedents and dicta that are repugnant to it may be considered as overruled. Though there is a loose and unsatisfactory note of Sylvester's Case, in 7 Mod. 150, which was a few years later, and looks somewhat to the contrary; yet it never has been considered as affecting the former decision. Indeed, the law on this subject has undergone a progressive improvement. The doctrine once held in the English courts, that an alien bond became forfeited by the war, (Year Book, 19 Edw. IV, pl. 6,) would not now be endured. The plea is called in the books an odious plea, and the latter cases concur in the opinion that the ancient severities of war have been greatly and justly softened, by modern usages, the result of commerce and civilization.

In the case before us, we are to take it for granted (for the suit was commenced before the present war) that the plaintiff came to reside here before the war, and no letters of safe conduct were, therefore, requisite, nor any license from the president. The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out of the United States; but no such order is stated or averred. This is the evident construction of the act of congress of the 6th July, 1798, entitled, "An act respecting alien enemies." (Sess. 1 cong. 5, ch. 73.) Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.

The right to sue, in such a case, rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of the nations is part of the common law. By the law of nations, an alien who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express

will of the sovereign power to order him away. The rigor of the old rules of war no longer exist, as Bynkershoek admits, when wars are carried on with the moderation that the influence of commerce inspires. It may be said of commerce, as Ovid said of the liberal arts: *Emollit mores, nec sinit esse feros.*

We all recollect the enlightened and humane provision of Magna Charta (c. 30) on this subject; and in France the ordinance of Charles V as early as 1370, was dictated with the same magnanimity —for it declared that in case of war, foreign merchants had nothing to fear for they might depart freely with their effects, and if they happened to die in France, their goods should descend to their heirs. (Henault's Abrege Chron. tom. 1, 338.) So all the judges of England resolved, as early as the time of Henry VIII, that if an alien came to England before the declaration of war, neither his person, nor his effects, should be seized in consequence of it. (Bro. tit. Property, pl. 38; Jenk. Cent. 201, case 22.) And it has now become the sense and practice of nations, and may be regarded as the public law of Europe, (the anomalous and awful case of the present violent power on the continent excepted,) that the subjects of the enemy, (without confining the rule to merchants,) so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. (Bynk. Quœst. Jur. Pub. b. 1 c. 25 s. 8.) It is even held, that if they are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit. (Emerigon, Traite des Assurances, tom. 1. 567.)

Modern treaties have usually made provision for the case of aliens found in the country, at the declaration of war, and have allowed them a reasonable time to collect their effects and remove. Bynkershoek gives instances of such treaties, existing above two centuries ago; and for a century past, such a provision has become an established formula in the commercial treaties. Emerigon, who has examined this subject with the most liberal and enlightened views, considers these treaties as an affirmance of common right, or the public law of Europe, and the general rule is so laid down by the later publicists, in conformity with this provision. (Vattel, b. 3. c. 4. s. 63. Le Droit Public de L'Europe, par Mably. Oeuvres, tom. 6. 334.) Some of these treaties have provided that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they behave peaceably; (Treaty of Commerce between Great Britain and France, in 1786, and of Amity and Commerce between Great Britain and the United States, in 1794;) and where there was no such treaty, the permission has been frequently announced in the very declaration of war. Sir Michael Foster (Discourse of High Treason, 185, 186) mentions several instances of such declarations; and he says that the aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. The act of Congress of July, 1798, be-

fore alluded to, provides, in cases where there may be no existing treaty, a reasonable time, to be ascertained and declared by the president to alien enemies resident at the opening of the war, "for the recovery, disposal and removal of their goods and effects." This statute may be considered, in this respect as a true exposition and declaration of the modern law of nations.

The opinion that wars ought not to interfere with the security and collection of debts, has been constantly gaining ground, and the progress of this opinion is worthy of notice, as it will teach us with what equity and liberality, and with what enlarged views of national policy, the question has been treated. A right to confiscate the debts due to the enemy was the rigorous doctrine of the ancient law; but a temporary disability to sue, was all Grotius (b. 3. c: 20. s. 16) seemed willing to allow to hostilities. Since his time, continued and successful efforts have been made to strengthen justice, to restrain the intemperance of war, and to promote the intercourse and happiness of mankind. The power to collect debts, notwithstanding the event of war, is not an unusual provision in the conventional law of nations. In the treaty of commerce between England and France, in 1713, it was provided by the 2d article, that in case of war, the subjects of each power residing in the dominions of the other, should be allowed six months to retire with their property, and in the meantime, should be at full liberty to dispose of the same, "and the subjects on each side were to have and enjoy good and speedy justice, so that during the said space of six months they may be able to recover their goods and effects." So also in the treaty of commerce between Great Britain and Russia, in 1766, and again in 1797, it was provided, that in case of war, the subjects of each were to be allowed one year to withdraw with their property; and they were also authorized to substitute others to collect their debts for their benefit, "which debts the debtors should be obliged to pay in the same manner as if no such rupture had happened." A similar provision, in substance, was inserted in the treaty between the United States and Russia, in 1785; and in the treaty of commerce between the United States and Great Britain, in 1795, the government of each country was prohibited to interfere, either by confiscation or sequestration, with private contracts, and it was expressly declared to be unjust and impolitic, that the debts of individuals should be impaired by national differences.

The case before us does not raise the question, nor do we give any opinion in favor of the right of action by aliens who resided in the enemy's country when war was declared, and when the action was commenced. The cases appear to be against such right. But as to aliens who were residents with us when the war broke out, or who have since come to reside here, by a presumed permission, the authorities seem to be decisive. And whether we consider this case in reference to the decisions of the English courts, to the act of Congress, or to the sense of European nations, declared in their treaties,

and by their writers on public law, the plea must be overruled; and the plaintiff is entitled to judgment, upon his demurrer.

Judgment for plaintiff.[25]

---

[25] Accord: *Otteridge* v. *Thompson*, 2 Cranch. C. C. (U. S.) 108 (1814); *Janson* v. *Dreifontein Con. Min.*, 87 L. T. 372 (1902); *Princess Thurn and Taxis* v. *Moffit*, 112 L. T. 114 (1915).

The rule is well settled that during any war, foreign or civil, an action can not be prosecuted by an enemy residing in the enemy's territory, but must be stayed until the return of peace. The reasons assigned are that an enemy shall not have the protection of the courts and that the fruits of an action shall not be remitted to a hostile country to furnish resources to the enemy. *Kersha* v. *Kelsey*, 100 Mass. 561 (1868); *McConnel* v. *Hector*, 3 B. & P. 113 (1802); *Alcinous* v. *Nigreu*, 4 El. & B. 216 (1854); *Janson* v. *Dreifontein Consolidated Mines*, L. R. (1902) App. Cas. 484; *Wilcox* v. *Henry*, 1 Dall. (Pa.) 69 (1782); *Russel* v. *Skipwith*, 6 Binney (Pa.) 241 (1814); *Levine* v. *Taylor*, 12 Mass. 8 (1815); *Bishop* v. *Jones*, 28 Tex. 294 (1866); *Whelan* v. *Cook*, 29 Md. 1 (1867); *Knoefel* v. *Williams*, 30 Ind. 1 (1868); *Sanderson* v. *Morgan*, 39 N. Y. 231 (1868); *Zacharie* v. *Godfrey*, 50 Ill. 186, 99 Am. Dec. 506 (1869); *Haymond* v. *Camden*, 22 W. Va. 80 (1883). The rule, however, suspends the remedy only and the right of action revives on suspension of hostilities. *Bell* v. *Chapman*, 10 Johns. (N. Y.) 182 (1813); *Hutchinson* v. *Brock*, 11 Mass. 119 (1814); *Crutcher* v. *Hord*, 4 Bush. (Ky.) 360 (1868); *Louisville & N. R. Co.* v. *Buckner*, 8 Bush. (Ky.) 277 (1871), and by treaty or law the statute of limitations is ordinarily prevented from running. *Hopkirk* v. *Bell*, 3 Cranch (U. S.) 454 (1806); *Stewart* v. *Kahn*, 78 (U. S.) 493 (1870); *Cross* v. *Sabin*, 13 Fed. 309 (1882).

The existence of war does not prevent the citizens of one belligerent from taking proceedings against the citizens of the other in their own courts, whenever the latter can be reached by process. *Masterson* v. *Howard*, 85 U. S. 99 (1873); *Seymour* v. *Bailey*, 66 Ill. 288 (1872); *McNair* v. *Toler*, 21 Minn. 175 (1875); *McVeigh* v. *United States*, 78 U. S. 259 (1870); *University* v. *Finch*, 85 U. S. 106 (1873).

CHAPTER III.

ACTIONS.

SECTION 1. COMMON-LAW ACTIONS.[1]

3 BLACKSTONE'S COMMENTARIES 117.

With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions personal, real, and mixed.

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs; and they are the same which the civil law calls *"actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere."*[2] Of the former nature are all actions upon debt or promise; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions, (or, as they are called in the Mirror,[3] feodal actions) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance an action of waste; which is brought by him who hath the inheritance in remainder or revision, against the tenant for life who hath committed waste therein, to recover not only the land wasted, which would make it merely a real action; but also treble damages, in pursuance of the statute of Gloucester,[4] which is a personal recompense; and so both, being joined together, denominate it a mixed action.

Under these three heads may every species of remedy by suit or action in the courts of common law be comprised.

---

[1] See Maitland's History of the Register of Original Writs, 3 Harvard Law Review, 97 *et seq.*, reprinted in Select Essays in Anglo-American Legal History, vol. II, p. 549. Stephen on Pleading, Chap. I; Gould on Pleading (Will's ed.) Chap. I; Chitty on Pleading, Chap. II.

[2] 4 Inst. 6, 15.

[3] Ch. 2, § 6.

[4] 6 Edw. I, ch. 5.

3 STREET'S FOUNDATIONS OF LEGAL LIABILITY 44.[5]

To go through the catalogue of actions in order to place them properly in this classification would be unprofitable and the result unsatisfactory. We have a hint of the difficulties that would be encountered in such an undertaking when we learn that Bracton could hardly determine in his own mind whether the assizes of *novel disseisin* and *morte d'ancestor* were actions *in rem* or *in personam*. We must, however, notice a few of the most important of the actions and observe where they belong.

At the top of the scale actions avialable for the recovery of lands and interests therein was the writ of right, the most real of the real actions, the great and final remedy for the recovery of proprietary interests in land. Closely associated with this remedy in procedure were certain other writs said to be in the nature of the writ of right. Such were the writ of right of dower, the formedon in descender and reverter, and the writ of right *de rationabili parte*.

Below the writ of right were the possessory real actions known as the assizes and the writ of entry. In the assize of *novel disseisin* the plaintiff recovered both seisin and damages, this being, says Blackstone, the only instance where damages were recoverable in a possessory action at common law.

The assizes were in the nature of statutory remedies, and available only under circumstances defined for each. The writ of entry, on the other hand, was the universal remedy for the recovery of possession wrongfully withheld from the owner. Its forms were many, "being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *Registrum Brevium*." Some form of this writ was available by a party ousted of his tenements by abatement, intrusion, or disseisin, and, in general, for deforcements. But the widow's writs for obtaining her dower had special names: writ of dower and writ of dower unde nihil habet. If too much were assigned for dower her holdings could be cut down by means of a writ for the admeasurement of dower, sued out at the instance of the heir or his guardian. The writs of dower were analogous to the writ of right.

For disturbance or usurpation of the right of presentation to a benefice there was a scheme of real actions beginning with the writ of right of advowson and ending in the *quare impedit*, which latter remedy, in Blackstone's day, had supplanted the others and then remained almost the sole real action in common use. For disturbance in franchises, commons, ways, and tenures, the usual remedy was by an action on the case; but a real action for the admeasurement of common and an action upon a writ *quod permittat* were respectively available for surcharging and disturbing the common.

The writs *de ejectione firmae* and *quare ejecit infra terminum* were maintainable at the suit of a tenant for years who was dispossessed of his interest in the term. The former lay against the lessor, reversioner, remainderman, or any stranger who was himself

[5] See this volume generally for the personal actions at common law.

the wrongdoer; the other against a person claiming under a wrongdoer. From the *quare ejecit* came the modern action of ejectment. These actions are, like waste, mixed, inasmuch as the plaintiff recovers the unexpired term and damages for the injury. Originally the recovery of damages was the chief object in ejectment, but as the remedy came to be more and more real and was principally used to try questions of title, this object was lost sight of. The damages recoverable in the action of ejectment thus became nominal, and the plaintiff was allowed to sue for his actual damages in an independent action for mesne profits.

Of personal common-law actions the most important are account, covenant, debt, detinue, assumpsit, trespass, case, trover, and replevin. These, as we have seen, are divided into two classes—actions *ex contractu* and actions *ex delicto;* a classification logical enough in itself, but made somewhat unsatisfactory by the supposed necessity of forcing the action of detinue into one or the other divisions.

One who compares the treatise of Bracton with such a modern work as Chitty on Pleading will be struck with the fact that the comparative importance of the real and personal actions has been reversed in the period spanning the six intervening centuries. Bracton wrote a big book, and a large part of the really English law which he undertook to expound is found in connection with the subject of real actions. Of the personal actions he has little or nothing to say. In Blackstone's treatise only the personal actions are thought deserving of attention. The old real actions were practically obsolete when Chitty wrote (1808), and within the succeeding generation legislation abolished nearly every remaining vestige of them. The procedure incident to their prosecution was too cumbersome.

It was a toilsome and tedious process, that by which English remedial law was wrought out. Remedies conceived and partially developed in one field had to be warped and bent to strange uses. Ejectment, assumpsit, trover, all illustrate this. Wondrous are the mazes encountered even in a casual glance at the history of the various actions. That there has never been a logical classification in this field is not surprising. Before the time of Blackstone no man could have been in a position to see the subject in its entirety. Even when Coke wrote, many new things were yet to be done with such actions as assumpsit, detinue, trover, and replevin, and in Blackstone's day some parts of the long cavalcade of actions had already passed or were receding from view.

(a) Ejectment.[6]

DEN *ex dem.* JOHNSON *v.* MORRIS.

SUPREME COURT OF NEW JERSEY, 1822.

7 N. J. L. 6.

This was an action of ejectment, and came before the court upon a rule to show cause why the nonsuit which had been granted by the judge, at the circuit, should not be set aside and a new trial granted.[7]

KIRKPATRICK, C. J.: This is an ejectment for lands in Salem. At the trial of the cause, it was moved for a nonsuit by the defendant's counsel; because the lessor of the plaintiff had not shown a title by deed or other conveyance, nor a possession in themselves and those under whom they claimed, for the term of twenty years, and the plaintiff was called accordingly.

The ground of the nonsuit, as thus presented by the counsel, and taken by the court, is not quite so precisely stated as could have been wished. From the manner in which it is expressed, it is left doubtful whether it was intended to say, that the lessors of the plaintiff had not shown a possession of twenty complete years, and therefore not a sufficient one to maintain an action of ejectment, or that they had not shown a possession within twenty years before action brought, and therefore were barred by the statute.

It will be necessary, therefore, to look into the case, and see how far the motion is supported in point of fact, upon either the one or the other of those grounds.

But before I proceed to this, I feel myself constrained, from the course which the argument at the bar has taken, rather than from anything in the case itself, to make a few observations respecting the action of ejectment, as it has been used in this state, from the earliest settlement of the country down to this time. I say, I feel myself constrained to do this from the course of the argument; for it has been insisted, that the plaintiff in ejectment always has been, and still is obliged, in order to maintain his suit, to show, what the counsel call, a complete, substantive, impregnable title; that is, as it has been explained, a regular deduction of title, by deed from Charles II down to himself, or an exclusive and uninterrupted possession in himself and those under whom he claims, formerly for sixty years, then for thirty, and now for twenty, according as the successive statutes of limitation prevailed; or in other words, such a title as might be disputed, indeed, in point of fact, but could never be overcome by one superior to it. And by way of fortifying this position, reference is made to former practice, in which it is said such deduction was uniformly made, and always required.

---

[6] See 3 Blackstone's Commentaries, 199; 3 Stephen's Commentaries (15th ed.), 403; Adams on Ejectment, ch. 1; Sedgwick & Wait on Trial of Title to Land, ch. 1.

[7] Part of the opinion is omitted.

Let us examine this position a little. By the common law, estates of freehold in lands passed by livery of seisin only; that is, by a delivery over the actual possession. He, therefore, who was in the actual possession of land, was, prima facie, the tenant of the freehold, and had in him the heritable sesina facit stipitem. If he were ousted or dispossessed of this freehold, by one who had no right, he might without process of law, make a peaceable entry, or, if deterred from that, he might make claim from year to year, which was called continual claim, as near the land as he could, and such entry or claim restored him to his lawful seisin, and made him capable again of conveying, either by descent or purchase. This right of entry, though it might be tolled or taken away by a descent cast, and so, generally speaking, must be pursued during the life of him that made the ouster, or be forever lost, yet it was limited to no particular period or number of years; so that if it was not actually lost by descent or otherwise, the lawful owner might, at all times, restore himself by entering upon the wrongdoer, in a peaceable manner, and turning him out; but if he suffered it to be once lost, he could no longer restore himself by his own act, but must have recourse to his action at law.[8] And, indeed, even where it was not lost, as it but seldom happened that the wrongdoer would tamely submit to be turned out without force, the owner, if his object was to gain the actual possession and enjoyment of the land, and not merely to put himself in a capacity to make a lawful conveyance, was generally obliged to have recourse to such action, and to call to his aid the process of the law, to restore to him that right which he could not obtain by peaceable means without it; so that, in most cases it may be said, he was put to his action, even when his right of entry was not tolled or taken away.

This action might be, in the first place, by writ of entry,[9] in which he undertook to prove his own former possession, and that the defendant, or some one under whom he held, had dispossessed him; to which the defendant might answer by denying the fact of the dispossession, or by showing in himself an older and a better possession; and then, upon the trial, it was adjudged for him who had the clearest right, or it might be, in the second place, after the

---

[8] It would seem that in the time of Bracton "A term of four days was the time during which one who has ousted the owner must de facto hold it in order that he may have seisin of it." Maitland, The Beautitude of Seisin, 4 Law Quarterly Review, 31.

[9] At common law a writ of entry was a possessory action brought against the occupant of a freehold in possession under an entry alleged to have been unlawfully made by him or those under whom he claimed. Booth on Real Actions, 172; III Blackstone's Commentaries, 181; 15 Cyc. 1059. These writs were of various sorts according to the nature of the injury intended to be redressed. Stearn on Real Actions, 139. By the middle of the eighteenth century they were nearly obsolete and were abolished by the act of 3 and 4 William IV, ch. 27, § 36 (1833), but in America they were used in several of the colonies in preference to ejectment and, with modifications, survived the Revolution. *Hancock* v. *Wentworth*, 46 Mass. 446 (1843); *Bussey* v. *Grant*, 20 Maine 281; *Witherow* v. *Keller*, 11 S. & R. Pa. 271 (1824); *Potter* v. *Baker*, 19 N. H. 166 (1848). Where still in use, the proceedings are largely statutory. Rev. Laws of Mass. (1902), ch. 179.

reign of Henry II by writ of assize, which went upon the suggestion, that the demandant's ancestor had died in possession, and that he was the next heir; and therefore directed the sheriff to inquire, by a jury, whether this were so, and, if found for the demandant, the land was immediately restored.[10] But still, even if the demandant prevailed in these actions, it only restored to him his former possession, it decided nothing with respect to the right of property; all that he had to show, in order to maintain his suit, was the possession of himself or his ancestor, and this might be overcome by the defendant showing an older and a better possession; for it never was pretended that the demandant's must be such a possession as established the ultimate right; for this, either party might afterwards resort to his writ of right.[11] In these possessory actions, therefore, neither the deed of feoffment, by which the estate was created, nor the actual livery of seisin upon such deed were necessarily given in evidence, but the mere possession only. And so also after the 29 Car. II which directed that all conveyances of land should be in writing, and not otherwise, it was not necessary, upon the same principle, to give the writing in evidence, and the reason was, that the deed of feoffment and livery of seisin thereupon, in ancient times, and the written conveyance under the statute, related to, and were evidence of, the commencement of the estate, and of the ultimate right only, which was not at all in question; but that they could be no proof of the actual and subsequent possession upon which the ouster was alleged to have been committed, and which was the foundation of those possessory actions, and the only thing to be proved in them, or recovered by them. It is true that those might be given in evidence, and might greatly strengthen the proof of possession, but they were not essential to the maintenance of the action; that depended upon the mere possession.

To these real actions for the recovery of the possession of lands, succeeded, in common use, the action of ejectment. This was not originally devised as a remedy for injuries done to real estates, that is, to estates or freehold in lands, but as a remedy for injuries done to chattels real, such as terms for years, which were considered as mere chattel interests. But then, as one who

---

[10] III Blackstone's Commentaries, 184; 1 Pollock & Maitland's Hist. Eng. L. (2d ed.) 144. Writs of assize were also abolished in England in 1833.

[11] The writ of right was the most important of the real writs. While it lay concurrently with all other real actions in which an estate in fee simple could be recovered, it was the exclusive and final remedy of an owner of land in fee simple who had lost the right to recover in a possessory action. III Blackstone's Commentaries, 193. The writ, with other obsolete real actions, was abolished in England in 1833. In America the writ of right was in use in several of the states. *Haines* v. *Budd*, 1 Johns. (N. Y.) 335 (1800); *Leonard* v. *Leonard*, 10 Mass. 280 (1813); *Green* v. *Liter*, 8 Cranch (U. S.) 229 (1814); *Ten Eyck* v. *Waterbury*, 7 Cowen (N. Y.) 51 (1827); *Bolling* v. *The Mayor*, 3 Rand. (Va.) 563 (1825); *Genin* v. *Ingersoll*, 2 W. Va. 558 (1868). So also the Writ of Formedon, the writ of right of the tenant in tail, *Wells* v. *Prince*, 4 Mass. 63 (1808); *Dow* v. *Warren*, 6 Mass. 327 (1810). Statutory real actions and the action of ejectment have superseded these ancient methods of trying title. *Kerr* v. *Leighton*, 2 Greene (Iowa) 196 (1849); *Betz* v. *Mullin*, 62 Ala. 365 (1878).

came into a court of justice to complain that he had been ousted of his term, must necessarily show that such term existed, and that the lease under which he claimed was a good and valid lease, and, of course, that the lessor had a right to make it, the title of the lessor was thereby brought into question, as fully and upon the same principles as it would have been in the real action; so that though the action of ejectment got clear of all the intricacy and perplexity of the real action, and so become an easy and expeditious method of trying the title to land, yet it required precisely the same proof of title in substance as the real action did. For though the form of the action may have been changed, yet the great principles of right have not been changed, nor can they be without a total subversion of the whole system of property in land. In a real action, the demandant must show his possession, his ouster, and his right to re-enter; in an ejectment, the lessor of the plaintiff must show the very same thing;—he must show that he has been in possession of the land; that it is now withholden from him, which is an ouster; and that he had a right to re-enter and make the lease in question. I say he must show those things, for the lease, entry and ouster, which are confessed are the mere form of the action, and have nothing to do with the substantial right. The title, therefore, which the lessor of the plaintiff, by the consent rule, is bound to rest upon, and which he is obliged to make out at the trial, is his right of entry, (for if he had this right, it is always confessed that he had a right to make, and did make, the lease) a right which, upon the principles of the common law, necessarily results from his having had an anterior and peaceable possession of the lands in question, and their being now withholden from him by the defendant; a right, too, which can not be overcome by any subsequent possession, unless it has been tolled or taken away in the manner before mentioned, or is restrained by the statutes of limitation.

Let us, then, look a little to the history of these statutes, and consider their nature and effect.

I have said before, that this right of entry by the common law, was unlimited, in point of time, as were also the real actions of which I have spoken. In the progress of society, however, it was found necessary to constrain men to pursue their rights within a reasonable time or to abandon them forever, and especially so where they were to be pursued by the mere act of the party himself, without the intervention of judicial authority. Hence, after sundry other statutes, the 32 Henry VIII which limits writs of right to sixty years; writs of assize and entry and other possessory writs, if founded upon the possession of one's ancestors, to fifty years; and if founded upon one's own possession, to thirty years. Hence, also, the 21 Jac. I, which declares, that none shall make entry into lands but within twenty years next after his right or title shall accrue to the same.[12] After this last statute, if the lawful owner did not make

[12] In England the Act of 3 and 4 William IV, ch. 27 (1833), reduced the period of limitation in actions relating to real property, from sixty to twenty years, except in cases of disability, in which ten years from the removal of such disability was allowed for the assertion of their rights. By the Act of

his entry, and so restore himself to his possession within the time therein prescribed, his right to do so in this extra-judicial manner was gone, but still his right to have possession of the land remained as before. The only difference in his condition was, that before he had the remedy in his own hands, and he could restore himself when he pleased; but that now his remedy was in the hands of the law, and he must be restored, if at all, by its judicial process. But his right, in both cases, was the same, a mere possessory right, founded upon his having had the possession, and his having been turned out of it by the defendant; in both cases he was restored to his possession, and his possession only.

But those statutes of limitation which governed those remedies in England were not considered as extending to this country, until the Act of 1727, which declares, that "all the English statutes concerning the limitation of actions, real and personal, shall be in force here."

[The court discusses the early statutes of limitation and continues:]

The right of the lawful owner, therefore, to enter upon the wrongdoer in this extra-judicial manner, and so to restore himself to his possession and make leases, etc., from the first settlement of the province till the act of 1727, was wholly unlimited in point of time; from that time till the Act of 1787 it was limited to sixty years; after that, in some cases, to thirty years; and since the Act of 1798, in all cases, with the usual savings, to twenty years:[13] and as this right of entry is the foundation of the action of ejectment, that action, of course, was limited in the same manner, and not otherwise. But that limitation is merely a limitation of the time within which the entry must be made, and, by no possible construction, a designation of the time during which the possession must have continued. Can any book case be found in which, since the 21 Jac. I, a possession of twenty complete years has been holden necessary to maintain an ejectment? None such can be found. One comes into a court of justice, and says he has been in possession of lands for five, ten, or fifteen years, and that the defendant has turned him out, and holds him out, shall he be told he has no redress, because

---

37 and 38 Victoria, ch. 57 (1874), twelve was substituted for twenty years and six years for the extra ten allowed to persons under disability.

In Pennsylvania the Act of March 26, 1785 (2 Smith's Laws 299, § 2), barred an entry after the expiration of twenty-one years, but the entry is only barred by hostile and adverse possession. *Hawk* v. *Senseman*, 6 S. & R. (Pa.) 21 (1820).

Those under disability were allowed ten years from its removal, § 4. But the right of entry of persons under disability is definitely limited to thirty years by the Act of April 22, 1856, P. L. 532, § 1. *Hunt* v. *Wall*, 75 Pa. 413 (1874). Ejectment must be brought within one year after entry to arrest the running of the statute. *Douglas* v. *Irvine*, 126 Pa. 643 (1889). See further for England, Banning on the Limitation of Actions, ch. 9, and, for the United States, Kelly on Code Limitations of Actions, ch. 12. N. Y. Code Civ. Proc. § 365, requires seisin within twenty years before the commencement of the action.

[13] See 3 Compiled Statutes of New Jersey, 3169. *Den* v. *Wright*, 7 N. J. L. 175 (1824); *Pinckney* v. *Burrage*, 31 N. J. L. 21 (1864).

he has not been in twenty complete years? And shall the defendant be justified in withholding from him his peaceable possession, thus tortiously and forcibly gained? Suppose another should enter and turn him out, and another him, shall the last always hold? To what would all this lead but a mere trial of strength, in defiance of all law; for it is directly in the tooth of that universally acknowledged principle, that peaceable possession itself is a title which shall never be disturbed but by one who has a better right, and which, therefore, the law will carefully protect until that right be shown in a judicial manner. And whether that possession has lasted five years, or ten years, or twenty years, the law sees no difference. Upon what ground, then, is this notion of possession of twenty complete years founded? Certainly the 21 Jac. I says no such thing—our Act of 1798 says no such thing; they merely limit the time of entry, but require no possession of twenty complete years for this or any other purpose. Well, if those statutes do not require it, what is it that does require it? Is it the common law? Let us, then, lay the statutes of limitation out of the question, and then let us inquire what length of possession did the common law require. Does it say anything about twenty years, or thirty, or fifty, or even three score years? No. Time immemorial was its only limitation—time whereof the memory of man runneth not to the contrary, and beyond which, of course, no proof could possibly reach. But will any one say, that a possession for time immemorial was necessary to support an ejectment or other possessory action? No one will say so. It is true that, in early times, it was customary, in actions of ejectment, to deduce title from the general proprietors, and thereby to cut off all pretensions of the defendant at once, and that this continued to be the custom up till the revolutionary war, and for some time afterwards; and it is true, too, that this is done even till this day, when it can conveniently be done, because it is by far the shortest and safest course, for it stops the mouth of the defendant in limine. But the conclusion that is drawn from this, to wit, that the ejectment was put upon the same footing as the writ of right, and required the same proof, and had the same consequences, is not true. It never was put upon the footing of the writ of right; it never was conclusive upon the right of property; it never did necessarily require such deduction of title; but, on the contrary, always depended upon, and was governed by, its own proper principles; and, except in the cases I have mentioned, kept within its own proper bounds. I never heard of a nonsuit or a decision made against the plaintiff, upon the ground that he had not made such deduction of title, except in one case from Sussex, I think, in the Court of Errors at Perth Amboy, and in that, probably, there might have been intermingled other operative reasons, not much connected with the case, and not now easy to be traced. * * *

I conclude, then, that the lessor of the plaintiff, in an action of ejectment, must always count upon and show a possession of the land within the time to which the right of entry is limited, and under our Act of 1798, within twenty years next before the action brought. otherwise he is barred; but that he need not show a possession of

twenty complete years, or of any other number of years, further than is necessary to constitute a full and peaceable possession;[14] and that this being merely a possessory action, and the possession to be proved not being intended to establish the ultimate right, and not depending for its validity upon the manner in which it commenced, but being a mere matter in pais, it may be shown as well without deed as with it, though, when without it, it will always be looked upon with greater jealousy, and be overcome with greater ease.[15]

[The court then reviews the facts, finds evidence of undisturbed possession in the lessors of the plaintiffs and those under whom they held from 1759 to 1813 and concludes:]

Upon whichsoever of the two grounds first stated we may go, therefore, I see nothing in the case that, in point of fact, can support the motion; and even if it were otherwise, and the lessors of the plaintiff had given no evidence of a possession of twenty complete years, but only of a possession within twenty years, the motion must fail, for the law is not so. In my opinion, therefore,

Let the rule for a new trial be made absolute.[16]

---

[14] Accord: *Smith* v. *Lorillard,* 10 Johns. (N. Y.) 338 (1813); *Hoey* v. *Furman,* 1 Pa. 295 (1845); *Currier* v. *Gale,* 91 Mass. 522 (1865); *Bowman* v. *Wettig,* 39 Ill. 416 (1866); *Elofrson* v. *Lindsay,* 90 Wis. 203 (1895). As to what is evidence of possession see *English* v. *Johnson,* 17 Cal. 107 (1860); *Courtney* v. *Turner,* 12 Nev. 345 (1877); *Miller* v. *Long Island R. Co.,* 71 N. Y. 380 (1877); *Perry* v. *Weeks,* 137 Mass. 584 (1884); *Thompson* v. *Burhaus,* 79 N. Y. 93 (1879); *Doe* v. *Roe,* 26 Del. 78 (1911).

[15] In the absence of a paper title, possession is *prima facie* evidence of ownership. *Strange* v. *White,* 84 Ala. 212 (1887); *Robinoe* v. *Doe,* 6 Blackf. 85 (1841); *Plume* v. *Steward,* 4 Cal. 94 (1854); *Dale* v. *Faivre,* 43 Mo. 556 (1869); *Hunter* v. *Starin,* 26 Hun (N. Y.) 529 (1882); *Beam* v. *Gardner,* 18 Pa. Super. Ct. 245 (1901); *McCreary* v. *Jackson Lumber Co.,* 148 Ala. 247 (1906); *Perry* v. *Clissold,* L. R. (1907) App. Cas. 73. Possession is, however, the lowest form of evidence. It is merely presumptive and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. *Rawley* v. *Brown,* 71 N. Y. 85 (1877); *Alexander* v. *Campbell,* 74 Mo. 142 (1881); *Cahill* v. *Cahill,* 75 Conn. 522 (1903). The legal title to real property carries with it the right of possession and this is sufficient against an adverse occupant who has not remained in possession a sufficient length of time to divest the legal title. *Norton* v. *Frederick,* 107 Minn. 36 (1909); *Kreamer* v. *Voneida,* 213 Pa. 74 (1905).

[16] Accord: *Den* v. *Sinnickson,* 9 N. J. L. 149 (1827); *Leport* v. *Todd,* 32 N. J. L. 124 (1866).

The plaintiff must recover on the strength of his own title, not the weakness of that of his adversary. *Joseph* v. *Bonaparte,* 118 Md. 591 (1912); *Turknett* v. *Johnson,* 66 Fla. 309 (1913); *Center Bridge Co.* v. *Wheeler,* 86 Conn. 585 (1913); *James* v. *Hutchinson,* 73 W. Va. 488 (1914). The plaintiff must trace his paper title back to someone who is shown to have been in possession of the *locus in quo,* or failing in that, he must show that his grantor acquired title from the original proprietors. *Troth* v. *Smith,* 68 N. J. L. 36 (1902).

Where both parties claim title from a common source, the plaintiff need not go back of that source since neither party can deny the title under which he claims. The inquiry is limited to which has the better title. *Riddle* v. *Murphy,* 7 Serg. & R. (Pa.) 230 (1821); *Clark* v. *Trindle,* 52 Pa. 492 (1866); *Pollock* v. *Maison,* 41 Ill. 516 (1866); *Jay* v. *Michael,* 82 Md. 1 (1896); *Drake* v. *Happ,* 92 Mich. 580 (1892); *Board* v. *Board,* L. R. (1873), 9 Q. B. 48; *Gaines* v. *New Orleans,* 73 U. S. 642 (1867); *Mining Co.* v. *Taylor,* 100 U. S. 37 (1879).

The common-law rule is that an equitable title to land will not support

CAPERTON *v.* SCHMIDT.

SUPREME COURT OF CALIFORNIA, 1864.

26 Cal. 479.

The plaintiff, Caperton, brought an action against the defendant, Schmidt, to recover certain real property in the City of Oakland relying on a title derived from the original grantee of the Mexican government. On the trial the defendant offered in evidence the record of a former suit by the plaintiff against the defendant for the recovery of the same land, in which it was adjudged that the defendant was the owner of an undivided interest in the tract amounting to forty eighty-firsts. The evidence was rejected and judgment entered for the plaintiff.

Defendant appealed contending that the judgment in the former suit was conclusive. Plaintiff argued that a verdict and judgment in ejectment did not conclude the parties from questioning the title in a subsequent contest about the same land.[17]

SAWYER, J.: From habit, and as a matter of convenience, we ordinarily speak of the action, in a general sense, as an action of ejectment. This is well enough, so long as we do not suffer ourselves to be misled by confounding the action to recover real estate in use

---

an action of ejectment. *Swayze* v. *Burke*, 12 Peters' (U. S.) 11 (1838); *Peck* v. *Newton*, 46 Barb. (N. Y.) 173 (1862); *Vallette* v. *Bennett*, 69 Ill. 632 (1873); *Windsor* v. *Bacon*, 7 Houst. (Del.) 1 (1884); *Allen* v. *Woods*, 68 L. T. (N. S.) 143 (1893); *Paisley* v. *Hobzshu*, 83 Md. 325 (1896); *Russell* v. *Allmond*, 92 Va. 484 (1896); *Carter* v. *Ruddy*, 166 U. S. 493 (1897); *Nalle* v. *Thompson*, 173 Mo. 595 (1902); *Mead* v. *Chesbrough, B. Co.*, 151 Fed. 998 (1907); *McFall* v. *Kirkpatrick*, 236 Ill. 281 (1908); *Taylor* v. *Russell*, 65 W. Va. 632 (1909). In Pennsylvania, in the absence of a court of chancery, equitable ejectment was recognized as part of the system of administering equity in common-law forms. *Hawthorn* v. *Bronson*, 16 Serg. & R. (Pa.) 269 (1827); *Ohio, &c., Co.* v. *Pennsylvania Co.*, 222 Pa. 573 (1909). In other jurisdictions, usually under their codes, ejectment will lie on an equitable title. *State* v. *Johnson*, 26 Wash. 668 (1901); *Wright* v. *Fort*, 126 N. Car. 615 (1900); *Laughlin* v. *Fariss*, 7 Okla. 1 (1897); *Dodge* v. *Spiers*, 85 Ga. 585 (1890); *Pope* v. *Nichols*, 61 Kans. 230 (1899); *Whitehead* v. *Callahan*, 44 Colo. 396 (1908). Pomeroy's Code Remedies (4th ed.), § 40, compare Sedgwick & Wait on Trial of Titles to Land, § 790. In New York a plaintiff can not reform a deed through the medium of an action of ejectment. *Hall* v. *La France F. E. Co.*, 158 N. Y. 570 (1889). But if a deed is set up to avoid his claim he may avoid it by proof of the fraud by which it was obtained. *Babcock* v. *Clark*, 93 App. Div. (N. Y.) 119 (1904). While at common law equitable defenses were not available in ejectment, many states permit the interposition of such defenses. *Thurman* v. *Anderson*, 30 Barb. (N. Y.) 621 (1860). See also cases in 15 Cyc., p. 71. There is a conflict of authority as to whether ejectment can be maintained on an equitable estoppel. Compare: *Buchanan* v. *Myer*, 3 Yeates (Pa.) 586 (1803); *Tindall* v. *Conover*, 20 N. J. L. 214 (1843); *Suddarth* v. *Robertson*, 118 Mo. 286 (1893); *Rutland R. Co.* v. *Chaffee*, 71 Vt. 84 (1898); *Summerfield* v. *White*, 54 W. Va. 311 (1903), with *Nix* v. *Collins*, 65 Ga. 219 (1880); *Winter* v. *White*, 70 Md. 305 (1889); *Harrison* v. *Alexander*, 135 Ala. 307 (1902); *Amboy, City of* v. *Illinois C. R. Co.*, 236 Ill. 236 (1908).

[17] The arguments of counsel are omitted and the statement of facts is abridged from the opinion of the court, a portion of which is omitted.

in this state, with the action of ejectment at common law, and as a consequence embarrass ourselves by attempting to apply the rules of law peculiar to the latter action to the former. Technically, and substantially, we have no action of ejectment. The forms constitute the substance of that action at common law. True, practically, the possession of the land was recovered. But this was equally true of the writ of entry, and an assize. All these were possessory actions merely. And there would be just as much propriety in calling our action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment. In theory, the writ of entry, and the assize, were actions to recover the freehold; while ejectment was an action to recover the term of the tenant—a mere chattel interest. But, in our state, an action is rarely brought by a tenant, either in substance or form, to recover his term. Practically, the possession of the land, and nothing more, was recovered at common law in each of the actions named. * * *

Says Mr. Blackstone: "As a writ of entry is a real action which disproves the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action which proves the title of the demandant merely by showing his or his ancestors' possession; and these two remedies are, in all other respects, so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them."[18]

"Actions of ejectment have succeeded to those real actions called possessory actions; but an inconvenience was found to result from them which did not follow from real actions, to which it has been found necessary to apply a remedy. Real actions could not be brought twice for the same thing; but a person might bring as many ejectments as he pleased, which rendered the rights of parties subject to endless litigation."[19]

The inconclusiveness of the judgment resulting from the form of proceeding was admitted to be an inconvenience, and the necessary remedy for it, referred to by Mr. Archibold, was, an injunction, which was at length granted, after two or more trials.[20] In these real actions, then, we may say, with at least as much propriety as the respondent's counsel says of the action of ejectment, "the object is the recovery of possession; the subject-matter to be tried is the right of possession as between plaintiff and defendant; that is the extent of the issue."

---

[18] III Blackstone's Commentaries, 185.

[19] Archbold's Note to III Blackstone's Commentaries, 206.

[20] *Earl of Bath* v. *Sherwin*, 4 Brown's Cases in Parliament, 373 (1709); *Barefoot* v. *Fry*, Burnb. 158 (1723); *Leighton* v. *Leighton*, 1 Peere Wms. 671 (1720). In *Cheery* v. *Robinson*, 1 Yeates (Pa.) 521 (1795), after the fourth verdict, the court said that any further proceedings would be regarded as vexatious and would be stayed. There was no jurisdiction at that time to grant an injunction.

It is manifest, therefore, that the reason that one recovery in ejectment at common law was not a bar to a second ejectment between the same parties for the same land, was not because the subject matter to be tried was the right of present possession; for this reason would apply with equal force to the actions we have just considered, in which a former recovery was a bar. But the reason is found in the very framework and essential qualities of the action, which rendered the rules of law laid down at the commencement of this opinion inapplicable. The character of the proceeding is well known. Originally, the party who desired to recover the possession of land in this action entered upon the land, and there executed a lease to some friend, and left him in actual possession, where he remained till some other friend (called the casual ejector), or the prior tenant, came and turned him out. For this injury the tenant brought his action against the party who ousted him. If the party ousting him was a stranger, he was bound, under a rule of court, to give notice to the tenant in possession that he had been sued and should make no defense, and that unless the tenant in possession should defend he would be turned out. This served as process to the tenant in possession, who then appeared and defended by permission of the court, and became the real defendant in the suit. The plaintiff did not allege title in his declaration. He simply alleged that his lessor, on a day named, demised to him the premises in question, to hold for a specified term then next ensuing; that by virtue of said demise he entered into said premises and became and was thereof possessed for the said term; that being so possessed the defendant, at a time specified, and before the expiration of his term, with force and arms, entered and ejected him. Subsequently a change was made by the courts, after which the plaintiff and casual ejector were fictitious persons. The tenant in possession, as a condition of being allowed to appear and defend, was required to enter into what was called the consent rule, whereby he agreed to confess the lease, entry and ouster, and to plead not guilty.[21] This obviated the necessity of proof on the points admitted, and left the parties at the trial at that stage of the proceedings in which they would have been after proving

[21] This practice was established in the time of Lord Chief Justice Rolle, who presided in the court of the Upper Bench during the Protectorate. Style 368 (1652); ——— v. *Davies,* 1 Keble 28 (1661). The practice was reprobated because it was thought that it provided no responsibility for costs in case the defendant succeeded. But this objection was obviated by making it part of the consent rule that the lessor of the plaintiff would pay costs. Chitty's note to III Blackstone's Commentaries, 203; *Den* v. *Wilson,* 5 N. J. L. 680 (1819). See also *Wilson* v. *Campbell,* 1 Dall. (Pa.) 126 (1785); *Jackson* v. *Denniston,* 4 Johns. (N. Y.) 311 (1809); *Hillard* v. *Connelly,* 7 Ga. 172 (1849); *Huddleston* v. *Hughlett,* 1 Humph. (Tenn.) 64 (1839); *Atwell* v. *McLure,* 49 N. Car. 371 (1857). The form of summons prescribed by the Pennsylvania Act of March 21, 1806, 4 Smith's Laws of Pennsylvania, 326, § 12, dispensed with fictitious parties. In New Jersey the consent rule and all fictions in ejectment were abolished in 1855, General Statutes of New Jersey, p. 1282. The common-law forms survive in a few jurisdictions. *Doe* v. *McCullough,* 155 Ala. 246 (1908); *Doe dem. Dockstader* v. *Roe,* 4 Pennew. (Del.) 398 (1903); *Nevin* v. *Desharoon,* 6 Pennew. (Del.) 278 (1907), at p. 282; *Doe* v. *Roe,* 26 Del. 78 (1911).

lease, entry and ouster. But the form of the declaration continued to be the same. Upon proof of the facts alleged, as the action originally stood, or upon their admission under the modified forms of proceeding, without proving any title in the landlord, if the defendant should introduce no testimony whatever, the plaintiff would probably be entitled to recover. He certainly would upon the face of the record, whatever the practice might have been under the almost unlimited control exercised over the action by the judge who introduced it, and his successors. And he certainly would at this day in this state, on such a complaint, and proof of the facts alleged, with no counter proof.[22] But it would not be safe for the plaintiff to rest on such proof or admissions; for the defendant would undoubtedly introduce testimony to rebut his prima facie case; hence it was necessary for the plaintiff to show title in his lessor, notwithstanding none was directly alleged; and the title, though not directly in issue, thus became the real question and the only question litigated. But, as there was no averment of title, and no issue directly taken upon it, the title was only collaterally or incidentally litigated. It became "a fact in controversy," as distinct from "a fact in issue." Mr. Blackstone, after stating the mode of proceeding says: "This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court in order to show the injury done to the lessee by this ouster." * * * "Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner."[23] But we have seen, that the rule in all cases requires that the matter tried must be directly, and not merely collaterally in issue, in order that the judgment shall be a bar. And in an action of ejectment at common law the title is not directly in issue; hence the judgment under the rule was not a bar, nor could the determination of the title be used as a matter of estoppel.

---

[22] At the common-law judgment for default of appearance or plea was entered against the casual ejector not the tenant. *Doe* v. *Roe,* 1 Dowl. & Ry. 514 (1822); *Gardiner* v. *Murray,* 4 Yeates (Pa.) 560 (1808); *Jackson* v. *Vischer,* 2 Johns. (N. Y.) 106 (1800); *Williams* v. *Doe,* 1 Sm. & Mar. (Miss.) 559 (1844); *Cushwa* v. *Cushwa,* 9 Gill (Md.) 242 (1850). Now judgment by default may be obtained against the real party by complying with the particular statutory prerequisites of the jurisdiction. *Bolard* v. *Mason,* 66 Pa. 138 (1870); *Lorenz* v. *Berry,* 207 Pa. 296 (1904); *Sheridan* v. *Andrews,* 49 N. Y. 478 (1872); *Smithson* v. *Briggs,* 33 Gratt. (Va.) 180 (1880). If the case goes to trial and the defendant gives no evidence, but relies on the weakness of plaintiff's title, the court may direct a verdict. *Foust* v. *Ross,* 1 Watts & S. (Pa.) 501 (1841); *Anderson* v. *McCormick,* 129 Ill. 308 (1889). A judgment in ejectment against a tenant is not binding upon the landlord, as to the title, if he was not made a party to the action and did not appear therein. *Eldred* v. *Johnson,* 75 Ark. 1 (1905). After judgment for the plaintiff, whether against casual ejector or tenant, a writ of *habere facias possessionem* issued at the common law. Under the modern English practice, where one is sued who is not in possession and judgment obtained by a default, an actual tenant without notice, claiming the land through a different source, who is ejected, may have the judgment and subsequent proceedings set aside upon electing to appear and defend. *Minet v. Johnson,* 63 L. T. (N. S.) 507 (1890).

[23] III Blackstone's Commentaries, pp. 202, 205; *Aflin* v. *Parkin,* 2 Burr. 665 (1758).

"In ejectment the unsuccessful party may re-try the same question (that is the title), as often as he pleases without leave of the court, for by making a fresh demise to another nominal character it becomes the action of a new plaintiff upon another right." * * *

This is the reason given in the books. By a new demise a different term is created, a new possession and ouster alleged, and the matters directly alleged are different from those directly alleged in the former suit. The recovery alone, therefore, could not be a bar, as a different term was recovered. And the determination of the title was not available as matter of estoppel, because it was not directly in issue. And thus the title—the "fact in controversy," but not "directly in issue"—might be again and again "collaterally and incidentally" tried. The judgment is not conclusive upon the title till it has been "directly" put in issue, and determined.[24] * * *

In several of the states, as in New York and Illinois, there are special statutes regulating actions for the recovery of real estate.[25] In such cases, the forms of the common-law action of ejectment are generally abolished, and another form substituted, and—what would naturally be expected, as a consequence of the change of the form in the action—the effect of the judgment is also modified, regulated and prescribed. Sometimes one new trial in the same action is granted, as a matter of right, and another upon a proper showing, in the discretion of the judge. But when finally determined in that action, it is made conclusive. The statutory form of a declaration in New York does not even allege title. It only alleges a possession by plaintiff and an ouster by defendant. Yet the judgment is made conclusive. A second trial, if any be had, must be in the same action.[26] * * *

If a party declares upon a seisin in fee, and thus puts his title in issue, and chooses to rely upon a prior possession merely, or does not choose to put in all his evidence of title, or is unable from any accident to get it in, he is in no worse position than many other

---

[24] *Jackson* v. *Dieffendorf*, 3 Johns. (N. Y.) 268 (1808); *Bailey* v. *Fairplay*, 6 Binn. (Pa.) 450 (1814); *Hawkins* v. *Hayes*, 3 Harr. (Del.) 489 (1842); *Kimmel* v. *Benna*, 70 Mo. 52 (1879). The modern tendency is strongly in favor of holding the judgment in ejectment conclusive, as in other actions, when the issue is made in the names of the real parties and the titles and defenses are the same as in the first suit. *Miles* v. *Caldwell*, 69 U. S. 35 (1864); *Sturdy* v. *Jackson*, 71 U. S. 174 (1866); *Barger* v. *Hobbs*, 67 Ill. 592 (1873); *Doyle* v. *Hallam*, 21 Minn. 515 (1875); Freeman on Judgments (4th ed.), § 299.

[25] Starr & Curtis's Ann. Stat. of Ill., Vol. 2, p. 1607, *et seq.*; *Aetna L. Ins. Co.* v. *Hoppin*, 255 Ill. 115 (1912). See also California Code of Civ. Proc., § 738, *et seq.*; General Code of Ohio (1910), § 11901, *et seq.* The provision of the N. Y. Code Civ. Proc., § 1525, for a new trial as of right within three years is repealed by the Act of 1911, ch. 509, 2 Session Laws 1911, p. 1166.

In Pennsylvania the Act of April 13, 1807, 4 Smith's Laws, 476, § 4, provided that two verdicts in succession for the same party, for the same land and on the same title should be a bar. *Drexel* v. *Man*, 2 Pa. 267 (1845); *Treaster* v. *Fleisher*, 7 W. & S. (Pa.) 137 (1844). The Act of May 8, 1901, P. L. 142, makes one verdict and judgment conclusive. *Neeld* v. *Cunningham*, 216 Pa. 523 (1907); *Lynch* v. *Lynch*, 221 Pa. 423 (1908).

[26] *Evans* v. *Millard*, 16 N. Y. 619 (1858); *Harris* v. *Waite*, 54 How. Pr. (N. Y.) 113 (1877); *Setzke* v. *Setzke*, 121 Ill. 30 (1887); *Cook County* v. *Calumet, etc., Co.*, 131 Ill. 505 (1890).

parties, who for any reason fail in personal action to get in sufficient, or all their evidence. Prudent counsel, where, from any unforseen accident they fail to make as strong a case as the facts and evidence attainable should enable them to do, and they are not satisfied of the sufficiency of their proofs, will submit to a nonsuit, or in a proper case, with the permission of the court, withdraw a juror and begin again. If they do not, they can not complain that the judgment against them in the action should be followed by its legitimate consequences.

In order that we may not be misapprehended, we will add, that the estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and can not preclude either party from showing that their rights have been varied or extinguished at a subsequent period. No injury, therefore, can result on that ground.

In this case the record offered in evidence, and excluded by the court, shows, that in the former suit, the title was distinctly put in issue and determined (the possession of an undivided half was admitted by the answer); that the undivided forty-one eighty-first parts was found and adjudged to be in the plaintiffs—and forty eighty-first parts in the defendant; that the same title, and the same ouster, were relied on in this action—for the plaintiffs proved that the defendant's possession extended as far back as 1857 before the commencement of the former action, and no evidence of title acquired since the former suit was offered. The court, therefore, erred in refusing to admit the record in evidence, and the judgment must be reversed.[27]

---

[27] At the early law ejectment was an action for the recovery of damages, but when the proceedings became fictitious and the parties nominal, the damages became nominal also. Hence for the injury due to loss of possession a further remedy became necessary and this was found in an action of trespass *vi et armis*, generally termed an action for *mesne* profits. Sedgwick on Damages (8th ed.), ch. 30; *Goodtitle* v. *Tombs*, 3 Wils. C. P. 118 (1770); *Gill* v. *Patten*, 1 Cranch (U. S.) 465 (1807); *Davis* v. *Doe dem. Delpit*, 25 Miss. 445 (1853); *Osbourn* v. *Osbourn*, 11 S. & R. (Pa.) 55 (1824). "The action for *mesne* profits differs from an action for use and occupation, in this, that the latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry *vi et armis* upon premises, and a tortious holding." *Thompson* v. *Bower*, 60 Barb. 463 (1871); *Avent* v. *Hord*, 3 Head (Tenn.) 458 (1859); *Brandmeier* v. *Pond Creek Co.*, 229 Pa. 280 (1910). In New Jersey and Pennsylvania a recovery of *mesne* profits was permitted in the action of ejectment provided notice of the claim had previously been given. *Den* v. *Chubb*, 1 N. J. L. 466 (1795); *Kline* v. *Williams*, 60 N. J. L. 17 (1903); *Boyd* v. *Cowan*, 4 Dall. (Pa.) 138 (1794); *Cook* v. *Nicholas*, 2 W. & S. (Pa.) 27 (1841). And now, under modern statutes and codes, the plaintiff is usually allowed to unite in the same complaint claims to recover real property and for damages for the withholding thereof. *Vandervort* v. *Gould*, 36 N. Y. 639 (1867); *Wallace* v. *Berdell*, 101 N. Y. 13 (1885); *Provident I. S.* v. *Burnham*, 128 Mass. 458 (1880); *Lippett* v. *Kelly*, 46 Vt. 516 (1874); *Methodist Church* v. *Northern P. R. Co.*, 78 Wis. 131 (1890); *Scott* v. *Colson*, 156 Ala. 450 (1908); *Cape Girardeau, etc., Co.* v. *St. Louis, etc., Co.*, 222 Mo. 461 (1909); *Whitehead* v. *Callahan*, 44 Colo. 396 (1908). Otherwise in R. I., *Rinfret* v. *Morrissey*, 29 R. I. 223 (1908).

In a subsequent action for the recovery of *mesne* profits the record of the judgment in ejectment is, between the parties, conclusive as to plain-

BUTLER *v.* FRONTIER TELEPHONE COMPANY.

COURT OF APPEALS OF NEW YORK, 1906.

186 *N. Y.* 486.

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a trial term without a jury.

This is an action of ejectment, which was tried by consent before the court without a jury. The trial judge found as facts that "the defendant on or about January 1, 1903, without the consent of the plaintiff and without lawful authority, entered upon" his premises in the city of Buffalo "and stretched a wire over and across the same in the manner described in the complaint and maintained said wire upon said premises until January 10, 1903, when the defendant removed the said wire entirely from plaintiff's said premises."

According to the allegations of the complaint the wire was strung "about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side," reached "across the entire width of said premises."

The trial judge further found that "the plaintiff has been in possession of the premises described in the complaint at all times mentioned therein and since, except that portion thereof occupied by the defendant with said wire during the period specified." The damages sustained by the plaintiff were assessed at six cents for "the withholding by the defendant of that portion of the premises occupied by said wire for the period above specified." There was neither allegation nor evidence that the wire was supported by any structure standing upon the plaintiff's lot. The action was commenced on the 5th of January, 1903.

The court found as a conclusion of law that the plaintiff, as the owner in fee of the premises in question, "was entitled at the commencement of this action to have said wire removed from said premises, and is entitled to judgment against the defendant so declaring, and for six cents damages for withholding said property and for the costs of this action."

The judgment entered accordingly was affirmed on appeal to the appellate division by a divided vote, and the defendant now comes here.[28]

---

tiff's title and right of possession between demise and execution on the judgment. *West* v. *Hughes*, 1 H. & J. (Md.) 574 (1805); *Benson* v. *Matsdorf*, 2 Johns. (N. Y.) 369 (1807); *Buntin* v. *Duchane*, 1 Blackf. (Ind.) 56 (1820); *M'Cready* v. *Guardians of Poor*, 9 S. & R. (Pa.) 94 (1822); *Chirac* v. *Reinicker*, 11 Wheat. (U. S.) 280 (1826); *Den* v. *McShane*, 13 N. J. L. 35 (1831).

But it is not conclusive as to plaintiff's rights prior to the commencement of the suit. *Avent* v. *Hord*, 3 Head (Tenn.) 458 (1859); *Kille* v. *Ege*, 82 Pa. 102 (1876); *Miller* v. *Henry*, 84 Pa. 33 (1877).

[28] The arguments of counsel are omitted. The decision affirms 109 App. Div. (N. Y.) 217 (1905).

VANN, J.: The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review. Questions similar but not identical, as they related to overhanging eaves, projecting cornices or leaning walls, were decided in favor of the defendant in *Aiken* v. *Benedict* (39 Barb. 400), and *Vrooman* v. *Jackson* (6 Hun 326), and in favor of the plaintiff in *Sherry* v. *Frecking* (4 Duer. 452). In *Leprell* v. *Kleinschmidt* (112 N. Y. 364) the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other state, and upon the cognate question relating to projecting cornices and the like, the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin. (*Murphy* v. *Bolger*, 60 Vt. 723; *McCourt* v. *Eckstein*, 22 Wis. 153; *Stedman* v. *Smith*, 92 Eng. C. L. 1.)[29] Others hold that there is not such a disturbance of possession as to sustain an action in that form. (*Norwalk H. & L. Co.* v. *Vernam*, 75 Conn. 662; *Rasch* v. *North*, 99 Wis. 285).[30] The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in *Wilmarth* v. *Woodcock* (58 Mich. 482, 485) it was decided that equity would require the removal of a projecting cornice because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and appropriate the property of another and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession." (See, also, *Plummer* v. *Gloversville Electric Co.*, 20 App. Div. 527.)

---

[29] So also in *Johnson* v. *Minnesota Tribune Co.*, 91 Minn. 476 (1904); *Outhwaite* v. *Gunn*, 180 Mich. 66 (1914). Where one erects upon his own land a building and projects the foundation beyond the line upon adjoining land, the owner of such land may maintain ejectment. *Wachstein* v. *Christopher*, 128 Ga. 917 (1907). But not if he uses the foundation himself. *Zander* v. *Valentine B. B. Co.*, 95 Wis. 162 (1897).

[30] *Harrington* v. *Port Huron*, 86 Mich. 46 (1891), a sewer constructed through plaintiff's land. As to wires over a street, see *Wadsworth Board of Works* v. *United Telephone Co.*, L. R. (1884), 13 Q. B. Div. 904; *Telegraph Co.* v. *Wilt*, 1 Phila. (Pa.) (1851); *Millville Traction Co.* v. *Goodwin*, 53 N. J. Eq. 448 (1895). Ejectment was held not to lie for backing water on adjoining land. *Ezzard* v. *Findley G. M. Co.*, 74 Ga. 520 (1885). Contra: *Reynolds* v. *Munch*, 100 Minn. 114 (1907).

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner, and disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than fifty dollars damages. (Code Civ. Proc. §§ 1525[31], 3228.)

An action of ejectment, according to the code, is "an action to recover the immediate possession of real property." (Code Civ. Pro. § 3343, sub. 20.) While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. (Code Civ. Pro. §§ 1496 to 1532; Real Property Law, §§ 1, 218; 2 R. S. 303.)

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formely in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises and that he was entitled to the immediate possession thereof as owner when the action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute, for it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder. (*Sullivan* v. *Legraves*, 2 Str. Cases, 695; *Doe* v. *Burt*, 1 T. R. 701; *Lady Dacre's Case*, 1 Lev. 58; *Rowan* v. *Kelsey*, 18 Barb. 484; *Otis* v. *Smith*, 26 Mass. 293; *Gilliam* v. *Bird*, 8 Iredell [Law], 280; *Reynolds* v. *Cook*, 83 Va. 817; *McDowell* v. *King*, 4 Dana [Ky.], 67; Adams on Ejectment, 27; Newell on Ejectment, 38; Warvelle on Ejectment, 22). Mines, quarries, mineral oil and an upper room in a house are familiar examples.[32] Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a

[31] Repealed by the Act of 1911, ch. 509, 2 Session Laws 1911, p. 1166.

[32] *White* v. *White*, 16 N. J. L. 202 (1837); *Asheville D. S. T.* v. *Aston*, 92 N. Car. 578 (1885); *Brady* v. *Kreuger*, 8 S. Dak. 464 (1896); *Condict* v. *Erie R. Co.*, 80 N. J. Eq. 519 (1912). Compare: *Thorn* v. *Witson*, 110 Ind. 325 (1886). As to fixtures, compare: *Jackson* v. *May*, 16 Johns. (N. Y.) 184 (1819), with *Stancel* v. *Calvert*, 60 N. Car. 104 (1863); *Hill* v. *Hill*, 43 Pa. 521 (1862). Ejectment may be maintained for the recovery of a mine. *Whittingham* v. *Andrews*, 4 Mod. Rep. 143 (1693); *Grotz* v. *Lehigh & W. C. Co.*, 1 Luzerne Legal Reg. 53; *Kirk* v. *Mattier*, 140 Mo. 23 (1897). As to oil wells, compare: *Karns* v. *Tanner*, 66 Pa. 297 (1870), with *Union Petroleum Co.* v. *Bliven P. Co.*, 72 Pa. 173 (1872); *Priddy* v. *Thompson*, 204 Fed. 955 (1913). Ejectment will lie upon a right to quarry and remove stone. *Reynolds* v. *Cook*, 83 Va. 817 (1887). Contra: *Brown* v. *Chadwick*, 7 Ir. C. L. 101 (1857).

mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property?" What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad coelum et ad inferos.* The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. (Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th ed.] *401.) *"Usque ad coelum"* is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossed pro tanto. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subject to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a diseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the sheriff to deliver possession is a test of the right to maintain an action of ejectment. (*Jackson* v. *Buel,* 9 Johns, 298; *Woodhull* v. *Rosenthal,* 61 N. Y. 382, 389; *Patch* v. *Keeler,* 27 Vt. 252, 255; Warvelle on Ejectment,

34; Crabb on Real Property, 710; Butler's Nisi Prius, 99.) "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." (*Nichols* v. *Lewis*, 15 Conn. 137.) The defendant insists that the sheriff can not give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied there is no occasion for delivery, because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced. (*Wisner* v. *Ocumpaugh*, 71 N. Y. 113.)

The judgment should be affirmed, with costs.[33]

---

[33] Compare *Kraus* v. *Birnbaum*, 200 N. Y. 130 (1910) where the removal of boards from a fence on the disputed ground was held not an ouster.

Ejectment will not lie for mere incorporeal hereditaments since there can be no seizin thereof, nor ouster, nor can the sheriff deliver possession on execution. *Den* v. *Craig*, 15 N. J. L. 191 (1836); *Black* v. *Hepburne*, 2 Yeates (Pa.) 331 (1798); *Child* v. *Chappell*, 9 N. Y. 246 (1853). A grant of the exclusive right of interment in a cemetery lot subject to certain regulations, is not an interest in land that will support ejectment. *Hancock* v. *McAvoy*, 151 Pa. 460 (1892). Ejectment will not lie for the interruption of a mere easement or license. *Doe* v. *Cowley*, 1 Car. & P. 123 (1823); *Wood* v. *Truckee T. Co.*, 24 Cal. 474 (1864); *Provident I. S.* v. *Burnham*, 128 Mass. 458 (1880); *Croker* v. *Fothergill*, 2 B. & Ald. 652 (1819); *Harlow* v. *Lake Superior T. Co.*, 36 Mich. 105 (1877); *Conover* v. *Atlantic S. Co.*, 70 N. J. L. 315, 57 Atl. 897 (1904); *Coquille M. Co.* v. *Johnson*, 52 Ore. 547 (1910); *Chism* v. *Smith*, 138 App. Div. (N. Y.) 715 (1910); *Menominee R. L. Co.* v. *Seidl*, 149 Wis. 316 (1912). But otherwise where a right of entry exists and the interest is tangible so that possession can be delivered. *Winona* v. *Huff*, 11 Minn. 119 (1866); *Mahon* v. *San Rafael T. Co.*, 49 Cal. 269 (1874); *Southern Pacific Co.* v. *Burr*, 86 Cal. 279 (1890).

(b) Forcible Entry and Detainer.

CARL SCHWINN *v.* RANDOLPH PERKINS.

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1910.

79 N. J. L. 515.[34]

SWAYZE, J.: This was an action of forcible entry and detainer by Schwinn against Perkins in the First District Court of Jersey City. Prior to August, 1908, Schwinn was in possession of the main front room on the first floor of a house in Jersey City under a lease from Perkins ending November 1, 1908. There was evidence that on September 3, 1908, during the term, one Willits was in the room in the employ of the plaintiff as caretaker and watchman. The plaintiff had there conducted a tailoring business, but about August 16th or 18th had moved to New York all his stock in piece goods and most of the things necessary to do business. He testified, however, that he had left part of his property used for trying on purposes in the premises; that he also had there a complete set of fall samples; that he did not take down his sign, but had made arrangements to do so, intending to use it in New York. On September 3d Willits was forcibly ejected from the premises by the defendant. The evidence of force was sufficient to bring the case within the statute relating to forcible entries and detainers. The defendant sought to prove that he had had possession from the twenty-first day of August under an agreement for surrender of the term between him and Schwinn, and he offered evidence that the plaintiff had contracted to have his sign taken down; that another person was in possession of the premises; and that his own representatives had been in possession of the premises in August. In short, he offered evidence of a parol surrender of the lease executed by an actual possession. *Miller* v. *Denins*, 68 N. J. L. 320, p. 323, 53 Atl. 394. This evidence was rejected, and the trial judge directed a verdict in favor of the plaintiff. Judgment was entered that Schwinn, the plaintiff, be restored to the possession of the premises specified in his complaint, and recover treble costs. This judgment was reversed by the Supreme Court.

The only question we think it necessary to consider is whether a parol surrender executed by an actual possession would constitute a defense in an action of forcible entry and detainer. The peculiarities of this action have been frequently dwelt upon by the courts, and the difficulties have arisen out of the seeming injustice of a judgment restoring the possession of property to one not rightfully entitled thereto.[35] The difficulties are well illustrated by the pro-

[34] Affirming 77 N. J. L. 402 (1909).

[35] "While forcible entry and detainer as a civil proceeding is based upon and has by modern legislation been evolved from the English forcible entry and detainer which was a criminal proceeding merely, yet the present statutes often contain such modifications and additions as to make it impossible to state any rules or principles which are always applicable. Generally speaking,

longed litigation in *Newton* v. *Harland,* 1 Manning and Granger, 644. In *Harvey* v. *Brydges,* 14 Meeson & Welsby, 437, Baron Parke said: "If it were necessary to decide it, I should have no difficulty in saying that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assails a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I can not see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." It is evident that his view was that in such a case the only remedy was by an indictment for the forcible entry and detainer, and that a civil action to redress the private wrong would not lie. These cases were, however, actions of trespass, did not necessarily involve the construction of the forcible entry and detainer act, and are not inconsistent with the view that one who is in possession and wrongfully evicted by force may be entitled to be restored to the possession in the method prescribed by the act. *Beddell* v. *Maitland,* 17 Ch. Div. 174, was a case of forcible entry, and Mr. Justice Fry distinctly held that there was no civil remedy for the forcible entry alone, unaccompanied by some independent wrong. Our Supreme Court, however, has held that trespass can be maintained. *Thiel* v. *Bull's Ferry Land Co.,* 58 N. J. L. 212, 33 Atl. 281. Mr. Pollock says (Pollock on Torts, 312): "The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but he shall be punished for the breach of the peace by losing it, besides making a fine to the King." The opinion as to the right of the party who is forcibly dispossessed to bring an action of trespass, expressed by the learned chief justice in *Thiel* v. *Bull's Ferry Land Co.,* was referred to, but neither approved nor disapproved, by this court in *Mershon* v. *Williams,* 62 N. J. L. 779, at pp. 784, 785, 42 Atl. 778. It is not involved in the present case. We think that under the statute, which forbids an inquiry into the estate or merits of the title, the plaintiff, even though his possession may be wrongful, is entitled to recover possession by this statutory action, where he is ejected by violence, whether he is or is not entitled to sue in trespass for damages. It is essential, however, to the maintenance of the action that he should have been in peaceable possession. The old forms of indictment for forcible entry and detainer contained that allega-

---

forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of the plaintiff and the use of force by defendant." 19 Cyc. 1124 and cases there cited. See also *Murry* v. *Burris,* 6 Dak. 170 (1889); *Fults* v. *Munro,* 202 N. Y. 34 (1911); *Meier* v. *Hilton,* 257 Ill. 174 (1913). For Pennsylvania, see Act of March 31, 1860, P. L. 382, §§ 21, 22, P. & L. Dig. 2329 and notes, also under the Act of 1700, *Blythe* v. *Wright,* 2 Ashmead 428 (1841).

tion. 3 Chitty, Criminal Law 887, 888; 2 Burns' Justice, 220. The reported cases in this state where the statutory action is brought by the person injured sustain the same view. *Mairs* v. *Sparks*, 5 N. J. L. 513; *Berry* v. *Williams*, 21 N. J. L. 423, at p. 427; *Funkhauser* v. *Colloty*, 67 N. J. L. 132, at p. 135, 50 Atl. 580. The peculiar section of our act which was the subject of discussion in *Mason* v. *Powell*, 38 N. J. L. 576, recognizes the necessity of possession, and the language of the act is: "If any person shall enter upon or into any lands, tenements, or other possessions," the judgment, if in favor of the complainant, is followed by a writ of restitution directed to the sheriff to cause the complainant to be reseised or possessed.[36] 1 Gen. St. 1598, pl. 13.

The important question now presented, one of the difficult and important questions of the law, is: What constitutes "possession"? The learned trial judge seems to have thought that mere occupancy was possession in the view of the law—a not uncommon confusion of thought to which the Court of Appeals of New York called attention in *Mygatt* v. *Coe*, 142 N. Y. 78, 36 N. E. 870, 872, 24 L. R. A. 850. The distinction has been touched upon in our own cases. *Corlies* v. *Corlies*, 17 N. J. L. 167, was an action for forcible entry and detainer. Mr. Justice Dayton in dealing with the averments of the complaint said that the complainant must have had actual possession of the premises, and that an averment that he and his horses and wagon were pushed and backed off the premises, when coupled with an averment of seizin in fee simple, did not suffice, since it might be true that he was actually on the premises, but was there only by accident or as a visitor or trespasser. That mere occupancy or personal presence upon the ground is not sufficient to constitute that possession which the law clothes with legal rights is shown by a few illustrations. There may be possession without occupancy, as where a man's servant is in the actual occupancy of the property holding possession for him, or where a man has temporarily gone out of his house, leaving no one in charge, but still having legal possession; and there may be a case of occupancy without possession, as where in a man's absence a mere stranger, visitor or trespasser goes into his house without claim of right. In Bacon's Abridgment, under the head of "Forcible Entry and Detainer" (4 Bacon's Abridgment, Amer. ed. 328), it is said: "A man who breaks open the doors of his own dwelling or of a castle which is his own

---

[36] Judgment in forcible entry and detainer is for restitution of the premises sued for. *Kerr* v. *Phillips*, 5 N. J. L. 818 (1820); *Robinson* v. *Crumer*, 10 Ill. 218 (1848); *Farwell* v. *Easton*, 63 Mo. 446 (1876); *Stover* v. *Hazelbaker*, 42 Nebr. 393 (1894). Damages are not recoverable. *Minor* v. *Knowles*, 1 Root (Conn.) 142 (1789); *Poe* v. *Bradley*, 44 Ark. 500 (1884), unless allowed by statute, *Rimmer* v. *Blasingame*, 94 Cal. 139 (1892); *Lane* v. *Ruhl*, 103 Mich. 38 (1894); *Bach.* v. *New*, 23 App. Div. (N. Y.) 548 (1897); *Cole* v. *Eagle*, 8 B. & C. 409 (1828); *Mairs* v. *Sparks*, 5 N. J. L. 513 (1819). But where damages can not be recovered against the rightful owner for forcible entry, they may be recovered for any independent wrong such as injury to furniture. *Beddall* v. *Maitland*, L. R. (1881), 17 Ch. Div. 174, but see *Jones* v. *Foley*, L. R. (1891), 1 Q. B. Div. 730. A writ of restitution on a collusive plea of guilty will be set aside. *Comm.* v. *Griffin*, 149 Pa. 176 (1892).

inheritance, but forcibly detained from him by one who claims the bare custody of it, can not be guilty of a forcible entry or detainer within the statute," and *Ex parte Shotwell,* 1 Ashm. (Pa.) 140, is quoted as authority for the statement that the possession of the prosecutor must be quiet, peaceable and actual, not a mere scrambling possession. Archbold (2 Archbold's Criminal Pleading 331) cites this passage as the law. In a recent philosophical treatise (Pollock & Wright on Possession), it is said that whether legal possession shall follow physical possession or not is a point of law; and that whether there exists at the date in question between a given person and a given thing the relation of physical possession or occupation is wholly or mainly a matter of fact (p. 10). The distinction thus made between occupancy or physical possession and legal possession appears very clearly when the case is presented of two persons in the occupancy of the same property. Littleton[37] says that "If A be seised of a mese (i. e., a house including 'buildings, curtilage, orchard and garden,' Co. Litt. 56a), and F that no right hath to enter into the same mese claiming the said mese to hold to him and to him and to his heirs entereth into the said mese, but the said A is then continually abiding in the same mese; and in this case the possession of the freehold shall be always adjudged in A and not in F, because in such case where two be in one house or other tenements and the one claimeth by one title and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements." Bacon's Abridgment (4 Bacon's Abridgement, 327), cites Dalton: "If two are in possession of a house, and the one enters by one title and the other by another, he that hath the right shall be supposed to be in the possession." It is said in Pollock & Wright, p. 19: "We must have some positive rule to meet the case of a thing which is the object of dispute and so evenly disputed that no claimant can be said to have de facto possession rather than another. It might conceivably be held that legal possession is in suspense as well as the physical possession. But the common law does not so hold; it prefers, in the absence of a decisive state of fact, to make legal possession follow the better right." Although the authors last cited were not dealing with cases involving force, the citations are important as showing the difficulties that arise in determining the question of actual possession, which alone is important in an action of forcible entry and detainer. The illustrations last given are quite like the case at bar. If Perkins had been allowed and able to prove what he offered to show, he would have established a prior possession of the premises in dispute, with the acquiescence of Schwinn. This, as the Supreme Court said, did not involve any questioning of Schwinn's title or estate, but only the question of his assent to Perkins' actual possession. While Perkins may not have been physically present in the premises at all hours, if he had taken possession in execution of a parol surrender of the lease, he was legally in possession of the property, and thereafter any attempt by Schwinn to resume possession was a trespass.

[37] Co. Litt. 368a.

A mere trespasser may be forcibly ejected if no more force than is necessary for the purpose is used; it is only when a trespasser has ceased to be a mere trespasser and his occupancy has ripened into a possession, although it may be a wrongful possession only, that the statute relating to forcible entry and detainer becomes applicable. We agree with the statement of Pollock that a mere trespasser does not gain possession until there has been something like acquiescense in the physical fact of his occupation on the part of the rightful owner. Pollock on Torts, 312. This was the view taken by Lord Denman in *Brown* v. *Dawson*, 12 Adolphus & Ellis, 624, at page 629, 10 L. J. Q. B. 7. He says: "A mere trespasser can not, by the very act of trespass, immediately and without excuse give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." The use of the word "former" in connection with possession seems to be inaccurate, as the possession can hardly be said to have been terminated by the act of trespass if the trespasser did not himself gain possession by that act alone. It is difficult to say what will suffice to enlarge a mere occupation into a legal possession. Some light is thrown upon the subject by the passage from Bracton, quoted by the Supreme Court of Massachusetts in *Page* v. *Dwight*, 170 Mass. 29, 48 N. E. 850, 39 L. R. A. 418. Bracton, 162b. Bracton is dealing with a case of disseisin, and says: "The first and principal remedy is of this kind, namely, that he who has been disseised may reject the spoiler of his own strength if he can, or by strength which he has called in or recalled, provided no interval has elapsed, the disseisin or misdeed being flagrant." Bracton's expression as translated, "provided no interval has elapsed," hardly differs from Lord Denman's expression six centuries later, "without delay." In such a case as Mr. Justice Barker suggests in *Page* v. *Dwight*, the forcible entry and the recapture are but one transaction, and the recapture is not a forcible entry, but a successful and proper resistance of a forcible entry; all that has been done is to resist successfully a wrongful act. It would be a travesty of law, if a man could enter my house and defy me to protect my own possession except by the slow process of the courts; and, if I am in possession, it can make no difference whether the trespasser enters by force or by stealth. The act as to forcible entries and detainers was for the protection of those who already had actual and peaceable possession, not for those who newly acquired a mere foothold by force or by stealth. No distinction in the two methods is made by the books, and in *Mason* v. *Powell*, 38 N. J. L. 576, the entry which was held to be a forcible entry was made in the absence of the rightful possessor and without any breach of the peace. These views are in harmony with the expressions of our own courts. *Mairs* v. *Sparks*, 5 N. J. L. 513, at page 516, and *Mercereau* v. *Bergen*, 15 N. J. L. 244, at page 247, 29 Am. Dec. 684. These cases are similar to the present. If Perkins took possession in August in execution of Schwinn's surrender, that possession was in him still unless Schwinn had in some way acquired a new possession; and the jury might have found that Perkins, instead of acquiescing, under-

took to resist what amounted, under the decision in *Mason* v. *Powell*, to a forcible entry by Schwinn, and, so far from being himself guilty of a forcible entry, was only defending his already existing possession against a mere trespasser. The Massachusetts Supreme Court has reached the same result in a similar case. *Hodgkins* v. *Price*, 132 Mass. 196. The court said: "The process is for the purpose of restoring one to a possession which has been kept from him by force. It is not a process against a party who resists the right of possession by force, but it is for an interference with an actual possession. The claim that this plaintiff was ever in possession of this estate is simply preposterous. He had no more possession of it than he would have had of one of the rooms of the building if he had gone into such room and said to the occupant of it: 'I have come to take possession of this room. Here I am, in possession; you will please go out. I propose to hold this by force, and, if you attempt to remove me by force, then the weaker of us on being ejected will bring an action of forcible entry and detainer against the other.' But to make this illustration precisely analogous we will say that this party, instead of calling in at the place of business when the tenant was there, took the opportunity while he had gone to dinner to clamber through the transom window over his door, and in the mode before suggested salute him upon his return. It would be a disgrace to the law and to all concerned in the administration of it, to say that a possession thus forcibly obtained, before the business hours of the day from one who is in actual peaceable occupation of the premises, is to be protected and restored by the law when the actual occupant shall resume his occupation." If the rejected evidence had been received, it would have presented a question for the jury whether the plaintiff's agent Willits was occupying the premises under such circumstances as amounted to a legal possession, or whether Perkins had the legal possession by virtue of an executed surrender. We think the evidence should have been received, and that the Supreme Court was right in reversing the judgment of the District Court.[38]

---

[38] The plaintiff in this action must show actual and peaceable possession prior to the time of the forcible entry and detainer. *Pennsylvania* v. *Waddle*, Addison (Pa.) 41 (1792); *Carter* v. *Newbold*, 7 How. Pr. (N. Y.) 166 (1852); *Mann* v. *Brady*, 67 Ill. 95 (1873); *Commonwealth* v. *Brown*, 138 Pa. 447 (1891); *Cain* v. *Flood*, 21 N. Y. Civ. Proc. 116 (1891); *Gulledge* v. *White*, 73 Tex. 498 (1889); *Chessen* v. *Harrelson*, 119 Ala. 435 (1898); *Laskodik* v. *Tomashumes*, 161 Ill. App. 598 (1911); *Carrier* v. *Carrier*, 85 Conn. 203 (1912). Mere constructitve possession is insufficient, although an actual foothold is not always absolutely requisite. *O'Neill* v. *Jones*, 72 Minn. 446 (1898); *Bradley* v. *West*, 60 Mo. 59 (1875); *Giddings* v. *Land, &c., Co.*, 83 Cal. 96 (1890); *Muller* v. *Blake*, 167 Ill. 150 (1897). Possession without right has been protected against forcible dispossession even by the legal owner. *Iron Mountain R. Co.* v. *Johnson*, 119 U. S. 608 (1886); *Mitchell* v. *Carder*, 21 W. Va. 277 (1883); *Peyton* v. *Peyton*, 34 Kans. 624 (1886). But a mere scrambling or interrupted possession is insufficient to support an action. *Wray* v. *Taylor*, 56 Ala. 188 (1876); *Newton* v. *Doyle*, 38 Mich. 645 (1878); *Stevenson* v. *Morrissey*, 22 Ill. App. 258 (1886); *Blake* v. *McCray*, 65 Miss. 443 (1888). A mere trespasser or intruder can not bring proceedings. *Hodgkins* v. *Price*, 132 Mass. 196 (1882); *Lawton* v. *Savage*, 136 Mass. 111 (1883); *Cox* v. *Cunningham*, 77 Ill. 545 (1875); *Torrey* v. *Berke*, 11 S. Dak. 155 (1898). Generally, the entry or the detainer must be accompanied by acts of violence or

(c) Dower.

WATERS *v.* GOOCH.

COURT OF APPEALS OF KENTUCKY, 1831.

6 *J. J. Marsh.* (*Ky.*) 586.

ROBERTSON, C. J.: This writ of error is prosecuted to reverse a judgment against the demandant in a writ of dower, *unde nihil habet.*[39] The defendant, who was such as tenant, did not enter his appearance, but demurred to the evidence given on a writ of inquiry; and the demurrer was joined by the demandant, and sustained by the court. The opinion on the demurrer was reserved until the jury had returned a verdict in favor of the demandant for dower, and for one cent in damages. And then, after sustaining the demurrer, the following judgment was rendered:

"Therefore, it is considered by the court that the defendant recover against the plaintiff his costs by him, about his defense herein expended, and the said plaintiff in mercy," etc.

The common-law writ is an unusual though an appropriate remedy for obtaining dower in this state.[40] But as no statute of Kentucky, or of Virginia prior to the separation, has prescribed the mode of procedure throughout, and as the bill in equity has, in the practice of both states, superseded the real action of the common law in cases of dower, we have to decide now, for the first time and without the aid of any direct authority, how far the ancient British forms in such cases shall prevail, and what is the proper mode of proceeding in the courts of this state.

In England, when the writ was obtained, a summons was served

---

menaces sufficient to cause an apprehension of injury. *Kramer* v. *Lott,* 50 Pa. 495 (1865); *Thompson* v. *Commonwealth,* 116 Pa. 155 (1887); *Pharis* v. *Gere,* 110 N. Y. 336 (1888); *Richter* v. *Cordes,* 100 Mich. 278 (1894); *Fults* v. *Munro,* 202 N. Y. 34 (1911); *In re Munro,* 195 Fed. 817 (1912); *Brooks* v. *Brooks,* 84 N. J. L. 210 (1913). In some cases an entry against the will of the occupant obtained by strategy or stealth has been held sufficient to sustain the charge. *Tucker* v. *Quimby,* 37 Iowa 15 (1873); *Hammond* v. *Doty,* 184 Ill. 246 (1900); *Young* v. *Milward,* 109 Ky. 123 (1900); *Carteri* v. *Roberts,* 140 Cal. 164 (1903); *White* v. *Pfieffer,* 165 Cal. 740 (1913). The action does not lie against one put in possession by the sheriff under a writ. *Rook* v. *Godfrey,* 105 Tenn. 534 (1900), but if the writ be void it will not give lawful possession. *Stark* v. *Billings,* 15 Fla. 318 (1875).

[39] The legal remedy at common law to enforce an assignment of dower was the writ of dower *unde nihil habet,* or the writ of right of dower, brought against the tenant of the freehold, the former writ was adopted where no dower had been assigned by the tenant within the vill where the lands lay of which dower was demanded, but if the widow had received part of her dower the remedy was by writ of right of dower. Scribner on Dower, vol. II, p. 91. The writ was abolished in England by the Common-Law Procedure Act of 1860, § 26, and now an ordinary action is commenced by writ endorsed with notice that dower is claimed, Rules of Supreme Court, Appendix A, pt. II, § 4. 3 Select Essays Anglo-Amer- Leg. Hist. 690.

[40] In a number of the states the common-law mode of proceeding by writ of dower *unde nihil habet* is substantially retained, although the widow is

on the land, and proclamation, warning the tenant of the freehold, was made, fourteen days before the return of the summons, on a Sabbath day after divine service, at or near the church in the parish in which the land lay; on a proper return of the service and proclamation, the tenant was entitled to an essoign if he appeared, but if he failed to appear the demandant was entitled to a "grand cape," commanding the sheriff to take one-third of the land designated by metes and bounds by the view of good and lawful men (generally two, and to warn the tenant to appear at the next term. On a proper return of the grand cape the demandant was entitled to a judgment for her dower and for a writ of seizin for the land, described in the return, to be held by her in severalty; after judgment for dower by default, if the demandant claimed damages also, and suggested on record that her husband died seized, a writ of inquiry was awarded; the inquisition was taken by the sheriff in the country and returned on the writ of seizin. It was not necessary to file a count unless the tenant entered his appearance and offered to plead; and when an issue was made up, unless the jury, impannelled and sworn to try it, found specially that the husband died seized, and of what estate and when he died, the demandant was not entitled to damages; 2 Saunders Reports 43, n. 1, 3, 4.

The judgment for dower and that for damages were deemed distinct, and independent, the one of the other. The suit was considered as ended, at common law, by the judgment for seizin, and the damages were added by the statute of Merton, only when the husband died seized; and hence, though personal notice was not necessary in order to obtain a judgment for dower, an inquisition of damages was illegal and ineffectual unless the tenant had personal notice of the time of executing the writ of inquiry; 2 Saun. 45, a. n. 4.

A statute of Virginia (1748) re-enacted in this state in 1796, 1 Dig. 66, declares that "process in all real actions shall be the same and have the same effect as in England, except that the returns shall be according to the laws of this commonwealth;" and also allows one imparlance, and abolishes "views" essoins, and "vouchers." An act of 1798, 1 Dig. 66, reformed the method of proceeding in writs of right; but the mode of proceeding in writs of dower has never been specially regulated by any statute. We are of opinion, however, that the statute of 1810, 1 Dig. 258, and that of 1811, 1 Ib. 262, for regulating civil proceedings in all suits at common law,

---

not limited to the common-law action alone. The action, however, has been modernized and simplified. See Massachusetts Revised Laws (1902), ch. 180, p. 1621; Maine Rev. Stat. (1903), ch. 105, p. 848; New Hampshire Public Statutes (1901), ch. 242, p. 753; Rhode Island General Laws (1909), ch. 329, p. 1196, § 7; New Jersey General Statutes, vol. II, p. 1275; Delaware Laws, ch. 87, p. 663; Pennsylvania Act of June 13, 1836; P. L. 568, § 79; *Brown* v. *Adams*, 2 Whart. (Pa.) 188 (1836); *Jones* v. *Patterson*, 12 Pa. 149 (1849); *McFadden* v. *McFadden*, 32 Pa. Super. Ct. 534 (1907). In some jurisdictions ejectment will lie for unassigned dower. *Galbraith* v. *Fleming*, 60 Mich. 408 (1886), although at the common-law ejectment would not lie where the dower had not been assigned. *Doe* v. *Nutt*, 2 Car. & P. 430 (1826); *Gourley* v. *Kinley*, 66 Pa. 270 (1870). In New York the action for dower is regulated by the Code of Civil Procedure, §§ 1596 to 1625. In California, dower, as such, is not allotted to the widow, California Civil Code, § 173.

must be understood as applying to writs for dower, not only as to the service and return of process, but also as to the pleadings and trial: Consequently, a count will be necessary whether the tenant appear or not, and the case, like other common-law suits, may stand for trial at the first term after ten days' personal service of the writ.

Prior to the statute of Merton a demandant was not entitled to recover damages in any writ of dower. That statute allowed damages when the husband had died seized.[41] But since its enactment the common-law form of declaring (when a count became necessary) was not changed; and consequently it was never necessary to aver, in the count, that the husband died seized. But when the demandant had obtained judgment for dower by default and without a count, a writ of inquiry of damages was not awarded unless it was suggested on the record that the husband had died seized.

The tenant, by default, admits the demandant's right to dower so far as her count alleges a legal claim: consequently a judgment for the dower should be rendered, in such a case, in consequence of the default. But there should be no writ of inquiry unless it be inferable from the count that the demandant claims damages by averring, in substance, that her husband died seized. For, unless the count can be construed as importing an allegation that the husband died seized, a default does not admit that the demandant has a right to damages or to a writ of inquiry: and as a writ of inquiry in a case of dower should be executed in court (as in ordinary cases in this country), the tenant might be surprised if there should be an inquisition as to damages when he had not been notified by the count or otherwise that the demandant claimed, or was ever entitled to any damages. It seems to us that as, according to the statutes of 1810-11, writs of dower should be tried in the same manner as other suits at law are triable, whenever a demandant may be entitled to a writ of inquiry, the inquisition should be held on the hearing of the cause in court; and hence, as the common-law mode of suggesting on the record that the husband died seized, and of notifying the tenant of the time of holding the inquisition in the country is ineligible and inappropriate here, there should be no inquiry of damages, by default, unless the count allege, in effect, that the husband died seized.[42]

---

[41] *Embree* v. *Ellis*, 2 Johns. (N. Y.) 118 (1807). See N. Y. Code Civ. Proc., § 1601, and *Marble* v. *Lewis*, 53 Barb. (N. Y.) 432 (1867); *Blair* v. *Oliphant*, 9 Mo. 237 (1945); *Layton* v. *Butler*, 4 Harr. (Del.) 507 (1847); *Hopper* v. *Hopper*, 22 N. J. L. 715 (1850); *Benner* v. *Evans*, 3 P. & W. (Pa.) 454 (1832); *Price* v. *Hobbs*, 47 Md. 359 (1877); *Roan* v. *Holmes*, 32 Fla. 295 (1893) and note 21 L. R. A. 180.

[42] In modern proceedings the sufficiency of the pleadings will, of course, depend upon the statutes and practice of the particular jurisdiction. In general, the widow should set forth her marriage. *Draper* v. *Draper*, 11 Hun (N. Y.) 616 (1877), the seizin of her husband, *Morse* v. *Thorsell*, 78 Ill. 600 (1875); *Hutchins* v. *Burril*, 72 Maine 311 (1881); *Kenyon* v. *Kenyon*, 17 R. I. 539 (1891); *Garrison* v. *Young*, 135 Mo. 203 (1896); describe the premises. *Atwood* v. *Atwood*, 22 Pick. (Mass.) 283 (1839); *Bostick* v. *Barnes*, 59 S. Car. 22 (1900), and in some jurisdictions a demand on the tenant, *Freeman* v. *Freeman*, 39 Maine 426; (1855); *Page* v. *Page*, 60 Mass. 196 (1850); *Davis* v. *Walker*, 42 N. H. 482 (1861), although at common law such a demand was unnecessary to the maintenance of an action, *Jackson* v. *Loucks*, 7

The count in this case, does not allege that the husband died seized; consequently the writ of inquiry was unauthorized, and ought to have been set aside. When a defendant admits, by default, that the plaintiff is entitled to damages, a demurrer to evidence on the inquiry would be irregular, because the effect of a demurrer to evidence, and of a judgment sustaining such demurrer, is, that the plaintiff is not entitled to any damages; and, therefore, when a defendant has admitted, by his default, that the plaintiff is entitled to some damages, he should not demurr to illegal or insufficient testimony, but should object to its introduction, or move to exclude it. But as the default in this case did not admit that the demandant was entitled to any damages, the demurrer to the evidence which proved that her husband had sold and conveyed the land in his lifetime, was proper, although a motion to set aside the inquisition, or quash the writ of inquiry might, perhaps, have been more regular. The demandant was not entitled to costs, unless she had been entitled to damages, for we know of no law allowing costs to a demandant in a writ of dower when she fails to obtain damages.[43]

Wherefore, as to the damages and costs, the circuit court did not err in sustaining the demurrer. But it erred in giving costs to the tenant, as he had not entered an appearance, and also in rendering judgment in bar of the action. As the default admitted the right to dower so far as it was sufficiently alleged in the count, judgment ought to have been given for dower; and if the count be defective, still the court erred in barring the action; and therefore judgment must be reversed. As the case will be remanded, and may be retried, it is proper to observe that the count is defective in not alleging that the husband was ever seized of such an estate as would entitle the wife to dower. To entitle a demandant to dower, her count must aver, in substance, that she was the wife; and that the husband was, during coverture, seized of a freehold interest at least; see Booth on Real Actions; Sanders, supra, and *Ambler and Wife* v. *Norton*, 4 Henning & Munford, 42. It is true that a freehold may be only a life estate; but it is a maxim in pleading that a freehold shall prima facie, be understood to mean the largest estate in fee. The count in this case avers only, that the husband had "purchased" the land. That is not equivalent to an averment that he had acquired a freehold interest; because he might have "purchased" only an estate for years, of which his wife would not have been dowable.

As there may be another trial, we deem it not improper to make a further suggestion as to the mode of obtaining and enforcing a judgment for dower. Neither the grand nor petty cape can be applicable or proper in the procedure by writ of dower in this state; because, according to the statute regulating the mode of proceeding in common-law actions, a judgment may be obtained at the appearance term; nor is any other process necessary or proper for warning

---

Cow. (N. Y.) 287 (1827); *Cowan* v. *Lindsay*, 30 Wis. 586 (1872); but failure to make demand may bar a recovery of damages for detention on a plea of *tout temps prist*. *Woodruff* v. *Brown*, 17 N. J. L. 246.

[43] *Fisher* v. *Morgan*, 1 N. J. L. 147 (1792); *Sharp* v. *Pettit*, 4 Dall. (Pa.) 212 (1800), but see *Gannon* v. *Wildman*, 3 Pa. D. R. 835 (1894).

the tenant, than a writ in the nature of the precipe, and the form of which is given, in outline, by an act of 1796, 1 Dig. 445.

In England, when the tenant appeared and pleaded to the action, if the demandant obtained judgment for dower, it was rendered for one-third of the land (described in the count) to be ascertained and allotted to her by metes and bounds by the sheriff, on an inquisition by two or more persons selected by him in pursuance of the writ of seizin on which he made his return to court showing the manner in which he had executed it, and what land he had delivered to the demandant.[44] The form of the judgment for dower, together with that for damages when the husband died seized, may be seen in 2 Sanders, 331-2. Such must be the judgment in this country, whether rendered upon an issue or by default, because, as neither the grand nor petty cape can be used, and as a judgment may be rendered at the first term succeeding the service of the writ, the dower can not be designated here prior to the judgment, as it was in England when there was a default, and therefore must, in all cases alike, be set apart in severalty by the sheriff acting under the writ of seizin. If either party have cause to complain of the manner of executing the writ, the return may, for sufficient cause, be quashed, and a new writ issued.

If the husband had alienated the land in his lifetime, seizin should be given to the wife of a third in value, according to the condition of the land at the date of the alienation; Perkins, Tit. Dow. sec. 328; Hargrave's note, 193, to lib. 1 Co. Lit. *Humphrey* v. *Phinney*, 2 Johnson's Rep. 484; *Dorchester* v. *Coventry*, 11 Johnson's Rep. 512; *Shaw* v. *White*, 13 Johnson's Rep. 179.

On the return of the cause to the circuit court the demandant may amend her count, and the defendant may, of course, appear and plead.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.[45]

---

[44] *Foliambe's Case*, Godbolt's Reports 165 (1611); *Gannon* v. *Widman*, 3 Pa. Dis. R. 835 (1894). See also, Scribner on Dower, vol. II, p. 140; Park on Dower, p. 299.

[45] As early as the reign of Elizabeth the court of chancery exercised an auxiliary jurisdiction in claims for dower. The limits of this jurisdiction were not clear at first, but in time were expanded until as a final result of the decisions, equity entertained a general concurrent jurisdiction in the assignment of dower. *Curtis* v. *Curtis*, 2 Brown's Ch. 620 (1789); *Mundy* v. *Mundy*, 2 Vesey Jr. 122 (1793); *Pultney* v. *Warren*, 6 Vesey Jr. 73 (1801). This jurisdiction has generally been assumed by courts of equity in America. *Herbert* v. *Wren*, 7 Cranch (U. S.) 370 (1813); *Badgley* v. *Bruce*, 4 Paige ch. (N. Y.) 98 (1833); *Hartshorne* v. *Hartshorne*, 2 N. J. Eq. 349 (1840); *Blain* v. *Harrison*, 11 Ill. 384 (1849); *Farrow* v. *Farrow*, 1 Del. Ch. 457 (1822); *Sprague* v. *Stevens*, 32 R. I. 361 (1911).

In Pennsylvania, the Act of July 7, 1885, P. L. 257, confers upon the courts of common pleas all the power and jurisdiction of a court of equity in dower and partition. See under prior acts, *Brown's Appeal*, 84 Pa. 457 (1877); *Kelso's Appeal*, 102 Pa. 7 (1882). The Orphans' Court has jurisdiction where the widow elects to take against her husband's will. *Lippincott's Estate*, 7 Phila. (Pa.) 504 (1870); Robin's Appeal, 1 W. N. Cas. 238 (1875).

(d) Waste.

DUVALL *v.* WATERS.

COURT OF CHANCERY OF MARYLAND, 1827.

1 *Bland Ch.* (*Md.*) 569.[46]

BLAND, Chancellor: The terms waste and trespass are very often used to designate injuries to property of the identical same nature. The cutting of a timber tree, or the pulling down of a house, may be an act entirely lawful; or it may be an act of waste, or of trespass; and, that not because of any peculiarity in the act itself; but, because of the party, by whom it may have been done, having an absolute title, a limited estate, or no right whatever. The absolute owner of an estate in fee simple, without any incumbrance, or charge upon it, has an uncontrollable power to dispose of it as he may think proper; and can be, in no way held accountable, as a waster or trespasser, for any thing he may do with the trees, houses, or soil of his lands. If he who does such an act has only a particular estate, as a tenancy for life or years, it is properly denominated waste; but, if he has no right whatever, it is then said to be a trespass. In general, when any permanent or lasting injury is done, by the holder of the particular estate, to the inheritance, or to the prejudice of any one who has an interest in the inheritance, it is properly called waste; as where timber trees are felled, or houses are destroyed by a tenant for life or years; or by a mortgagor or mortgagee in possession; or by a tenant in fee simple, where the state has reserved to itself an interest in the trees, etc., for the use of the public.

In general waste is the abuse, or destructive use of property by him who has not an absolute unqualified title. And in general trespass is an injury, or use, without authority, of the property of another, by one who has no right whatever.

At common law, if the owner of the inheritance had good reason to believe, that a tenant in dower, or by the courtesy, or a guardian designed to commit waste, he might, before any waste was done, have a prohibition directed to the sheriff, commanding him to prevent it from being done; and in execution of this writ of prohibition, the sheriff might, if necessary, call to his aid the *posse comitatus*. This writ was extended, by a statute passed in the year 1267, to tenants for life and for years; and afterwards, in 1285, it was taken away, and another form of writ given in its place; but when the court of chancery first granted injunctions, it seems to have taken its jurisdiction from this writ of prohibition of waste.[47]

After waste had been actually committed, the ancient corrective remedy, in a court of common law, was by a writ of waste, for the

---

[46] Only so much of the opinion of the chancellor as describes the common-law remedies for waste is printed.

[47] Coke on Littleton, 53; 2 Coke's Institutes, 299; *Jefferson* v. *Bishop of Durham*, 1 B. & P. 105 (1797).

recovery of the place wasted and treble damages, as a compensation for the injury done to the inheritance.[48] There were, however, several cases to which the writ of waste did not extend; and as to such cases, the party was left without any remedy at common law. The action of waste could only have been brought by him who had the immediate reversion or remainder, to the disinheritance of whom the waste was always alleged to have been committed; and therefore, if a lease had been made to A for life or years, remainder to B for life; and A committed waste, the action could not be brought by him, in reversion or remainder, so long as the life estate of B continued. But the intervening life estate only suspended the remedy; for, after its termination, the reversioner, or remainderman might then bring his action against A for the waste done before that time.[49] Nor could any one maintain this action unless he had the estate of inheritance in him at the time the waste was committed; nor could it be sustained against an executor, for waste committed by his testator, it being a wrong which died with the person; nor could one coparcener bring an action of waste against another; although one joint tenant or tenant in common might have a writ of waste against his cotenant, compelling him either to make partition, and take the place wasted as his own share, or to give security not to commit any further waste.[50]

At the common law there was no process by which a threatened trespass upon a real estate, however great or irreparable, could be prevented. After the act was done the injured owner might bring his action of trespass against the wrongdoer, and recover satisfaction in damages; but, the common law gave him no means of preventing the execution of the designs and threats of any one, whose declared and settled purpose was to commit a trespass upon his

---

[48] "Waste, at common law, was a real action which could be maintained for an injury to lands, houses and woods to the prejudice of the heir. By the statute of Gloucester (6 Edw. I, ch. 5), the plaintiff could recover not only the possession of the property, but treble damages for the injury. Thereafter the action was considered a mixed action and was based partly on the common law and partly on the statute. After being in long disuse in England, the action was abolished by the statute, 3 & 4 William IV, ch. 27. This action was never much in use in this country, the action on the case in the nature of waste for the recovery of single damages only being resorted to in its stead, as it had long superseded in England the old action of waste." Wills' Gould on Pleading, 13. 3 Blackstone's Commentaries, 228; *Moore* v. *Townshend*, 33 N. J. L. 284 (1869); *Stevens* v. *Rose*, 69 Mich. 259 (1888). To what extent the statutes of Marlbridge and Gloucester are in force in this country is a matter of considerable uncertainty. Compare *Sackett* v. *Sackett*, 8 Pick. (Mass.) 309 (1829); *Waples* v. *Waples*, 2 Harr. (Del.) 281 (1837), with *Moore* v. *Ellsworth*, 3 Conn. 483 (1821); *Stetson* v. *Day*, 51 Maine 434 (1863); *Roby* v. *Newton*, 121 Ga. 679 (1904); *Magness* v. *Harris*, 80 Ark. 583 (1906), and see 4 Kent's Commentaries, 80.

[49] *Robinson* v. *Wheeler*, 25 N. Y. 252 (1862); *Short* v. *Piper*, 4 Harr. (Del.) 181 (1844); Tiffany on Real Property (1903), § 255. One entitled to a contingent remainder can not maintain an action of waste, his remedy is in equity. *Latham* v. *Lumber Co.*, 139 N. Car. 9 (1905); *Ohio Oil Co.* v. *Daughetee*, 240 Ill. 361 (1909); *Canada* v. *Daniel*, 157 S. W. 1032 (Mo. 1913). Otherwise in Pa. by act of June 8, 1891, P. L. 208.

[50] *Nelson* v. *Clay*, 7 J. J. Marsh. (Ky.) 139 (1832); *Hoolihan* v. *Hoolihan*, 193 N. Y. 197 (1908).

lands. If, however, the claimant was not in possession, and he thought proper to bring an action to establish his right, and recover the estate; then, and in aid of such suit, and to prevent any injury from being done to the property, pending the controversy, the common law gave the writ of estrepement. It would seem, that originally this writ could only be used as an aid to a real action for the recovery of the land itself; but, its scope having been extended by statute, it was afterwards used in connection with actions in which no land was demanded, as in actions of waste, trespass, etc. It was not, however, allowed to be associated with a suit for partition; because the tenants, being both of them in possession, there was no reason why one should be restrained and not the other. A writ of estrepement might be sued out at the same time, and together with the original writ, commencing the action; and that too, in those cases where damages for waste done, pending the action, might be recovered; because it was injurious to the commonwealth that waste should be done, and peradventure he who committed it might not be able to satisfy the plaintiff his full damages.[51]

The writ of estrepement is certainly a preventive remedy, and so far it is analogous to a writ of prohibition, by which a tenant in dower, or by the courtesy might be prevented from doing waste. But it is more; it is also a remedial and corrective remedy; because, the holder of land may not only be prevented from doing waste; but if he should do any notwithstanding the prohibition, the plaintiff may recover damages for such waste, even up to the time when possession shall be delivered to him. This writ has some other peculiar traits of character. It can never be brought into action independently and alone; it must always be associated with another as its leader; to which it acts as an auxiliary, whose fortunes it must follow, and to whose final fate it must submit. If it emanates, as it may, at the same time and together with its chief, from the chancery office, it is then called an original; but if it be awarded by the court, in which the action is depending, as it may, it is then called a judicial writ of estrepement. This writ, as its very name distinctly imports, is always intended to stay waste. It is nowhere spoken of as a means by which a mere trespass may be prevented; in all its modifications, it is continually treated as a remedy against waste. But in a writ of right, and all the other actions, except a writ of waste, to which an estrepement is called in as an auxiliary, there is not any privity of title whatever between the parties to the suit; all such privity being expressly disavowed. The plaintiff asserts, and calls for the vindication of his absolute title against an unqualified wrongdoer, who he complains of as a disseizor, ejector, or trespasser.

[51] The scope of the writ of estrepement has been extended in Pennsylvania by the acts of April 2, 1803, 4 Sm. L. 88, § 2; March 29, 1822, 7 Sm. L. 520, § 1; March 27, 1833, P. L. 99, as well as other acts which will be found in 2 Pepper & Lewis' Digest, 3333, title estrepement. *Brown* v. *O'Brien*, 3 Clark (Pa.) 93 (1838); *Jones* v. *Whitehead*, 1 Parson Eq. (Pa.) 304 (1847); *Smith* v. *Chappell*, 25 Pa. Super. Ct. 81 (1904); *Eberly* v. *Rupp*, 90 Pa. 259 (1879); *Arthurs* v. *Wilson*, 242 Pa. 429 (1913).

And, therefore, in all such cases, the injury which it is the office of the writ of estrepement to prevent, is not properly waste, founded on privity of title, as between a reversioner and a particular tenant; but literally a trespass, in the chancery acceptation of that term; and not a mere abusive use of that which a lawful holder had a right to enjoy.

Where the title and the rights of the parties are admitted, there can be no mistake; and therefore, there should be no confusion or misapplication of these terms waste and trespass. But, in the English authorities, there is not the same distinctness, in the application of them, to any such injuries to the inheritance, where the rights of the parties are disputed and put in litigation. If the party asserts his title to an estate, by an action at law, such acts, with reference to a presumption in favor of the validity of his title pending the suit, are said to be waste; but if he asks, in a court of chancery, to have the doing of such acts prevented by an injunction, they are denominated trespasses. This difference in characterizing the same injurious acts, when proposed to be prohibited by an estrepement, as waste; and when proposed to be restrained by an injunction as trespass, has been attended with some confusion. And therefore in relation to the peculiar species of injunctions, now under consideration, all such acts as would be deemed waste, when done by an admitted particular tenant, if done after the institution of any suit involving the title, or of a suit for partition, it may be well to denominate eventual waste.

The judicial records of the state, and the acts of assembly regulating officers' fees show, that the writ of waste as well as the writ of estrepement were at one time in common use in Maryland. But here, as in England, these writs have fallen into disuse, and are now seldom, or never brought, having given way to the more easy and expeditious remedy by an action upon the case in nature of waste at common law; by which the plaintiff obtains satisfaction for the injury done to his inheritance by a recovery of damages alone;[52] and in Maryland to an injunction from chancery which performs the office of a writ of estrepement.

The whole subject of waste, in Maryland, seems to have passed, almost altogether, from the cognizance of the court of common law to that of the court of chancery; and the shifting of this matter so entirely, from the one jurisdiction to the other, may be attributed to the nature of the injury requiring redress; to the different constitutions of the tribunals; and to their peculiar modes of proceeding. Waste is a wrong which can not always be duly estimated and remunerated in damages; it is an injury which requires to be met, in

[52] *Greene* v. *Cole*, 2 Saund. 252 (1671) and note; *Young* v. *Spencer*, 10 B. & C. 145 (1829); *Woodhouse* v. *Walker*, L. R. (1880), 5 Q. B. Div. 404; *White* v. *Wagner*, 4 H. & J. (Md.) 373 (1818); *Smith* v. *Follansbee*, 13 Maine 273 (1836); *Bellows* v. *McGinnis*, 17 Ind. 64 (1861); *Moore* v. *Townshend*, 33 N. J. L. 284 (1869); *Patterson* v. *Cunliffe*, 7 Phila. (Pa.) 564 (1875); *Stevens* v. *Rose*, 69 Mich. 259 (1888); *Dorsey* v. *Moore*, 100 N. Car. 41 (1888); *Trustees of Proprietors of Kingston* v. *Lehigh V. Coal Co.*, 241 Pa. 469 (1913). There is a double remedy in Rhode Island. *Thackeray* v. *Eldigan*, 21 R. I. 481 (1899); and Maine, *Stetson* v. *Day*, 51 Maine 484.

its onset, or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise; and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident can be obtained from a court of common law, open only at short intervals during the year; acting from term to term; and limited to a given set of technical forms of proceeding. Hence it is, that the remedy has been so constantly, in modern times, sought in the court of chancery, which is always open, constantly accessible, and is capable of moving with an energy and despatch called for by the emergency, and suited to the peculiar nature of the case.[53]

(e) Account.[54]

THOURON *v.* PAUL.

SUPREME COURT OF PENNSYLVANIA, 1841.

6 *Whart.* (*Pa.*) 615.[55]

Error to the District Court of the City and County of Philadelphia.

This was an action of account render brought by Nicholas E. Thouron and Henry Paillet, trading under the firm of N. E. Thouron & Co., against Joseph S. Paul and Eliza his wife, late Eliza Clark, administratrix of Maskline Clark. The defendants pleaded that the intestate never was bailiff or receiver, plene administravit, etc.

The cause came on for trial before Jones, J., on the 23d of April, 1838, when evidence was given on the part of the plaintiffs, that on the tenth day of May, A. D. 1826, the plaintiffs being the owners of certain silk goods and other goods, in value seven thousand eight hundred and forty-eight dollars and eighty-six cents, sold one half of the same to the intestate Maskline Clark, and took from him his notes at six months, for the same, under an agreement that the goods were to be shipped to Guayaquil, in South America, on their joint

---

[53] For the remedy in equity for waste see Lewis' Cases on Equity Jurisdiction, 1; 1 Ames' Cases on Equity Jurisdiction 460; Bewes on Waste, 166; *Garth* v. *Cotton*, White & Tudor's Leading Cases in Equity, 806; *Wilds* v. *Layton*, 1 Del. Ch. 226 (1822); *Phoenix* v. *Clark*, 6 N. J. Eq. 447 (1847); *Denny* v. *Brunson*, 29 Pa. 382 (1857); *Moses* v. *Johnson*, 88 Ala. 517 (1889). In England the remedies for waste, under the Judicature Act of 1873, are an action for damages, for an account and for an injunction; Judicature Act of 1873, § 25, cl. 3; Annual Practice (1914), p. 1928; Rules of Sup. Ct., Order 50, rule 6; *Meux* v. *Cobley*, L. R. (1892) 2 Ch. Div. 253.

In most states there are express statutory or code remedies for waste which sometimes include a double or treble liability for damages, 1 Stimson's American Statute Law, §§ 1332, 1343; N. Y. Code Civ. Pro., §§ 1651-1659; *Hoolihan* v. *Hoolihan*, 193 N. Y. 197; Cal. Code Civ. Proc., § 732; *Isom* v. *Book*, 142 Cal. 666 (1904); *Rupel* v. *Ohio Oil Co.*, 95 N. E. 225 (Ind. 1911).

[54] See 1 A. & E. Encyc. of Law (1st ed.) 128, Title Account Render; article by Prof. Langdell, 2 Harvard Law Rev. 242, 267.

[55] The statement of facts is abridged and the arguments of counsel and part of the opinion of the court are omitted.

account; the shipment to be under the control of the plaintiff, and the profit and loss to be equally divided between them. That the shipment was accordingly made by the plaintiff, but proved unfortunate; and the net loss to each of the parties was two thousand six hundred and thirty-four dollars and thirty-three cents. The plaintiff's counsel admitted that none of the proceeds of the shipment came into the hands of the intestate Clark, in his lifetime, or of his administrators, since his death, and that all the proceeds were received by the plaintiffs. The plaintiff's counsel claimed to recover in this suit the sum of four thousand five hundred and twenty dollars and fifty-one cents, being the amount of the net loss on half of the shipment, as above mentioned, with interest to the day of trial, giving the defendant credit for the payments made by him and received by the plaintiff, as by an account current produced. The plaintiff's counsel then closed his case. The defendant's counsel offered no evidence. The learned judge being of opinion that the plaintiffs had given no such evidence, as in law was sufficient to maintain the action, ordered a judgment of nonsuit to be entered. And afterwards the court in bank refused to set aside the judgment of nonsuit. The plaintiffs then took this writ of error.

KENNEDY, J.: It seems to be well settled that the action of account render lay only at common law against a guardian in socage, bailiff or receiver, and in favor of trade between merchants. 1 Bac. Abr. tit. Accompt (A) page 32 (Wilson's ed.), Co. Lit. 172a. 2 Inst. 379. 1 Roll. Abr. 117, l. 43. 1 Com. Dig. tit. Accompt, A 1. Bull. N. P. 127. And to maintain it, there must be either a privity in deed by consent of the party, for against a disseisor or wrong-doer no account doth lie; or a privity in law, *ex provisione legis*, made by the law, as against a guardian, etc. 1 Inst. 172a. But an infant tenant in socage may maintain an action of account render against a stranger who enters into his land and receives the profits thereof; Fitz. N. B. 117, note a. Inst. 89 b; Cro. Car. 229: which would rather seem to be an exception to the rule that requires privity to maintain the action. The statute of 13 Ed. III, ch. 23, gave it to the executors of a merchant; the 25 Ed. III, ch. 5, to the administrators. And afterwards, the statute of 3 & 4 Ann. ch. 16, gave the right to maintain it against the executors and administrators of every guardian, bailiff and receiver, and by one joint-tenant, tenant in common, his executors and administrators against the other, as bailiff, for receiving more than his share, and against their executors and administrators.[56] Now, upon examination in each of these cases, it will be perceived that the action of account render is only main-

[56] *Henderson* v. *Eason*, 17 Ad. & El. 70 (1851). Owing principally to the extension of equity jurisdiction, as well as the growth of assumpsit, the common-law action became nearly obsolete in England before the change in procedure. Now a plaintiff may endorse his writ with a claim for an account and a reference will be made under Order XV, rule 1, unless there is a preliminary question to be tried. *In re Gyhon*, L. R. (1885), 29 Ch. Div. 834.

In most of the states the action has been abandoned in favor of the remedy afforded by equity, *Linton* v. *Walker*, 8 Fla. 144 (1858); *Field* v. *Brown*, 146 Ind. 293 (1906); *Church* v. *Anti-Kalsomine Co.*, 118 Mich. 219

tainable by the plaintiff against the defendant upon the ground that the latter has been entrusted with the care of the lands belonging to the former, and had the capacity at least to receive, if he did not actually receive, the rents and profits thereof for the use of the owner; or with the management and disposition of goods, partly if not wholly belonging to the plaintiff, and been in the receipt of the moneys arising therefrom for the use of the plaintiff, either in part or in whole. Upon this ground, the ward has a right to maintain the action against his guardian in socage; for as Littleton saith, sec. 123, "such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir when it pleaseth the heir, after he accomplisheth the age of fourteen years." See also 1 Inst. 89a, 87b, 88a. Fitz. N. B. 118, A. In like manner, for the like reason, the action lies against the bailiff of the plaintiff, by whom, as Lord Coke says, "is understood a servant that hath administration and charge of lands, goods and chattels, to make the best benefit for the owner against whom an action of account doth lie for the profit which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expenses deducted." 1 Inst. 172a. So according to the same authority, it lies against a receiver on the ground of his having received money for the use of the plaintiff; as, "when one receiveth money to the use of another to render an account; but, upon his account, he shall not be allowed his expenses and charges. And therefore a man can not charge a bailiff as a receiver; because then the bailiff should lose his expenses and charges." 1 Inst. 172a. And for this latter reason, it may be, that a guardian shall not be charged as a receiver, on account of the issues of the land, received by him, before his ward has attained the age of fourteen years; but for other moneys received by him, he may be charged as receiver. Fitz. N. B. 118. See also note (a) there. To the rule, however, that a receiver shall not be allowed for his expenses and charges, the *receptor denariorum,* in favor of merchants, and for advancement of trade and traffic, seems to be an exception, so that he shall have his expenses and charges allowed, but then it would seem that he shall account on the other hand for the profit he has or might reasonably have received. 1 Inst. 172a.[57] And as between merchants,

(1898); *Tilla* v. *Cook,* 77 Va. 477 (1883), and under the system of code procedure has lost its identity, *Pico* v. *Columbet,* 12 Cal. 414 (1859); *Wright* v. *Wright,* 50 How. Pr. (N. Y.) 176 (1879); *Dunn* v. *Johnson,* 115 N. Car. 249 (1894); *Teasley* v. *Bradley,* 110 Ga. 497 (1900). But in several jurisdictions the action is still in use, *Garrity* v. *Hamburger Co.,* 136 Ill. 499 (1891); *Kemp* v. *Merrill,* 92 Ill. App. 46 (1900); *Bitterling* v. *Deshler,* 160 Pa. 1 (1894); *Sieger* v. *Sieger,* 209 Pa. 65 (1904); see *Enterprise Oil Co.* v. *National Transit Co.,* 172 Pa. 421 (1896), as to the statute of 4 Anne; *Hamilton* v. *Conine,* 28 Md. 635 (1868); *Hayden* v. *Merrill,* 44 Vt. 336 (1872); *Black* v. *Nichols,* 68 Maine 227 (1878).

[57] *Sturton* v. *Richardson,* 13 M. & W. 17 (1844); *Sargent* v. *Parsons,* 12 Mass. 149 (1815); *Gibbs* v. *Sleeper,* 45 Vt. 409 (1873); *Bredin* v. *Kingland,* 4 Watts (Pa.) 420 (1835); *McLean* v. *Wade,* 56 Pa. 146 (1866).

A defendant charged with receiving a sum from the plaintiff's hand could wage his law. Y. B. 13 & 14 Edw. III (Roll's ed.) 289, pl. 24.

who are copartners in trade, it is also quite clear that at common law the action of account render can only be maintained by one against the other, upon the ground that the defendant has been entrusted with the goods belonging to them, to be disposed of by him for the common benefit of both, or has received moneys for the use of both. It is thus laid down by Lord Coke, 1 Inst. 172a, "If two joint merchants occupy their stock, goods and merchandise in common to their common profit, one of them naming himself a merchant shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa et contractu ad communem utilitatem ipsorum A. & B. provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.*" And such appears to be the form and words of the writ: "We command you (the sheriff), that you summon A, merchant, that justly, etc., he render to B, merchant, a reasonable account for the time in which he was receiver of the money of him the said B, from whatever cause and contract coming, to the common profit of them the said A and B, as by the law of merchants he may reasonably show that he ought to render to him," etc. Fitz. N. B. 117 D.[58] The receipt of money, therefore, on their joint account by the defendant, appears to be the very gist of the action of account render between merchant and merchant, or copartners in trade; and such appears to have been the understanding and decision of this court many years since, in *James* v. *Brown* (1 Dall. 339). This case, I believe, has ever been regarded here as laying down the ground upon which the action may be maintained by a partner in trade against his copartner. That such has ever been considered in England the true ground of the action in such case, is evidenced further not only by the form of the writ already noticed, and the declaration which follows the form of the writ, but likewise by the form of the judgment. The judgment is, that the defendant account with the plaintiff. *Godfrey* v. *Saunders* (3 Wils. 88, 89).[59]

But it appears from the evidence adduced in this case by the plaintiffs themselves and their own statement, that the amount of money claimed by them to be recovered from the defendant, as his proportion of the net loss, which accrued, as they say, in transacting their partnership business, was, in truth, the balance of a debt owing

---

[58] *James* v. *Browne*, 1 Dall. (Pa.) 339 (1788); *Kelly* v. *Kelly*, 3 Barb. (N. Y.) 419 (1848); *Wood* v. *Morrow*, 25 Vt. 340 (1853); *Horne* v. *Ingraham*, 125 Ill. 198 (1888).

[59] In this action there are two judgments, first, on the preliminary trial of the right to an accounting the judgment is that defendant account. Auditors are then appointed and upon their report a second and final judgment is entered for the balance found due. *Gratz* v. *Phillips*, 5 Binney (Pa.) 563 (1813); *Closson* v. *Means*, 40 Maine 337 (1855); *Black* v. *Nichols*, 68 Maine 227 (1878); *Partridge* v. *Ryan*, 134 Ill. 247 (1890); *Lee* v. *Yanaway*, 52 Ill. App. 23 (1893).

In Pennsylvania, the Act of April 4, 1831, P. L. 492, § 1, permits the jury before whom the action is tried to settle the accounts of the parties. The Act of October 13, 1840, P. L. 7, § 18, provides that after it shall have been found that defendant is liable to account, the court may either appoint auditors or direct a jury to be impaneled to settle the accounts.

by the defendant to them created by the purchase of goods from them, and was not to be affected in any way by the business of the partnership or its result, whether it turned out to be profitable or otherwise to the parties, and therefore could not upon the principles already laid down for the maintenance of the action of account render be recovered in it. As well might an account stated between the parties be made the subject of recovery in such action. But an account stated, showing a balance due by one partner to the other, upon a final settlement of all their partnership transactions, accompanied with an express promise to pay it, would, I take it, be a bar of itself to an action of account thereafter to recover such balance. It would, as it appears to me, be good evidence to support the plea of *plene computavit,* which is considered a good plea in bar to the action. *Godfrey* v. *Saunders* (3 Wils. Rep. 113). Bac. Abr. (by Wilson) 38, tit. Accompt. Two notes of hand were here given by the defendant to the plaintiffs, containing a promise on his part to pay the debt created by the purchase of the goods; which would be good evidence, in an action of assumpsit brought by the plaintiffs against the defendant, upon an account stated, to show that they had had an account between them, and that the sum of the notes was thereupon found to be the amount of money coming from the defendant to the plaintiffs. 2 Stran. 719. Chitty on Bills, 366. *Clayton* v. *Gosling* (5 B. & C. 360); *Highmore* v. *Primrose* (5 M. & S. 65). Seeing, then, these notes would be good evidence to prove an account stated, the inevitable conclusion would seem to be, that they would be good evidence also to prove the plea of *plene computavit.* It is also clear that the money mentioned in the notes was to be paid for the purpose of launching the partnership; and if not paid according to the tenor thereof, was recoverable in an action of assumpsit. *Venning* v. *Leckie* (13 East 7). And in no other form of action, excepting that or debt, do I conceive that it was recoverable. For it was the price, and a sum certain, that was to be paid by the defendant to the plaintiffs, at all events, for the goods purchased by him of them; and could not be said to have arisen out of the partnership entered into between them.[60]

At first, I misapprehended the facts of this case, and took up the notion that the claim of the plaintiffs against the defendant in it, was founded upon their partnership transactions; and under that misapprehension, conceived, that although the plaintiffs could not maintain the action of account render, according to the rules of the common law on the subject, yet they might be permitted to have the benefit of such action with us, as a substitute for a bill in equity; seeing we had no court of chancery to resort to, in cases of complicated accounts, for the purpose of obtaining a settlement of them; where, by means of auditors, they could be examined and adjusted with much more accuracy than by a jury.[61] But upon a more full in-

[60] Accord: *Holmes* v. *Wakelin,* 20 Pa. D. R. 784 (1911). On the other hand, assumpsit will not lie where the duty of the agent is to account only, until an account has been settled. *Reeside* v. *Reeside,* 49 Pa. 322 (1865); *Burton* v. *Trainer,* 27 Pa. Super. Ct. 626 (1905).

[61] Equity jurisdiction in matters of account was conferred on the Su-

vestigation of the facts of the case, and the principles of equity as well as those of law applicable to it, I am now satisfied that the plaintiffs can not be considered as having a sufficient cause to entitle them to redress, in such form of action, upon either legal or equitable principles. It is perhaps true, that Lord Hardwicke may have thought that any matter of account, growing out of privity of contract between parties, was cognizable by a court of equity, when he said in *Billion* v. *Hyde* (1 Atk. 127, 128), "It is a matter of contract and account; and consequently a proper subject for the jurisdiction of this court." And it may possibly be that Lord Redesdale entertained a similar opinion, when he said, in *O'Connor* v. *Spaight* (1 Schoales & Lef. 309), "The ground on which I think this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at nisi prius, with all necessary accuracy; and it could appear only from the result of the account, that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it can not properly be taken at law; and until the result of the account, the justice of the case can not appear." But it must be observed, that in each of these cases there were mutual claims and accounts, arising from contract and a course of dealing between the parties, that had been carried on through a series of years; and that the justice of the claim of the plaintiffs here does not necessarily depend upon the result of a final settlement and adjustment of the partnership accounts. That courts of equity, however, will take cognizance of cases where mutual accounts exist between the parties, founded in privity of contract, is a doctrine which is recognized in both the English and American courts, and acted upon without any limitation or restriction whatever. *Denwiddie* v. *Bailey* (6 Ves. 140, 141); *Wells* v. *Cooper,* cited there; *Courtney* v. *Godshall* (9 Ves. 473); *Porter* v. *Spencer* (2 John. Ch. Rep. 171); 1 Story's Equi. 439, pl. 457, and other cases there referred to.[62] But it would seem, as if courts of equity will not entertain jurisdiction in matters of account, where the accounts to be examined are all on one side only, and no discovery is wanted for the purpose of supporting the account. *Barker* v. *Dacie* (6 Ves. 687, 688); *Frietas* v. *Don Santos* (1 Younge & Jerv. 574); *Courtney* v. *Godshall* (9 Ves. 473); 1 Story's Equi. 439, pl. 558, and other cases cited by him in the margin. In such case, Mr. Justice Story, in his

preme Court and the Common Pleas of Philadelphia by the Act of June 13, 1840, P. L. 666, § 39, and by the Act of October 13, 1840, P. L. 7, § 19, upon the Supreme Court and all the courts of common pleas in partnership accounts and such other accounts as had theretofore been settled by the action of account render.

[62] "Equity will take jurisdiction on the ground of account, notwithstanding that the accounting involved is on one side only, if it is so complicated as seriously to embarass the remedy at law and in cases where discovery is needed and is sought. But it will not take jurisdiction where there is no relation of trust and the accounting is not complicated and is merely a basis for ascertaining damages." *Holland* v. *Hallahan,* 211 Pa. 223 (1905). See also, *Stitzer* v. *Fonder,* 214 Pa. 117 (1906); *Fischer* v. *Riehl,* 219 Pa. 505 (1908); *Paton* v. *Paton,* 156 Pa. 49 (1893).

valuable Commentary on Equity Jurisprudence, vol. 1, page 440, pl. 458, lays it down that "if no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintainable. And *a fortiori* when there are no mutual demands, but a single matter on one side, and no discovery is required, a court of equity will not entertain jurisdiction of the suit, though there may be payments on the other side, which may be set off; for in such case, there is not only a complete remedy at law; but there is nothing requiring the peculiar aid of a court of equity to ascertain and adjust the claim. To found the jurisdiction, in case of a claim of this sort, there should be a series of transactions on the one side, and of payments on the other;" for which he cites *Wells* v. *Cooper,* cited in *Dinwiddie* v. *Bailey* (6 Ves. 139); *Foster* v. *Spencer* (2 John. Ch. Rep. 171); *Moones* v. *Lewis* (12 Price, Rep. 502) *King* v. *Rossett* (2 Younge & Jerv. 33); Madd. Ch. Prac. 70, 71. Now this doctrine is directly applicable to the case before us, and goes to show that the plaintiffs could not demand an account even in a court of equity against the defendant. This being the case, it naturally follows that the present action can not be sustained upon equitable principles. It may be observed, however, that Lord Chief Baron Comyns, in his Digest, tit. Chancery, A 2, declares that chancery will oblige any one to give an account for money received by him. But admitting this position to be correct to its fullest extent, and that it is not necessary that there should be mutual accounts, or a requisition of discovery, when the account is all upon one side, as the current of authorities on the subject would seem to evince, in order to give chancery jurisdiction over the case, still it goes to prove that chancery will not take cognizance of the matter, unless the respondent be charged by the complainant with having received money or something else that he has converted into money for the use of the complainant; which does not exist in the case under consideration. Upon this view, it appears that the court below were right in nonsuiting the plaintiffs; and the judgment therefore ought to be affirmed.

Judgment affirmed.[68]

---

[68] Compare: *Woolley* v. *Osborne,* 39 N. J. Eq. 54 (1884); *Blodgett* v. *Foster,* 114 Mich. 688 (1897); *Gleason, &c., Co.* v. *Hoffman,* 168 Ill. 25 (1897); *McMullen L. Co.* v. *Strother,* 136 Fed. 295 (1905); *Miller* v. *Russell,* 224 Ill. 68 (1906); *Noble* v. *Burnett Co.,* 208 Mass. 75 (1911), with *Walker* v. *Brooks,* 125 Mass. 241 (1878); *Uhlman* v. *New York L. I. Co.,* 109 N. Y. 421 (1888); *Rutherford* v. *Alyea,* 54 N. J. Eq. 411 (1896); *Ellis* v. *Southwestern L. Co.,* 102 Wis. 409 (1899); *Fuller* v. *Davis,* 184 Ill. 505 (1900); *Tennessee, &c., Co.* v. *Fitzgerald,* 140 Ill. App. 430 (1908); *Mersereau* v. *Bennett,* 62 Misc. (N. Y.) 356 (1909); *Grieb* v. *Equitable Soc.,* 189 Fed. 498 (1911); *Franklin* v. *Crane,* 80 N. J. Eq. 509 (1912). See further 1 Ames' Cases on Equity Jurisdiction 442.

(f) Covenant.

M'VOY *v.* WHEELER.

SUPREME COURT OF ALABAMA, 1838.

6 *Porter* (*Ala.*) 201.

Action of covenant. The plaintiffs, Wheeler and M'Cormick, declared against the defendant M'Voy on an indenture sealed by the parties wherein the plaintiffs agreed within five months to erect two three-story brick buildings for the defendant in the city of Mobile according to certain specifications in a workmanlike manner, for which defendant agreed to pay eight thousand six hundred dollars. The plaintiffs further averred that they fully performed their contract except that at the request of the defendant they made divers alterations in the plans not provided for in the indenture and completed the buildings as soon as they could be completed, which was two months after the time agreed, but the defendant had failed to pay the sum of twenty-three hundred dollars, the last instalment of the contract price. The defendant demurred to the declaration, which demurrer was overruled. There was, subsequently, a trial and a verdict rendered for plaintiff upon which judgment was entered. The defendant took a writ of error assigning as error the overruling of the demurrer.[64]

COLLIER, C. J.: Several questions were raised in the circuit court, upon the demurrers to the declaration and pleas, which were so disposed of, as to make it necessary for an issue of fact to be tried by the jury, who found a verdict for the plaintiffs, on which judgment was rendered. At the trial, a bill of exceptions was taken by the defendant below, who prosecutes a writ of error to this court, and assigns the judgment on the demurrers, and the decision of the court excepted to, as causes for reversal.

We shall only consider the sufficiency of the declaration, which presents the question, whether an action of covenant will lie upon an agreement under seal (to perform certain work), which has been modified, or the time of performance enlarged by parol.

Covenant can only be maintained upon a writing under seal.[65] If a contract be unattested by a seal, or is unwritten, the action by which redress can be had, for a non-performance, is debt or assump-

[64] The statement of facts is abridged.

[65] Covenant can not be maintained except on a deed. *Cutts* v. *Frost*, Smith (N. H.) 309 (1813); *Pierson* v. *Pierson*, 6 N. J. L. 168 (1822); *Bilderback* v. *Pounder*, 7 N. J. L. 64 (1823); *Moore* v. *Jones*, 2 Ld. Raym. 1536 (1728); *Berkeley* v. *Hardy*, 5 B. & C. 355 (1826); *Andrews* v. *Herriott*, 4 Cow. (N. Y.) 508 (1825); *LeRoy* v. *Beard*, 8 How. (U. S.) 451 (1850); *Davis* v. *Judd*, 6 Wis. 85 (1857); *McManus* v. *Cassidy*, 66 Pa. 260 (1870); *Ewings* v. *Gordon*, 49 N. H. 444 (1870); *Trutt* v. *Spotts*, 87 Pa. 339 (1878); *Manning* v. *Perkins*, 86 Maine 419, 29 Atl. 1114 (1894); *Simpson* v. *Ritchie*, 89 Maine 299 (1913). It is immaterial whether the covenant be implied or express. "If, from the specialty executed by the parties, the law implies such a covenant, it is, as respects the form of action thereon, as if it were incorporated therein in terms." *Wilson* v. *Griswold*, 9 Blatch. (U. S.) 267 (1871), and see *Lucky* v. *Rowzee*, 1 A. K. Mar. (Ky.) 217 (1818).

sit, or either, according to the subject-matter. If new terms are introduced into a contract, other duties imposed, or another day provided for its consummation, it is clear, that the original contract does not remain unimpaired, so that an action would lie for a breach of its stipulations.—If then, no action could be maintained upon the original contract, when thus modified, we think it follows that the present action is misconceived. For though the modifications are set out in the declaration, yet they are to be shown by parol, and can not, according to the premises, we have assumed, be made the basis, either in whole or in part of an action of covenant.

The case of *Littler* v. *Holland* [3 Term Rep. 590] was an action of covenant, upon an agreement under seal, to build two houses by a certain day. It appeared on the trial, that the time of performance was enlarged by parol, and that the houses were built within the enlarged time. This evidence, it was held, did not support the allegation in the declaration, and the plaintiff was nonsuited.

So, in *Brown* v. *Miller* [3 Term Rep. 590] an action of debt was brought on a bond to submit to arbitration. The condition limited the time for the arbitrator to make his award. The declaration alleged that the time was enlarged by mutual consent, and that the award was made within that time. On demurrer, it was determined, that the remedy on the bond was gone, by the failure to make the award within the time contemplated by its condition. To the same effect, also, is the case of *Freeman* v. *Adams* [9 Johns. Rep. 115].

In *Philips, et al.* v. *Rose* [8 Johns. Rep. 392], the plaintiff agreed to build an oil-mill within a prescribed time, which was enlarged by parol, and the work completed within the enlarged time.—The court held that evidence of the enlargement would not support the declaration. And in *Jewell, et al.* v. *Schroeppel* [4 Cowen 565], the court consider the law as settled, "that the plaintiffs, inasmuch as they had not performed, within the time stipulated by the original contract, could not recover upon the covenants contained in it. They could not, in such an action, give evidence of an extension of the time.

In *Langworthy* v. *Smith,* [2 Wend. 587] the Supreme Court of New York reaffirm the previous decisions of that court, on the point, and consider it as beyond doubt, that a parol agreement to enlarge the time for the performance of covenants, is good; and that by an enlargement, the remedy upon the covenant itself, is lost, and must be sought upon the agreement enlarging the time of the performance.

In the case at bar, the declaration shows, that the contract was so materially varied, and the labor of the defendants so greatly increased, that they could not perform it until several months after the expiration of the day therefor appointed. It will, therefore, follow, that the action can not be maintained, and that the plaintiffs must resort to their remedy upon the parol agreement; making the covenant, so far as material, inducement to the action.

The judgment is reversed.[66]

---

[66] Accord: *Sherwin* v. *Rut. & B. R. Co.,* 24 Vt. 347 (1852); *Raymond* v. *Fisher,* 6 Mo. 29 (1839); *Manuel* v. *Campbell,* 3 Ark. 324 (1840); *Phillips & C. Co.* v. *Seymour,* 91 U. S. 646 (1875); *Vicary* v. *Moore,* 2 Watts (Pa.)

TAIT *v.* ATKINSON.

COURT OF QUEEN'S BENCH, UPPER CANADA, 1845.

3 *U. C. Q. B.* 152.

The plaintiffs declare specially in assumpsit, for the nonpayment by the defendant of a certain sum of money awarded to the plaintiffs; the award was given, as averred, in accordance with the terms of a written instrument under seal, recited at length in the declaration; no new consideration apart from the deed to support the promise was alleged.

The defendant demurs, on the ground that the action should have been covenant, and not assumpsit.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this action is strictly founded on the covenant; upon which therefore the plaintiffs should have sued, and not in assumpsit. The case of *Barber* v. *Harris*[67] is much in point. No new consideration is stated for supporting an assumpsit, apart from the deed. What the parties had stipulated for in that instrument was, that the house should be paid for to the tenant at the expiration of the term, after being valued by persons appointed by them respectively; they did appoint persons to value, and the valuation was made by those persons, and adopted and assented to as the value, as the plaintiff's statement of his case shows. All, therefore, had taken place which was necessary to enable the plaintiffs to sue under the covenant; and we see no difficulty on account of the valuation having been made on a later day than had been at first agreed on. It would not have been necessary to state any day in the declaration when the appraisers were to determine the value; and it became immaterial, as the value had been ascertained by referees,

---

451 (1834); *Luciani* v. *Insurance Co.*, 2 Whart. (Pa.) 167 (1836); *Lehigh C. & N. Co.* v. *Harlan*, 27 Pa. 429 (1856); *Carrier* v. *Dilworth*, 59 Pa. 406 (1868). But otherwise where the additional acts are in pursuance of the terms of the specialty itself. *Potts* v. *Point Pleasant Land Co.*, 49 N. J. L. 411 (1887); *Ramsburg* v. *McCahan*, 3 Gill. (Md.) 341 (1845); *Fry* v. *Talbot*, 106 Md. 43 (1907). Covenant will lie on a specialty, although not fully performed if strict performance is prevented by or waived by defendant. *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453 (1901); *Monocacy B. Co.* v. *American I. B. M. Co.*, 83 Pa. 517 (1877). It has been held that covenant would lie on a sealed instrument, although the time of performance had been extended by parol, if the breaches assigned went only to the manner of performance. *Crane* v. *Maynard*, 12 Wend. (N. Y.) 408 (1834).

Even in jurisdictions that have abolished the distinctions between forms of actions it sometimes becomes necessary to determine what the action would have been before the code; as where the statute of limitations is to be applied. *Hayden* v. *Patterson*, 39 Colo. 15 (1906).

In *Jerome* v. *Ortman*, 66 Mich. 668, 33 N. W. 759 (1887), it was held that under a statute providing that no deed should be deemed invalid for want of a seal, covenant would lie on an instrument signed but not sealed which would otherwise have been a deed. Accord: *Steele* v. *Curle*, 4 Dana (Ky.) 381 (1863); *Graves* v. *Sniede's Admr.*, 7 Dana (Ky.) 344 (1838).

[67] 1 P. & D. 360.

with the consent of both parties, and subsequently adopted as the value.[68]

Judgment for defendant on demurrer.

(g) Debt.

MITCHELL *v.* McNABB.

SUPREME JUDICIAL COURT OF MAINE, 1870.

58 *Maine* 506.

On exceptions to the ruling of Goddard, J., of the Superior Court for the county of Cumberland.

Debt, "for that the said defendant, at said Portland, on the 30th day of May, A. D. 1870, by his writing obligatory of that date, sealed with his seal and here in court to be produced, therein sold to the plaintiff the good-will of his business and therein agreed not to carry on the boot and shoe business in the city of Portland for one year from the date thereof. Yet the said defendant, not regarding his said agreement, did again commence the boot and shoe business in said city of Portland, on the first day of July thereafter, and hath continued to carry on the boot and shoe business in said city of Portland, from said first day of July to the day of the purchase of this

---

[68] Since covenant lies for the breach of a promise under seal and assumpsit for the breach of a simple promise it is evident that they are not concurrent remedies. *Bulstrode* v. *Gilburn*, 2 Stra. 1027 (1736); *Toussaint* v. *Martinnant*, 2 T. R. 100 (1787); *Codman* v. *Jenkins*, 14 Mass. 93 (1817); *Wood* v. *Edwards*, 19 Johns. (N. Y.) 205 (1821); *Schlencker* v. *Moxsy*, 3 B. & C. 789 (1825); *Baber* v. *Harris*, 9 Ad. & El. 532 (1839); *Byrd* v. *Knighton*, 7 Mo. 443 (1842); *Myrick* v. *Slason*, 19 Vt. 121 (1847); *McManus & Henry* v. *Cassidy*, 66 Pa. 260 (1870); *McKay* v. *Darling*, 65 Vt. 639, 27 Atl. 324 (1893); *Conroy* v. *Equitable Accident Co.*, 27 R. I. 467 (1906); *Drew* v. *Western Union Tel. Co.*, 111 Maine 346 (1913). But a specialty may be evidence in assumpsit. *Varney* v. *Bradford*, 86 Maine 510, 30 Atl. 115 (1894); *Baldwin* v. *Emery*, 89 Maine 496, 36 Atl. 994 (1897); and see *Luckey* v. *Rowzee*, 1 A. K. Mar. (Ky.) 295 (1818); *Marker* v. *Kenrick*, 13 C. B. 188 (1853).

Where a specialty contained a promise to pay a sum certain covenant was usually concurrent with debt although the latter action was preferred. Anon. 3 Leon 119 (1585); *Chawner* v. *Bowes*, Goodb. 217 (1613); *Frere* v. ———, Style, 133 (1648); *Lowe* v. *Peers*, 4 Burr. 2225 (1768); *Harrison* v. *Wright*, 13 East 343 (1811); *Huddle* v. *Worthington*, 1 Ohio 423 (1824); *Taylor* v. *Wilson*, 27 N. Car. 214 (1844); *Wetumpka, &c., R. Co.* v. *Hill*, 7 Ala. 772 (1845); *New Holland T. Co.* v. *Lancaster Co.*, 71 Pa. 442 (1872); *Outtown* v. *Dulin*, 72 Md. 536, 20 Atl. 134 (1890). Covenant alone was proper where the specialty called for the performance of something other than the payment of a liquidated sum. *Watson* v. *Nairy*, 1 Bibb. (Ky.) 356 (1809); *Scott* v. *Conover*, 6 N. J. L. 223 (1822); *Wilson* v. *Hickson*, 1 Blackf. (Ind.) 230 (1822); *Jackson* v. *Waddill*, 1 Stew. (Ala.) 579 (1828); *Sims* v. *Whitlock*, 5 Ark. 103 (1843); *Fortenbury* v. *Tunstall*, 5 Ark. 263 (1843); *Haynes* v. *Lucas*, 50 Ill. 436 (1869); *Fox River Co.* v. *Reeves*, 68 Ill. 403 (1873); *Garland* v. *McDonald*, 41 U. C. Q. B. 573 (1877); *Morgan* v. *Guttenberg*, 40 N. J. L. 394 (1878).

writ. And the plaintiff avers that the said defendant, by not keeping his said agreement, has damaged him in his business the sum of two hundred dollars."

To this declaration the defendant filed a general demurrer which the plaintiff joined. The presiding judge sustained the demurrer and adjudged the declaration bad; whereupon the plaintiff alleged exceptions.[69]

APPLETON, C .J.: This is an action of debt. The writ is dated October 14, 1870. The declaration sets forth an agreement, under seal, signed by the defendant, in and by which he "agreed not to carry on the boot and shoe business in the city of Portland for one year," from May 31, 1870, and an averment that from the first day of July he "continued to carry on the boot and shoe business in said city of Portland to the day of the purchase of this writ." To this the defendant demurred, the demurrer was sustained, and the plaintiff excepted. The question presented is whether debt is maintainable.

The declaration sets forth no promise to pay any money under any terms or conditions, but simply an agreement to abstain from selling boots and shoes at a particular place and for a stipulated time, and a violation of such agreement. The damages in such case must obviously be uncertain and unliquidated.

Debt lies when one is entitled to receive a certain and liquidated sum of money, or in case of a bond for the payment of money, or the performance of some act under a penalty, or for goods sold and delivered, etc. "Debt," remarks Richardson, C. J., in *Lowell* v. *Bellows*, 7 N. H. 391, "is the proper action, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty; but it is not the proper remedy when the demand is rather for unliquidated damages than for money, unless the performance of the contract is secured by a penalty. 1 Chit. Pl. 101."[70] "The true

---

[69] Arguments of counsel omitted.

[70] *Grips* v. *Ingledew*, 7 Mod. 87 (1702), 2 Ld. Raym. 814; *Van Horn* v. *Hamilton*, 5 N. J. L. 477 (1819); *Little* v. *Mercer*, 9 Mo. 216 (1845); *Knowles* v. *Eastman*, 65 Mass. 429 (1853); *Lee* v. *Gardiner*, 26 Miss. 521 (1853); *Baum* v. *Tomkin*, 110 Pa. 569 (1885). At early law debt would lie for chattels as well as money. Ames: Parol Contracts, 8 Harvard L. Rev. 252. *Birkhead* v. *Wilson*, Dyer 24b (1537); *Rands* v. *Peck*, Cro. Jac. 618 (1621). In the modern cases it is said that the obligation must be payable in money, either a sum certain or one that can readily be reduced to certainty. *Watson* v. *M'Nairy*, 1 Bibb (Ky.) 356 (1809); *Thayer* v. *Campbell*, 2 Bibb (Ky.) 472 (1811); *Stroud* v. *Shimer*, 8 N. J. L. 134 (1825); *Cassaday* v. *Laughlin*, 3 Blackf. (Ind.) 134 (1832); *Crockett* v. *Moore*, 3 Sneed (Tenn.) 145 (1855); *Mix* v. *Nettleton*, 29 Ill. 245 (1862); *Dungan* v. *Henderlite*, 21 Gratt. (Va.) 149 (1871); *Turpin* v. *Sledd*, 23 Gratt. (Va.) 238 (1873); *Weiss* v. *Mauch Chunk I. Co.*, 58 Pa. 295 (1868); *Belford* v. *Woodward*, 158 Ill. 122 (1895); *Nottingham* v. *Ackiss*, 110 Va. 810 (1910). But where the obligation is in the alternative to pay money or furnish goods and on failure to exercise the option at a certain time is for money absolutely, then debt lies for the recovery of such money. *Henry* v. *Gamble*, Minor (Ala.) 15 (1820); *Bradford* v. *Stewart*, Minor (Ala.) 44 (1821); *Taylor* v. *Meek*, 4 Blackf. (Ind.) 388 (1837); *Gregory* v. *Bewly*, 5 Ark. 318 (1843); *Crockett* v. *Moore*, 3 Sneed (Tenn.) 145 (1855); *Minnick* v. *Williams*, 77 Va. 758 (1883).

test," remarks Story, J., in *Bullard* v. *Bell*, 1 Mason 543, "is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty." Debt "lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty." I Chit. Pl. 113. Debt will not lie on a contract of indemnity against unliquidated or unascertained damages. *Flannigan* v. *Com. Ins. Co.*, 1 Dutch. (N. J.) 506; *Rutan* v. *Hopper*, 5 Dutch. (N. J.) 112. As the action of debt is for the recovery of a sum of money, the breach or cause of action complained of must necessarily originate out of the nonpayment of the money previously alleged to be payable. But here there was not and could not be the allegation of any sum of money which the defendant was bound to pay, and for the neglect to pay which he should be held responsible in damages.[71]

Exceptions overruled.

YOUNG *v.* ASHBURNSHAM.

COURT OF COMMON PLEAS, 1586.

3 *Leonard's Reports* 161.

In an action of debt brought by the administrators of Young against Ashburnham; the defendant pleaded *nihil debet;* and the enquest was taken by default. And upon the evidence given for the plaintiff, the case appeared to be this, that the said Young was an innholder in a great town in the county of Sussex where the sessions used to be holden; and that the defendant was a gentleman of quality in the country there; and he, in going to the sessions, used to lodge in the house of the said Young, and there took his lodging and his diet for himself, his servants, and horses: upon which, the debt in demand grew: but the said Young was not at any price in certain with the defendant, nor was there ever any agreement made betwixt them for the same. It was said by Anderson, Chief Justice, that upon that matter, an action of debt did not lie. And therefore afterwards, the jury gave a verdict for the defendant.[72]

---

[71] Debt is distinguished from assumpsit in this, that the latter action must be brought where the object is to recover special damages for nonperformance of a parol or simple contract, while debt lies against one under a duty to pay a sum of money ascertained or readily ascertainable. *Eib* v. *Pindall*, 5 Leigh (Va.) 109 (1834); *Durrill* v. *Lawrence*, 10 Vt. 517 (1838); *Somerville* v. *Grim*, 17 W. Va. 803 (1881); *Respublica* v. *Lacaze*, 2 Dall. (Pa.) 118 (1791); *Knapp* v. *Hoboken*, 38 N. J. L. 371 (1876); *Huber* v. *Burke*, 11 Serg. & R. 238 (1824). Thus debt lies on a sealed bond, *Leland* v. *Barry*, 69 Ill. 348 (1873); on a judgment, *Lee* v. *Gardiner*, 26 Miss. 521 (1853); on a recognizance, *State* v. *Davis*, 43 N. H. 600 (1862); for use and occupation, *Gray* v. *Johnson*, 14 N. H. 414 (1843). As to collateral promises, compare *Bullard* v. *Bell*, 1 Mason. (U. S.) 242 (1817), with *Gregory* v. *Thomson*, 31 N. J. L. 166 (1865); *Randall* v. *Rigby*, 4 M. & W. 130 (1838). As to promissory notes, see *Mandeville* v. *Riddle*, 1 Cranch (U. S.) 290 and note p. 367; *Cresswell* v. *Crisp*, 2 Dow. Pr. 635 (1834); *Bishop* v. *Young*, 2 Bos. & P. 78 (1800); *Raborg* v. *Peyton*, 2 Wheat. (U. S.) 385 (1817).

[72] "The writ in debt, like the writs for the recovery of land, was a *praecipe quod reddat*. The judgment for the plaintiff is that he recover his debt.

ARTHUR DILLINGHAM *v.* JACOB SKEIN.

SUPREME COURT, TERRITORY OF ARKANSAS, 1832.

Hempstead (U. S.) 181.

Error to Washington Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge and Edward Cross, judges.[72]

OPINION OF THE COURT.—This suit was commenced on the following writ, before a justice of the peace:

"Territory of Arkansas, county of Washington. To the constable of Prairie Township, county of Washington, greeting: Summons Arthur Dillingham to appear before me, a justice of the peace, on the 3d day of June, 1831, at my dwelling-house, between the hours of ten in the forenoon, and three o'clock in the afternoon of said day, to answer Jacob Skein in an action of debt on an open account under one hundred dollars. Given under my hand, this 26th of May, 1831.

" (Signed) Henry Tollett, J. P."

On the 3d day of June, 1831, the parties appeared, and after hearing the evidence, the justice rendered judgment against the defendant Dillingham, in favor of the plaintiff Skein, for seventy dollars and costs of suit. From this judgment Dillingham prayed an appeal, and at the December term of Washington Circuit Court, the parties appeared by their attorneys, and the case was tried by a jury who found for the plaintiff Skein, now defendant in error, seventy-one dollars and seventy-five cents, for which the court rendered judgment to which judgment this writ of error is prosecuted.

It is objected that debt will not lie upon an open account, and

---

In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of a debtor was always for the payment of a definite amount of money or a fixed quantity of chattels. A promise to pay as much as certain goods or services were worth would never support a count in debt. In Y. B. 12 Edw. IV 9-22, Brian, C. J., said: 'If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of debt against me.' For the same reason, the *quantum meruit* and *quantum valebant* counts seem never to have gained a footing among the common counts in debt, and in assumpsit the *quantum meruit* and *quantum valebant* counts were distinguished from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *indebitatus* assumpsit when no price had been fixed by the parties, the verdict of the jury being treated as equivalent to a determination of the parties at the time of bargain.

The ancient conception of a creditor's claim in debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *praecipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19 he failed as effectually as if he had declared in detinue for the recovery of a horse and could prove only the detention of a cow." 2 Ames' Parol Contracts Prior to Assumpsit, 8 Harvard Law Review 252, reprinted Select Essays in Anglo-American Legal History, vol. III, p. 304. See also, *Baugh* v. *Phillips*, 1 Rolle 257 (1616); *Hooper* v. *Shepherd*, 2 Str. 1089 (1738).

[72] Part of the opinion dealing with other questions is omitted.

that therefore the writ of summons is erroneous and void. Admitting that a mistake in naming the appropriate form for action in the writ of summons would be a fatal error, on which we give no opinion, still we think there is nothing in the objection. Debt will lie upon an open account for goods sold and delivered, as well as an action of assumpsit. In the case of *Hughes* v. *Maryland Insurance Company,* 8 Wheaton, Rep. 311, Judge Washington says: "Debt is certainly a sum of money due by contract and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid more than he had recovered, and in a variety of other cases, where the law, by implication, raises a contract to pay. So an action of debt may be brought for goods sold to defendant, for so much as they are worth. In *Emery* v. *Fell,* 2 Term Rep. 28, in which there was a declaration in debt, containing a number of counts, for goods sold and delivered, work and labor, money laid out and expended, and money had and received; the court, on a special demurrer, sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. This case proves that debt may be maintained upon an implied, as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield, in the case of *Walker* v. *Witter,* Douglass, 6, is conclusive upon this point. He lays it down that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say that wherever indebtitatus assumpsit is maintainable, debt is also."[74] *United States* v. *Colt,* 1 Peters C. C. Rep. 145.

[74] Accord: Buller's Nisi Prius, 167; *Walker* v. *Witter,* Dougl. 1 (1778); *Aylett* v. *Lowe,* 2 Wm. Bl. 1221 (1778); *McQuillin* v. *Cox,* 1 H. Bl. 249 (1789); *Lord* v. *Houston,* 11 East 62 (1809); *United States* v. *Colt,* 1 Peters (U. S. C. Ct.) 145 (1815); *Hughes* v. *Union Ins. Co.,* 8 Wheat. (U. S.) 294, 5 L. ed. 620 (1823); *Smith* v. *Proprietors,* 8 Pick. (Mass.) 178 (1829); *Bloomfield* v. *Hancock,* 1 Yerg. (Tenn.) 101 (1826); *Jenkins* v. *Richardson,* 6 J. J. Mar. (Ky.) 441, 22 Am. Dec. 82 (1831); *Young* v. *Hawkins,* 4 Yerg. (Tenn.) 171 (1833); *Norris* v. *School District,* 12 Maine 293 (1835); *Hickman* v. *Searcy,* 9 Yerg. (Tenn.) 47 (1836); *Van Dusen* v. *Blum,* 35 Mass. 229 (1836); *Thompson* v. *French,* 10 Yerg. (Tenn.) 452 (1837); *Mahaffey* v. *Petty,* 1 Ga. 261 (1846); *Furman* v. *Parker,* 21 N. J. L. 310 (1848); *McVicker* v. *Beedy,* 31 Maine 314, 50 Am. Dec. 666 (1850); *Parker* v. *Bristol R. Co.,* 6 Exch. 702 (1851); *Weiss* v. *Mauch Chunk I. Co.,* 58 Pa. 295 (1868); *Kirk* v. *Hartman,* 63 Pa. 97 (1869); *National Exchange Bank* v. *Abell,* 63 Maine 346 (1872); *Seretto* v. *Rockland, &c., R. Co.,* 101 Maine 140 (1906). In *The Mayor of New York* v. *Butler,* 1 Barb. (N. Y.) 325 (1847), it is said by Strong, P. J., "The distinction is between a claim for the actual value of the work, and one where the plaintiff seeks to recover unliquidated special damages for the breach of a contract. The former is a debt, the latter is not until settled by a judgment. The action of debt can, in general be sustained for money due on a contract, wherever the demand is capable of being readily reduced to a sum certain, upon the predicated statement of facts."

The action, then, as described in the writ of summons, was not, in our judgment, misconceived, but was just as appropriate as *indebitatus assumpsit.* The omission to insert the word book before the word account, we do not deem material. We know no distinction between an open account and a book account; and each expression conveys the same idea.

Judgment affirmed.

CORNELIUS DOWD *qui tam v.* GIDEON SEAWELL.

SUPREME COURT OF NORTH CAROLINA, 1831.

3 *Devereux L.* (*N. Car.*) 185.

Debt, upon the statute prescribing the rules to be observed in solemnizing the rites of matrimony. The writ demanded "fifty pounds, which he (the defendant) owes and unjustly detains, to his damage one hundred dollars, due for having solemnized the rites of matrimony between, etc., contrary to the act of the general assembly in such case made and provided."

Upon *nil debet* pleaded, the jury, before his Honor Judge Strange, at Moore, on the last circuit, returned the following verdict, "that the defendant does owe the sum of fifty pounds, reduced by the scale to twenty-four pounds ten shillings." His Honor, upon the motion of the defendant's counsel, arrested the judgment, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Winston, for the defendant.

RUFFIN, J.: We think the decision of the superior court right, and that the judgment must be arrested.

It is an action of debt for the penalty for marrying a couple without a license. The sum demanded is one hundred dollars; and the verdict is for twenty-four pounds ten shillings. The Act of 1778 (Rev. ch. 134) gives a penalty of £50; which, when scaled, amounts to the sum found by the jury.

It was formerly thought that the action of debt, being for an entire thing, could not be maintained unless the exact sum—neither more nor less—was recovered. This is not now so considered, nor has been for a long time. And the rule is, that in actions, where from the nature of the demand the true debt is uncertain, it may be alleged to be large enough to cover the real debt, and there shall be a verdict according to the truth, and judgment thereon. Hence, in debt on simple contract, the declaration is good although the sums demanded in several counts do not amount to or exceed the sum demanded in the writ, or the recital of it in the beginning of the declaration. *McQuillin* v. *Cox,* 1 H. Bl., 249; *Lord* v. *Houston,* 11 East 62. And in *Aylett* v. *Lowe,* 2 Bl. Rep. 1221, it was held, that upon a verdict for £100 in debt for £200, on a *mutuatus,* there should be judgment for the plaintiff. And so too in debt on a specialty, if the deed does not of itself show the

certainty of the whole demand, but the extent is matter of proof *aliunde*, the verdict may be according to the truth, and if it be within the sum demanded, there shall be judgment for the plaintiff, as in *Incledon* v. *Crips*, 2 Salk. 658, S. C. 2 Ld. Raym. 814, which was debt on a bond, whereby the defendant obliged himself to pay the plaintiff £35 for every hundred stacks of wood, and he averred that he delivered a certain number of hundred and one half, which came to £182.10. Upon demurrer it was held, that there could be no apportionment on this contract for the half hundred, and therefore the plaintiff could not have judgment for that: but it was further held, that he might remit that, and have judgment for the rest; because the debt might be more or less by matter extrinsic of the deed, and therefore there was no variance between the deed and the verdict. And this observation shows the true rule; namely, that where the sum demanded is shown in the declaration to be on a contract or other matter, which in itself conclusively fixes the amount due thereon, then the recovery must agree with the demand. For the debt on that contract is that or nothing. This is not because in debt a sum *in numero* is claimed, but for the more substantial reason, that if the recovery of more or less were allowed, there would be a variance between the *allegata* and *probata*, and the declaration would convey to the defendant no information of the cause of action. Where the verdict therefore may stand with the contract set forth in the declaration, and both be true, there shall be judgment. Where the verdict can not be made to accord with the contract, there can not be judgment, as in debt on bond for £100, a verdict for $100 is not good, because it could not be for the debt created by the specialty sued on. It is the same upon any written instrument, as upon a bond; if it be declared on as a writing, constituting in itself a substantial contract, as a promissory note. It is not the instrument described, and therefore can not be received in evidence.[75]

The same principles apply to actions of debt for penalties given by statutes. As in every case, the declaration must set out the matter, whether of contract or law, whereby the demand arises; so in these actions the plaintiff must show a statute giving the penalty demanded by him, and charge the acts which show the defendant to be guilty of the offense within the statute. These allegations are indispensable to enable the defendant to know for what he is sued, and to protect himself by plea in another action for the same matter. Anciently the statute was set out at full length. That was relaxed, and stating it by its title was then allowed. Afterwards a general reference to it by alleging the particular penalties given thereby, and

[75] In *Hickman* v. *Searcy*, 6 Yerger (Tenn.) 47 (1836), it was held that debt would lie for contribution by one warrantor in a deed against his co-warrantor, and in *Sanders* v. *Marks*, 3 Levinz 429 (1696), debt was held to lie on an agreement under seal to pay the proportionable part of the charges of a suit at law. See also, *Wetumpka, etc., R. Co.* v. *Hill*, 7 Ala. 772 (1845). But in *Long* v. *Long*, 1 Hill (N. Y.) 597 (1841), it was held that debt would not lie for the breach of a sealed contract to pay a note and save the plaintiff harmless therefrom where the amount of the note did not appear in the contract and this case is cited with approval in *Flanagan* v. *Camden Mutual Ins. Co.*, 25 N. J. L. 506 (1856).

concluding "against the form of the statute" was held sufficient, upon the grounds that the court was bound to take notice of all public laws, and that the particular statute was sufficiently identified by the statement of the penalty and of the acts forbidden by it. But certainly there must be some description of it; and if there be no reference to it the declaration is bad. *Scroter* v. *Harrington*, 1 Hawks 192; *Myddleton* v. *Wynn*, Willes 599.

If, however, the statute itself give an uncertain penalty, or a penalty to be measured by reference to some uncertain thing, then the sum demanded is not conclusive on the plaintiff, but he may recover according to the certainty made by his proof, because he can do no more towards a more definite description of the statute or of the debt.[76] In an action, therefore, for substracting tithes against the stat., 2d and 3d ed., 6, which gives the treble value, the judgment shall be according to the verdict, though different from the sum demanded. *Pemberton* v. *Skelton*, Cro. Jac. 498. The court say there that the variance is no objection, because the statute gives no certain sum, but only so much in reference to the value; and the value can not be positively estimated until it is done by the jury themselves. And the judges distinguish that case from an action grounded on a specialty in which the certainty of the debt appears, and from an action grounded on a statute which gives a sum certain; in both which the precise sum must be demanded. This last position is, to be sure, but a *dictum* in that case, but it is the point of the decision in *Cunningham* v. *Bennett*, 1 Geo., 1 C. B., stated by Mr. Justice Buller in his Nisi Prius, a book of much authority. There it was held that a penal action could not be for less than the penalty given by the statute; and though the plaintiff had a verdict, judgment was arrested. I conclude, therefore, that wherever a statute gives a certain sum *in numero*, that exact sum must be demanded, else it can not be taken to be the penalty given by that statute. Here the declaration conforms neither to the act of 1741 nor that of 1778. The former gives £50 proclamation money to the use of the parish, or, by the act of 1777, to that of the county. The latter gives £50, scaled to £24.10, one-half to the informer and the other to the county. Consequently the judgment must be arrested for this reason.[77]

The other objection, that damages are demanded, is not a good one. They can not be recovered, but it is not error to demand them.[78]

---

[76] In debt on a statute giving an uncertain sum by way of penalty the verdict is good, although a less sum than is demanded is found to be due. *United States* v. *Colt*, 1 Pet. (U. S.) 145 (1815); *Dozier* v. *Bray*, 2 Hawk (N. Car.) 57 (1822); *Rockwell* v. *The State*, 11 Ohio 130 (1841); *Stockwell* v. *United States*, 13 Wall. (U. S.) 531, 20 L. ed. 491 (1871).

[77] *Shewell* v. *Fell*, 3 Yeates (Pa.) 11 (1800); *Martin* v. *Large*, 3 McCord (S. Car.) 112 (1831); *Russell* v. *Chicago*, 22 Ill. 283 (1859).

[78] *Norris* v. *Pilmore*, 1 Yeates (Pa.) 405 (1794); *Ritchie* v. *Shannon*, 2 Rawle (Pa.) 196 (1828). Damages in debt are usually nominal. *O'Neal* v. *O'Neal*, 4 W. & S. 130 (1842). Nominal damages are not given on judgment by default in debt. *People* v. *Hallett*, 4 Cow. (N. Y.) 67 (1825). As to the amount recoverable in debt on a penal bond, see *Frazer* v. *Little*, 13 Mich. 195 (1865).

The case of *Frederick* v. *Lookup*, 4 Burrows 2018, shows this: for the judgment was reversed only as to the damages assessed, and affirmed for the debt, which was the penalty.

Judgment affirmed.[79]

(h) Assumpsit. [80]

BROOKS *v.* SCOTT'S Exr.

SUPREME COURT OF APPEALS OF VIRGINIA, 1811.

2 Munford (Va.) 344.

In an action of assumpsit by Hezekiah Brooks against James Scott, in the county court of Prince Edward, the declaration contained four counts, viz. 1st. A general *indebitatus assumpsit* for goods sold and delivered; 2d. A like count for money lent; 3d. A like count for services done and performed in the capacity of an overseer; and, 4th. A common *quantum meruit* for like services. At the trial, on the general issue, the plaintiff offered evidence to prove that the defendant had acknowledged he had employed the plaintiff as an overseer for the term of three years, and was to pay him the quantity of two thousand pounds of tobacco per year; to which testimony the defendant objected; but the objection was overruled by the court, and the evidence permitted to go to the jury; to which opinion of the court a bill of exceptions was filed. Verdict and judgment for the plaintiff. Upon an appeal, the district court was of opinion that the county court "acted improperly in admitting evidence to go to the jury, of a special agreement to support the general charges laid in the declaration." The judgment was therefore reversed with costs; the suit retained for trial, and leave given to amend the declaration; whereupon the plaintiff obtained a writ of supersedeas from a judge of this court.[81]

---

[79] Debt is the action usually employed to enforce a statutory duty to pay money or to recover a penalty imposed by statute, if no other specific remedy is provided. *Bigelow* v. *Cambridge, &c., Co.*, 7 Mass. 202 (1810); *Jeffrey* v. *Blue Hill T. Co.*, 10 Mass. 368 (1813); *Bullard* v. *Bell*, 1 Mason (U. S.) 242 (1817); *Tilson* v. *Warwick G. L. Co.*, 4 B. & C. 962 (1825); *Blackburn* v. *Baker*, 7 Porter (Ala.) 284 (1837); *Simonson* v. *Spencer*, 15 Wend. (N. Y.) 548 (1836); *Gavman* v. *Gamble*, 10 Watts (Pa.) 382 (1840); *Janvrin* v. *Scammon*, 29 N. H. 280 (1854); *Love* v. *Pusey, &c., Co.*, 3 Penn. (Del.) 577 (1907); *California* v. *Poulterer*, 16 Cal. 514 (1860); *Orne* v. *Roberts*, 51 N. H. 110 (1871); *Springfield* v. *Postal Tel. C. Co*, 164 Ill. App. 276 (1911). The remedy may be concurrent with other actions. *Geneva* v. *Cole*, 61 Ill. 397 (1871). But if the statute prescribes another form of action, debt will not lie. *Smith* v. *Drew*, 5 Mass. 514 (1809); *Moyer* v. *Kirby*, 14 Serg. & R. (Pa.) 162 (1826). In the absence of statutory grounds debt will not lie for a mere tort. *Chamberlin* v. *Cox*, 2 N. J. L. 332 (1807); *Eads* v. *Pitkin*, 3 Green (Iowa) 77 (1851), and see *Williams* v. *Mead*, 80 Conn. 434 (1908).

[80] See Ames' History of Assumpsit, II Harvard Law Review, 1-18, reprinted in Select Essays in Anglo-American Legal History, vol. III, p. 599; Hare on Contracts (1887), p. 117.

[81] Portions of the opinions are omitted.

CABELL, J.: The only question now to be decided is, whether the evidence was properly admitted, under either count in the declaration. The two first counts, being for goods sold and money lent, are so totally variant from the evidence as to be thrown entirely out of view. Nor do I think the evidence admissible under the 3d count. It is true that, with respect to debts for work and labor, or other personal services, the rule is, that, however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, the party may declare either specially on the original executory agreement, or in *indebitatus assumpsit,* on the express promise to remunerate (if there was one), or on the promise which the law implies on the execution of the agreement.[82] But this rule, so far as relates to the *indebitatus assumpsit* count, has never been carried farther than to those cases where the remuneration contemplated by the parties was to be in money. When the remuneration was not to be in money, but was to be in any other kind of personal property, or in personal services, or in the doing any collateral act (as the delivery of a bond or the like), there, the general *indebitatus assumpsit* count is not sufficient, but the declaration must be special.[83] This principle applies, I conceive, with full force to the case now before the court (where the remuneration was to be in tobacco), and proves the error of the county court.

Every reason for excluding the testimony under the third count, is at least equally applicable to the fourth, or *quantum meruit* count; for it can not be contended that the latter count admits a greater range of testimony than the former. In fact, they are both emphatically termed money counts, "being founded on express or implied promises to pay money in consideration of a precedent debt." To extend them farther would be to demolish tthe distinction, wisely adopted, between general and special counts, and, with it, all those barriers established for the safety of the defendant, by apprising him of the real nature of the plaintiff's claim, and by enabling him to plead a former recovery in bar of a subsequent action.

FLEMING, J.: The plea was non assumpsit, and issue thereon. The evidence excepted to was, that the defendant had acknowledged, before witnesses, that he had employed the plaintiff as an overseer for three years; and was to pay him 2,000 lbs. of tobacco per year.

---

[82] *Leeds* v. *Burrows,* 12 East 1 (1810); *Streeter* v. *Horlock,* 1 Bingh. 34 (1822); *Bank of Columbia* v. *Patterson,* 7 Cranch. (U. S.) 299 (1813); *Bomeisler* v. *Dobson,* 5 Whart. (Pa.) 398 (1839); *Hancock* v. *Ross,* 18 Ga. 364 (1855); *Tunnison* v. *Field,* 21 Ill. 108 (1859); *Hosley* v. *Black,* 28 N. Y. 438 (1863); *Morse* v. *Sherman,* 106 Mass. 430 (1871); *Ford* v. *Rockwell,* 2 Colo. 376 (1874); *McArthur Brothers* v. *Whitney,* 202 Ill. 527 (1903).

[83] Accord: *Felton* v. *Dickinson,* 10 Mass. 287 (1813); *Mitchell* v. *Gile,* 12 N. H. 390 (1841); *Weart* v. *Hoagland,* 22 N. J. L. 517 (1850); *Ranlett* v. *Moore,* 21 N. H. 336 (1850); *Eastland* v. *Sparks,* 22 Ala. 607 (1853); *Meyers* v. *Schemp,* 67 Ill. 469 (1873); *Pierson* v. *Spaulding,* 61 Mich. 90 (1886); contra, *Crandall* v. *Bradley,* 7 Wend. (N. Y.) 311 (1831); *Teplin* v. *Packard,* 8 Barb. (N. Y.) 220 (1850); *St. Louis, &c., Co.* v. *Soulard,* 8 Mo. 665 (1844); *Payne* v. *Couch,* 1 Greene (Iowa) 64 (1847); *Powelton Coal Co.* v. *McShain,* 75 Pa. 238 (1874); *McKinnie* v. *Lane,* 230 Ill. 544 (1907).

The evidence then proves a special agreement to pay a quantity of tobacco for certain services, which was allowed to support a general charge of a sum of money, said to be due for services performed as an overseer, which, in my conception, was irrelative to the issue, and tended to take the defendant by surprise. Every plaintiff is presumed to understand his own case, and to know what evidence he can bring forward in support of it; which ought to apply directly to the charge in the declaration, and not by inference or implication.

In the case before us, the plaintiff, in order to avail himself of the evidence excepted to, should have brought a special action on the case, stating the agreement, his performance of the services, for which the law would have implied an *assumpsit,* his demand for the tobacco, and the defendant's refusal to pay: with an averment that the tobacco contracted for was worth so much money, and laid his damages accordingly; and then the parties would have gone to trial on fair and equal grounds; and no surprise on either side. But, as the case appears, the judgment of the county court can not be sustained; and was properly reversed by the judgment of the district court, which is affirmed by the unanimous opinion of this court.[84]

H. L. HOLLISTER *v.* LYON & HEALY.

APPELLATE COURT OF ILLINOIS, 1913.

177 *Ill. App.* 652.

BARNES, J.: This was an action of assumpsit on the common counts. The only question that need be considered is whether, on the facts appearing in the record, plaintiff could recover on the common counts only.

Plaintiff claimed to have returned a pianola, previously bought of defendant, with the understanding that he was to be credited with $250 on a piano or orchestrelle which he was to get some time in the future—when he got a new house he was building—and for which he was to pay $1,000. He called about three years after-

---

[84]A special contract must be declared on specially, *indebitatus assumpsit* will not lie. *Cutter* v. *Powell,* 6 T. R. 320 (1795); *Hull* v. *Heightman,* 2 East 145 (1802); *White* v. *Woodruff,* 1 Root (Conn.) 309 (1791); *Jennings* v. *Camp,* 13 Johns. (N. Y.) 94, 7 Am. Dec. 367 (1816); *Algeo* v. *Algeo,* 10 S. & R. (Pa.) 235 (1823); *Hurlock* v. *Murphy,* 2 Houst. (Del.) 550 (1862); *Maynard* v. *Tidball,* 2 Wis. 34 (1853); *Ladue* v. *Seymour,* 24 Wend. (N. Y.) 60 (1840); *Brown* v. *Fales,* 139 Mass. 21 (1885); *McGonigal* v. *Raughley,* 6 Penn. (Del.) 61 (1906); *Applebaum* v. *Goldman,* 155 Mich. 369 (1909); *Massachusetts C. & R. A.* v. *Crudeli,* 30 R. I. 193 (1909). Where performance of a special agreement has been prevented by the act or default of the defendant the plaintiff has been permitted to recover in *indebitatus assumpsit* in *Moulton* v. *Trask,* 50 Mass. 577 (1845); *Carrol* v. *Giddings,* 58 N. H. 333 (1878); *Money* v. *York Iron Co.,* 82 Mich. 263 (1890). In other jurisdictions it has been held that the plaintiff must declare specially. *Rankin* v. *Darnell,* 11 B. Mon. (Ky.) 30 (1850); *Harris* v. *Ligget,* 1 W. & S. (Pa.) 301 (1841); *Expardet Metal F. Co.* v. *Boyce,* 233 Ill. 284 (1908) waiver.

wards and was unable to get any information about the matter from any one he consulted in defendant's store. Nothing more was done about the matter and he brought this action.

On evidence of such facts, the court directed a verdict for $250 and accrued interest.

There was no agreement to pay him money, but simply to give credit for $250 on condition of a sale of either a piano or an orchestrelle, or on a sale that was executory, or where delivery must be made in the future. Under any theory he could not recover on the common counts. *Indebitatus assumpsit* will not lie where the agreement is not for the payment of money but for the doing of some other thing; *Myers* v. *Schemp*, 67 Ill. 469; nor on an executory contract, *Cast* v. *Roff*, 26 Ill. 453; nor for the nondelivery of goods, *Seckel* v. *Scott*, 66 Ill. 196. In such cases the party must declare specially on the contract.

Assuming that plaintiff had taken the necessary steps to perfect a cause of action, it nevertheless was one for unliquidated damages of which there was no proof. The court erred in directing a verdict and denying the motion in arrest of judgment. The judgment will be reversed and the cause remanded.

Reversed and remanded.[85]

EDWARD THOMPSON COMPANY *v.* KOLLMEYER.

APPELLATE COURT OF INDIANA, 1910.

46 *Ind. App.* 400.

RABB, J.: Appellant brought an action in general assumpsit against appellee, to recover on an account for goods alleged to have been sold and delivered by appellant to appellee. Issues were formed and a trial had, resulting in a finding and judgment for appellee. The only question presented here is the sufficiency of the evidence to sustain the finding.

The goods alleged to have been sold were volumes thirteen to thirty-two, inclusive, of the American and English Encyclopedia of Law, volumes fifteen to twenty-three, inclusive, of the Encyclopedia of Pleading and Practice, and volume two of the supplement to the Encyclopedia of Pleading and Practice. The appellant introduced in evidence, without objection, the following written order, given by appellee to appellant:

"Columbus, Indiana, March 19, 1903. Edward Thompson Company, Northport, New York, Gentlemen: Please renew shipments

---

[85] Accord: *Brand* v. *Henderson*, 107 Ill. 141 (1883); *Parmly* v. *Farrar*, 169 Ill. App. 606, 48 N. E. 693 (1897); *Meyer* v. *Frenkil*, 113 Ind. 36 (1910); *Schulze* v. *Farrell*, 142 App. Div. (N. Y.) 13 (1910); *Miller* v. *Walker*, 158 Ill. App. 276 (1910); *Smith* v. *Young*, 179 Ill. App. 364 (1913); *Gallup* v. *Jeffery Co.*, 86 Conn. 308 (1912), and cases in notes to preceding case. Compare *Vollmar* v. *Bayfield Mill Co.*, 146 Wis. 412 (1911) code.

on my contracts for American and English Encyclopedia of Law, second edition, and Encyclopedia of Pleading and Practice, sending me at once volumes thirteen to twenty-three, inclusive, of the American and English Encyclopedia of Law and volumes fifteen to twenty-three, inclusive, of the Encyclopedia of Pleading and Practice, for which I am to pay you $7.50 and $6 per volume respectively, also send me the remaining volumes of the American and English Encyclopedia of Law as published, and the supplement to the Encyclopedia of Pleading and Practice. The terms on the volumes of the American and English Encyclopedia of Law now published, and the subsequent volumes, and on volumes fourteen to twenty-three of the Encyclopedia of Pleading and Practice, I agree to pay as follows: $6.50 cash; balance $10 bimonthly, beginning September 1, 1903.

C. J. Kollmeyer."

It was shown by other undisputed and uncontradicted evidence that the goods were shipped pursuant to the order, and had been partially paid for by appellee, a balance of $139.50 remaining due.

Appellee contends that appellant's action, being in general assumpsit upon the account, and not based upon the written order, would not be sustained by proof of the written order introduced in evidence.

It is the settled law in this state, that where an express contract has been entered into, and one party has fully performed his part of the contract, so that nothing remains unexecuted but the other's obligation to pay, the party performing his part of the contract may sue the other upon the implied contract to pay for the benefit he has received. *Magee* v. *Sanderson* (1858), 10 Ind. 261; *Peden* v. *Scott* (1905), 35 Ind. App. 370; *Board, etc.*, v. *Gibson* (1902), 158 Ind. 471, and cases cited.

The special contract marks the maximum of the measure of damages. In this case the undisputed evidence shows that the goods were furnished to appellee, at his request, by appellant, and all that remained to be done under the contract was that appellee should pay for them. Under the evidence, appellant was clearly entitled to a finding and judgment against appellee for the balance remaining due on the purchase price of the books.

Judgment reversed and a new trial ordered.[86]

---

[86] Accord: *Dees* v. *Self Bros.*, 165 Ala. 225 (1910); *Marsh* v. *Fricke*, 1 Ala. App. 649 (1911); *Elliott* v. *Wilson*, 25 Del. 445 (1911); *Theis* v. *Svoboda*, 166 Ill. App. 20 (1911); *Wilson* v. *Reighard*, 230 Pa. 141 (1911); *Ludwig* v. *Pusey & Jones Co.*, 143 App. Div. (N. Y.) 290 (1911); *Clymers-Jones Lith. Co.* v. *United States F. & S. B. Co.*, 48 Pa. Super. Ct. 636 (1912); *St. Louis & S. F. R. Co.* v. *Hall*, 65 So. 33 (Ala. 1914); *American Surety Co.* v. *Fruin B. C. Co.*, 182 Mo. App. 667 (1914) and cases in note to *Brooks* v. *Scott, supra.*

NEGRO PETER *v.* WILLIAM STEEL.

SUPREME COURT OF PENNSYLVANIA, 1801.

3 *Yeates (Pa.)* 250.

This cause was tried at *nisi prius,* at Lancaster, before the late and present chief justice. The plaintiff declared in a general *indebitatus assumpsit* for work, labor and service, and on a *quantum meruit.* It was stated, that he was captured during the late revolutionary war, within the British lines, by the defendant then an American officer, and brought into Lancaster county. The defendant there registered him as a slave, and after being six months within the state, he was discharged by *habeas corpus.* The action was brought for remuneration for his services, after he had been six months within the state. The defendant at the trial, excepted to the form of the action, insisting that trespass was the proper remedy; and the court directed a nonsuit, with liberty to move in bank to take it off.[87]

YEATES, J.: This is a motion to set aside a nonsuit, and the only question is, whether a free negro may not support a general *indebitatus assumpsit* on a *quantum meruit,* for work, labor and service, against a person claiming, or who formerly did claim to hold him as a slave?

On the part of the plaintiff it has been insisted, that where the party has two remedies given by the law, for an injury done to his person or property, he may elect which he pleases. That though trespass and false imprisonment would lie, yet *indebitatus assumpsit* may also be maintained. That the party may waive the tort and go for the sum really due. 1 Burr. 21, *Cooper et al.* v. *Chitty et al.,* 2 Ld. Raym. 1216,*Lamine* v. *Dorrel; Fellham* v. *Terry* cited Cowp. 416, 419. 1 Term Rep. 387; Bull. 128. *Simpson* v. *Gisling;* Cowp. 246, *Cheny* v. *Batton;* 2 Dall. 76, 78,*Haldane* v. *Duche's exrs.* And it has been said, that this form of action is a liberal remedy, like a bill in equity, entrapping no one in form. 2 Bla. Rep. 830. 2 Burr. 1012.[88]

The defendant has contended, that trespass is the specific remedy pointed out by law, and that the point of slavery could only be tried in that form of action, or *homine replegiando.* That the defendant's holding the plaintiff by force is utterly inconsistent with a contract express or implied, which must be the ground of every assumpsit. 1 Term Rep. 20. *Stokes et al.* v. *Lewis et al,* Ib. 387, *Birch* v. *Wright.* And that a recovery in this suit would not be a bar to a future action of trespass. That surprise might be occasioned to

---

[87] The arguments of counsel are omitted.

[88] Where a plaintiff is entitled to two modes of redress and elects to bring assumpsit, the defendant may raise any defense peculiar to that action, although the same defense would not have been allowed had the other form of action been pursued. *Smith* v. *Hodson,* 4 Durn. & E. 211 (1791); *Duncan* v. *Ware,* 5 S. & P. (Ala.) 119 (1833); *Meredith* v. *Richardson,* 10 Ala. 828 (1846).

the defendant in this form of action and he might not know how to shape his defense. Assumpsit will not lie against an excise officer for an over payment. Cowp. 69, *Whitebread* v. *Brookbank;* nor money paid for the release of cattle distrained for damage feasant, though the distress was wrongful. Ib. 414. To support the suit, there must be privity between the parties. 2 Dall. 54, 55. *Rapalje et al.* v. *Emory.*

I am not disposed to break in on the boundaries of actions, nor to make any innovation therein. If the defendant would sustain any inconvenience or difficulty in the present form of action, or the plaintiff derive any advantage therefrom, I should not feel inclined to support it.

The argument of surprise in the present suit is most powerful, if well founded. But is not a demand for work, labor and service, an immediate notice to the defendant, that for such time as he claimed the plaintiff to be in a state of vassalage, compensation to a reasonable extent is sought for? Would trespass more thoroughly apprize him how to shape his defense, than the present form of action? On the general issue, the defendant may give every thing in evidence, which shows that the plaintiff has no right to recover. Indeed in actions for money had and received, which is a most liberal remedy, the objection as to want of notice of the nature of the demand on the face of the pleadings, almost uniformly occurs; and yet such assumpsits have been sustained notwithstanding.

In *Astley* v. *Reynolds* (2 Stra. 915) detinue or trover was open to the plaintiff, when money was unlawfully extorted by duress of goods, and yet assumpsit was held to lie. In *Howard* v. *Wood* (Sir. T. Jon. 126. 2 Lev. 245) and in *Arris* v. *Stakeley* (Mod. 260) it was held, that *indebitatus assumpsit* would lie for the rightful against the wrongful officer, for the profits of an office, as for money had and received. In these cases it was objected, that *indebitatus assumpsit* would not lie for want of *privity,* and because there was no contract; it was only a tort, a disseisin and the plaintiff might have brought an assize, and that the defendant took the profits against the will of the plaintiff. "There the question to be tried was, whether the grant of the office was good or bad, but that did appear from the form of the declaration; nor was it possible for the defendant to be apprized, what title the plaintiff intended to set up. Again, it was not the only remedy, for an assize will lie for an office." Cowp. 416. But the several objections were overruled by the court; because it is an expeditious remedy, facilitates the recovery of just rights, and this manner of action had long prevailed. 2 Jon. 128.

In *Hitchin* v. *Campbell,* (2 Bla. Rep. 829, 830) it was determined, that *indebitatus assumpsit* will lie for the assignees of a bankrupt against a creditor who has levied his debt by *fieri facias,* subsequent to the act of bankruptcy. There Lord Chief Justice De Grey observed, that "practice had certainly much extended the action of *assumpsit,* as a very useful and general remedy. While the action was in its infancy, the courts endeavored to find technical arguments to support it, as by a notion of *privity,* etc., yet that prin-

ciple is too narrow to support these actions in general, to the extent to which they are admitted. The assignees might have their election to bring either tort or contract, yet they could not bring both; and having elected to bring trover, the judgment in that, bars the action of *assumpsit.*"

In *Lamine* v. *Dorrel,* 2 Ld. Raym. 1216, the court held, that if one takes goods to which he has no right, and sells them, the owner may waive the tort and recover the price for which they were sold in *indebitatus assumpsit,* and that it did not differ from *assumpsit* for the profits of an office. Lord Chief Justice Holt remarks, that "the defendant may plead recovery in this suit in bar of an action of trover; because by the *indebitatus assumpsit,* the plaintiff makes and affirms the defendant's act to be lawful; and consequently the sale of the goods is no conversion." This reasoning is highly applicable to the case before the court. That a plaintiff may dispense with a trespass or wrong, and proceed for the sum really due, is I apprehend too well established by the cases cited and others, to be now shaken. But he shall not blow both hot and cold at the same time. 1 Term Rep. 387.[89]

I proceed now to consider and remark on the authorities adduced by the defendant's counsel.

In *Whitebread* v. *Brookbank,* Cowp. 69, Lord Mansfield said "it might be of great inconvenience, if the case "should hereafter be made a precedent, that an action for money had and received will lie against an officer of revenue for an over payment."[90] The resolution therefore is founded on principles of general policy, the revenue being materially interested in the construction of the statute of 1 Geo. 3. c. 7. § 6, granting a bounty on the exportation of beer, made from malted corn. The present is a mere controversy between individuals.

In *Lindon* v. *Hooper,* Cowp. 414, it was held, that an action for money had and received, does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful. The reasons are given: the case is singular and depends on a peculiar system of strict positive law, which has provided two precise remedies, replevin or trespass, in both of which the plaintiff must specially reply a right of common or some other title, as a justification of the cattle being where they were taken. "But if assumpsit might be brought in such a case, the defendant might be surprised at the trial. He could not be prepared to make his defense; he could not tell what sort of right of common, or other justification the plaintiff might set up. The plaintiff might shift his

---

[89] One who waives the tort and sues in assumpsit is bound by his election. *Lythgoe* v. *Vernon,* 5 H. & N. 180 (1860); *Reynolds* v. *Fenton,* 2 Phila. (Pa.) 298 (1857); *Ware* v. *Percival,* 61 Maine 391 (1872); *Finlay* v. *Bryson,* 84 Mo. 664 (1884); *Nield* v. *Burton,* 49 Mich. 53 (1882); *Beider* v. *Fuller,* 106 Mich. 342 (1895).

[90] *McMillan* v. *Eastman,* 4 Mass. 378 (1808); *Charleston* v. *Stacy,* 10 Vt. 562 (1838); *Seitzinger* v. *Steinberger,* 12 Pa. 379 (1850); *School District* v. *Tebbets,* 67 Maine 239 (1877), but compare *Mott* v. *Pettit,* 1 N. J. L. 298 (1795); *Gibson County* v. *Harrington,* 1 Blackf. (Ind.) 260 (1823).

prescription as often as he pleased, or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to throw such a difficulty upon his adverse party. Besides as applied to the subject-matter of this question, the action for money had and received could never answer the equitable end for which it was invented, and deserves to be encouraged. For the point to be tried therein, whether the plaintiff's cattle trespassed on the defendant's land, may depend on the plaintiff's right, or defendant's right, or the fact of trespassing, or it may depend on mere form. It would be unequal and unjust, as between the parties, to suffer assumpsit to be substituted in lieu of an action of trespass, and would create inconvenience by leaving rights of common open to repeated litigation, and depriving posterity of the benefit of precise judgments upon record."[91]

Lord Mansfield further observed, that "there was a material distinction between the case then before the court and the instances alluded to at the bar, where the plaintiff is allowed to waive the trespass and bring action for money had and received. In the latter, the relief is more favorable to the defendant. He is liable to refund only what he has actually received, contrary to conscience and equity; and the plaintiff, by electing this mode of action, eases the defendant of special pleading, and takes the risk of being surprised upon himself."

On the most careful consideration of this case, I am satisfied that not a single reason which influenced the court's decision in *Lindon* v. *Hooper,* applies to the case now before us; and that all the grounds of suffering assumpsits to be brought where the wrong is dispensed with, unite in the present instance, and fortify the mode of action which has been pursued.

The observation of the court in *Rapalje et al.* v. *Emory,* 2 Dall. 54, 55, goes merely to the identifying of money and tracing it into the hands of an utter stranger, according to the distinction laid down in Cowp. 200.

Where one does work for another by compulsion, whom he is under no legal or moral obligation to serve, the law will, I think, imply and raise a promise on the part of the person benefited thereby, to make him a reasonable recompence; and as I have not been able to discover any solid ground of objection against the plaintiff's sustaining the form in which this action has been conceived, I am of opinion that the nonsuit should be set aside, and the costs to await the determination of the suit. Of the merits of the plaintiff's demand, the jury are the constitutional judges.

Smith and Brackenridge, justices, concurred; Shippen, C. J., took no part in the decision.

Nonsuit set aside and new trial awarded.[92]

---

[91] Accord: *Webber* v. *Aldrich,* 2 N. H. 461 (1822); *Colwell* v. *Perden,* 3 Watts (Pa.) 327 (1834).

[92] *Higgins* v. *Breen,* 9 Mo. 493 (1845); *Abbott* v. *Freemont,* 34 N. H. 43 (1857); *Hickam* v. *Hickam,* 46 Mo. App. 496 (1891), similar to principal case. While assumpsit may be the remedy, the circumstances may be such as to rebut the implication of a promise to pay. *Urie* v. *Johnston,* 3 P. & W.

BOARD OF HIGHWAY COMMISSIONERS *v.* BLOOMINGTON.

SUPREME COURT OF ILLINOIS, 1912.

253 *Ill.* 164.

The Board of Highway Commissioners of the town of Bloomington, in McLean County brought an action of assumpsit, based on the common counts, against the city of Bloomington to recover from the said city the amount of taxes collected on property in Bloomington township located within the corporate limits of the city of Bloomington and paid over by the collectors of revenue to the city of Bloomington under the third proviso of section 16 of the Road and Bridge Law, as amended in 1909. The taxes in question were levied under sections 13 and 14 of the Road and Bridge Law in 1909 and were collected and paid over to the city in 1910. At the December term, 1910, of this court, in the case of *People* v. *Fox*, 247 Ill. 402, this court held that the third proviso of said section 16 of the Road and Bridge Law was unconstitutional and void, in that it granted a special privilege to certain cities based upon a mere arbitrary classification. Upon the assumption that the decision of this court in the Fox case established the right of the board of highway commissioners to the money paid over to the city under the unconstitutional proviso of section 16, said highway commissioners brought this action of assumpsit and recovered a judgment for the amount so paid over and $1,384.93 interest. From this judgment the city of Bloomington has prosecuted the present appeal.[93]

(Pa.) 212 (1831); *Sloss I. & S. Co.* v. *Harvey*, 116 Ala. 656 (1897); *Thompson* v. *Brouk*, 126 Mich. 455 (1901).

The owner of personal property tortiously taken and converted into money or money's worth, may waive the tort and sue in assumpsit. *Young* v. *Marshall*, 8 Bingham 43 (1831); *Russell* v. *Bell*, 10 M. & W. 340 (1842); *Hambly* v. *Trott*, Cowper 371 (1776), at page 375; *Dundas* v. *Muhlenberg*, 35 Pa. 351 (1860); *Norden* v. *Jones*, 33 Wis. 600 (1873); *Westcott* v. *Sharp*, 50 N. J. L. 392 (1887); *Chittenden* v. *Pratt*, 89 Cal. 178 (1891); *Pryor* v. *Morgan*, 170 Pa. 568 (1895); *St. John* v. *Antrim I. Co.*, 122 Mich. 68 (1899); *Phelps* v. *Church, etc.*, 99 Fed. 683 (1900). But the authorities are in conflict as to whether assumpsit will lie where the chattels have not been sold or disposed of. Among the cases denying the right of action are, *Jones* v. *Hoar*, 5 Pick. (Mass.) 285 (1827); *Willet* v. *Willet*, 3 Watts (Pa.) 277 (1834); *Crow* v. *Boyd*, 17 Ala. 51 (1849); *Smith* v. *Smith*, 43 N. H. 536 (1862); *Carson River L. Co.* v. *Bassett*, 2 Nev. 249 (1866); *Paine* v. *McGlinchy*, 56 Maine 50 (1868); *Johnston* v. *Deverill*, 61 Ill. 316 (1871); *Satterlee* v. *Melick*, 76 Pa. 62 (1874); *Grinnell* v. *Anderson*, 122 Mich. 533 (1899); *Woodruff* v. *Zaban*, 133 Ga. 24 (1909). Among those supporting the right of action are *Terry* v. *Munger*, 121 N. Y. 161 (1890); *McComb* v. *Guild*, 9 Lea (Tenn.) 81 (1882); *Evans* v. *Miller*, 58 Miss. 120 (1880); *Gordon* v. *Bruner*, 49 Mo. 570 (1872); *Braithwaite* v. *Akin*, 3 N. Dak. 365 (1893). And see *Rees* v. *Western E. Society*, 44 Pa. Super. Ct. 381 (1910).

Where the right of action arises out of negligence, the injured person can not waive the tort and sue in assumpsit for money paid for medical attendance. *Plefka* v. *Detroit U. R.*, 147 Mich. 641 (1907).

[93] Only a portion of the opinion is printed.

VICKERS, J.: Appellant next contends that there can be no recovery in this action because there is no privity between the parties to the suit and no basis in the evidence for the finding that the money in question was received by appellant for the use of appellee.

The action of assumpsit was devised for the purpose of recovering damages for the nonperformance of a parol or simple contract. (3 Johns. Cases 60.) The word is derived from the Latin *assumere,* meaning to assume or to undertake. (Bouvier's Law Dict.) In the law of contracts the word was understood as an undertaking, either express or implied, to perform a parol agreement. An "express assumpsit," by the common law, was "an undertaking made orally, by writing not under seal or by matter of record, to perform an act or to pay a sum of money to another." An "implied assumpsit" was defined to be "an undertaking presumed, in law, to have been made by a party from his conduct, although he has not made any express promise." (Bouvier's Law Dict.) There were two general forms in the action of assumpsit. "Special assumpsit" was brought upon an express contract or promise, while "general assumpsit" was brought upon an implied contract. (2 Smith's Leading Cases, 14.)

It will thus be seen that there is a general agreement between a special assumpsit and an express contract, and general assumpsit and an implied contract. As ordinarily understood, the only difference between an express contract and an implied contract is, that in the former the parties arrive at their agreement by words, either oral or written, sealed or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. (2 Page on Contracts, sec. 771.) In both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. A familiar illustration of an implied contract is, where one person, in the absence of any express agreement, renders valuable services to another which are knowingly accepted by such other, the law will imply a promise to pay a fair and reasonable compensation for such services. (*McFarlane* v. *Dawson,* 125 Ala. 428.) If an attorney renders services without any express agreement as to the amount of compensation to be received, the law implies a promise to pay him reasonable compensation for the work done. (*Miller* v. *Tracey,* 86 Wis. 330.) These illustrations are examples of genuine implied contracts, in all of which there is some act or line of conduct as a basis for the implication and which furnishes the necessary privity to support the action of general assumpsit. This class of implied contracts is sometimes called contracts implied as of fact. (Page on Contracts, supra.)

After subtracting express contracts and contracts implied in fact, there is still left another large class of obligations, to enforce which the action of general assumpsit is a well established remedy. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil law. This obligation was under the civil law designated *"quasi-contractus."* Stated as a civil law principle, it was

"an obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them or from a voluntary act of one of them, or, stated in other language, an obligation springing from voluntary and lawful acts of parties in the absence of any agreement." (Howe's Studies of Civil Law, 171; Morey on Roman Law, 371.) In *quasi* contracts the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. "The term was not found in the common law, but it has been taken by writers upon the common law from the Roman law and may be considered now as quite domesticated, even to the extent of being used as the title of a very valuable common-law textbook, Keener on Quasi Contracts." (Bouvier's Law Dict.) Page, in his late work on contracts (vol. 2, p. 1166), in discussing the term "*quasi* contract" says: "The term '*quasi* contract,' while but little used in law, is a term of considerable antiquity in English law. The term '*quasi ex contractu*' is used in Bracton to include 'agency, wardship, the division of common property, the distribution of an inheritance, an action arising out of a testament, a suit to require a sum paid not due, and such like'."

The class of obligations now under consideration, and which are treated in works on contracts as "contracts implied in law," or quasi contracts, are recognized and enforced by common-law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. (*Pract* v. *Daniels*, 20 Colo. 100.) In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases "the duty defines the contract." (*Hertzog* v. *Hertzog*, 29 Pa. St. 468; *Columbus, Hocking Valley and Toledo Railway Co.* v. *Gaffney*, 65 Ohio St. 104; 61 N. E. Rep. 152.) The action of assumpsit, under the common counts for money had and received, is an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned. (*Gaines* v. *Miller*, 111 U. S. 395; *Pauly v. Pauly*, 107 Cal. 8; *Brown* v. *Woodward*, 75 Conn. 254; *Wilson* v. *Turner*, 164 Ill. 398.) The action is in form *ex contractu*, but the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant and no privity is necessary. (2 Page on Contracts, sec. 789, and cases there cited.) The right to recover is governed by principles of equity although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex aequo et bono*

belongs to another. (*Jackson* v. *Hough*, 38 W. Va. 236; *Merchant's Bank* v. *Barnes*, 47 L. R. A. 737.) A few cases illustrating the application of the principle under consideration will be sufficient to enable us to determine the question now under discussion.

Where A receives money from X which belongs to B, without B's consent, the general rule is that in the absence of special circumstances B may recover such money from A. (*United States* v. *Bank*, 96 U. S. 30.) Where a sheriff retains money which he claims to be due him as commission, but which legally belongs to a board of education, he is liable in an action for money had and received. (*Socorro Board of Education* v. *Robinson*, 7 N. M. 231.) A public quasi corporation, such as a county, which receives taxes and applies them all to its own use when it should pay bonds issued by the town out of such taxes, is liable to such town therefor. (*Strough* v. *Jefferson County*, 119 N. Y. 212, 23 N. E. Rep. 552.) Where a county receives money belonging to other persons without authority it must refund to such persons. (*Chapman* v. *County of Douglas*, 107 U. S. 348.) Where taxes are paid to a county by a sheriff when they should have been paid to a city, the city may recover such taxes from the county. (*Salem* v. *Marion County*, 25 Ore. 449, 36 Pac. Rep. 163.) Where a county is divided and the original county is legally entitled to the taxes when the division was made, but which had not been then paid but the state official through whose hands such taxes passed paid a part thereof to the new county, the original county may recover such taxes from the new county. (*Colusa County* v. *Glen County*, 117 Cal. 434, 49 Pac. Rep. 457.) Where a stockholder receives dividends from a corporation which he knows to be insolvent and that such dividends are paid out of the capital of the corporation, he may be compelled to repay such dividends in an action brought by the receiver of the company. (*Warren* v. *King*, 108 U. S. 389.) Where a school trustee expends money for the actual benefit of township schools which by law he is required to pay over to another school corporation, such township is liable to such corporation for the amount of money thus expended. (*Center School Township* v. *School Comrs.*, 150 Ind. 168, 49 N. E. Rep. 961.) In *State* v. *St. Johnsbury*, 59 Vt. 332, it was held that where fines were improperly paid to a village instead of the county clerk for the use of the state, an action for money had and received was maintainable by the state against the village. This case reviews many cases, both English and American, and reaches the conclusion that the action was properly brought, and that no privity other than that implied by laws was necessary.

The facts in the case at bar are, that appellant received from the collectors of taxes the money here sought to be recovered. At the time this money was paid over by the collectors and received by appellant there was in the statute a provision which, had it been valid, would have settled the right of appellant to this money. The statute, however, under which this money was received by appellant has been declared unconstitutional. To be sure, the decision of this court, declaring said statute unconstitutional, was rendered after

the money had been paid over to appellant, but this circumstance does not affect the legal status of the parties in the least. The rule is universal that an unconstitutional law confers no right, imposes no duty and affords no protection. It is in legal contemplation as though no such law had ever been passed. (*Norton* v. *Shelby*, 118 U. S. 425.) There being no question of wrongful intention on the part of anyone in connection with this transaction, the unconstitutional statute must be eliminated from all consideration. With this statute out of view the situation is simplified. We merely have the case of the collectors of taxes voluntarily paying to the appellant, and the appellant voluntarily receiving, public funds which under the law belong to Bloomington township. The money in question must be conclusively presumed to have been levied and paid by the taxpayers for the benefit of the only municipality that had a legal right to receive it. The equitable right to this fund follows the legal title thereto. Applying the foregoing principles to these facts, we have no hesitation in coming to the conclusion that an action of assumpsit for money had and received to the use of appellee is maintainable to recover the money in question, and that it is not necessary that there should be any privity whatever between the parties other than such privity as is implied by law, to warrant a recovery.[94]

Judgment affirmed.

PARKER *v.* CLEMMONS.

SUPREME COURT OF VERMONT, 1908.

80 *Vt.* 521.

General assumpsit in the common money counts. Plea, the general issue. Trial by court at the March Term, 1907, Rutland County, Waterman, J., presiding. Judgment for the plaintiffs. The defendant excepted. The opinion states the case.[95]

TYLER, J.: Assumpsit with common counts;[96] plea, the general issue. It appeared by an agreed statement of facts that the defendant was manager of a telephone company and was engaged, with an assistant, in wiring a business block in Fair Haven; that while so engaged the assistant, in the defendant's absence from the

---

[94] Accord: *Trower* v. *San Francisco*, 152 Cal. 479 (1907), 15 L. R. A. (N. S.) 183 and note; *Butts Co.* v. *Jackson*, 129 Ga. 801 (1908), 15 L. R. A. (N. S.) 567 and note; *Luther* v. *Wheeler*, 73 S. Car. 83 (1905); *Allsman* v. *Oklahoma City*, 21 Okla. 142 (1908), c. f.; *Phoebus* v. *Manhattan Social Club*, 105 Va. 144 (1906), 8 Amer. & Eng. Ann. Cas. 667 and note.

[95] The arguments of counsel are omitted.

[96] These are counts framed in certain conventional forms alleging a debt founded on one of the several causes of action from which the law implies a promise to pay, as distinguished from special counts framed upon the particular circumstances of the case. Those usually employed were of four kinds: (1), the *indebitatus count;* (2), the *quantum meruit;* (3), the *quantum valebat;* (4), the *insimul computassent* or account stated. Those arising out of money transactions were called the money counts. The forms of these counts

room, accidently overturned a jar of chemical fluid; that the fluid ran out, leaked through the floor into the plaintiff's jewely store and injured various articles therein. The defendant was not employed by the telephone company, but was in charge of the work at the request of the son of the owner of the block, and the assistant was also employed by him. When the plaintiff discovered the injury to his goods he sent for the defendant, showed them to him and informed him that part of them would have to be sent away to be repaired. The defendant then promised the plaintiff that he would pay him the amount of the damage when he ascertained what it was. The plaintiff had the goods repaired, showed the bill therefor to the defendant, who at first agreed to pay it, but afterwards refused unless the owner of the block would pay one-half, which the latter would not do.

No question was made in the argument other than whether a recovery could be had under any of the common counts.

It is clear that the "work and labor performed" upon the goods were for the plaintiff and not for the defendant, and the same is true in respect to "money laid out and expended." Indeed, all the common counts are founded on express or implied promises to pay money in consideration of antecedent debts.[97]

This case does not fall within either of the first three divisions made in the text-books,—*indebitatus assumpsit, quantum meruit,* or *quantum valebat.* The plaintiff contends that the count for an account stated will lie, but we think that his demand does not fall within the definition of an account. It was said by Chief Justice Shaw in *Whitwell* v. *Willard,* 1 Metc. 216 that the primary idea of account *computatio,* is some matter of debt and credit, or demands in the nature of debt and credit, between parties; that it implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation. It is doubt-

---

were not in accord with the strict rules of pleading, and Lord Holt is stated to have said that he was a bold man who first ventured on them. *Hayes* v. *Warren,* 2 Str. 933 (1732), but they firmly established themselves in practice and practically supplanted special counts for common debts or money demands. 1 Chitty on Pleading, 342. For the forms of the counts in *indebitatus assumpsit,* see 2 Encyclopædia of Forms, p. 297. The common counts were made more concise in England by the rules of Trinity Term 1 William IV, see 7 Bingham 781 (1831). In most of the code states a complaint in the form of the common counts is sufficient. *Allen* v. *Carpenter,* 7 N. Y. 476 (1852); *Freeborn* v. *Glazer,* 10 Cal. 337 (1858); *Kerstetter* v. *Richmond,* 10 Ind. 199 (1858); *Grannis* v. *Hooker,* 29 Wis. 65 (1871); *Jones* v. *Mial,* 82 N. Car. 253 (1880); *Dunnett* v. *Thornton,* 73 Conn. 1 (1900). Contra: *Foerster* v. *Kirkpatrick,* 2 Minn. 210 (1858); *Bowen* v. *Chambers,* 3 Ore. 452 (1869). Since the act of May 25, 1887, P. L. 271, the common counts as such are obsolete in Pennsylvania. *Bank* v. *Kopitzsch,* 161 Pa. 134 (1894). In Massachusetts the plaintiff may use one of the common counts "when the natural import of its terms correctly describes the cause of action." Revised Laws, ch. 173, § 6, pl. 7; *Charman* v. *Henshaw,* 81 Mass. 293 (1860), or a count on an account annexed may be used, whenever the cause of action would be correctly described by any of the common counts at law. *Stearns* v. *Washburn,* 73 Mass. 187 (1856).

[97] *Chicago* v. *Chicago & N. R. Co.,* 130 Ill. 300 (1900); *Stewart M. Co.* v. *Iron Clad M. Co.,* 67 N. J. L. 577 (1902).

less true, however, that it would be sufficient to come within the definition if the accounts were all on one side, provided the amount were agreed to by the parties. *Langdon* v. *Roane's Admr.*, 41 Am. Dec. 60 and note.

The form adopted by Chitty and ever since followed is that, "the defendant accounted with the plaintiff of and concerning divers sums of money before then due from the defendant to the plaintiff and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that being so found in arrear and indebted, the defendant in consideration thereof undertook and faithfully promised," etc., and the allegation of the breach in this as in the other common counts is: "Yet the defendant, not regarding his said promises, * * * had not, although often requested, as yet paid said sum of money," etc.

Bouvier defines "account stated" as an agreed balance of account. It was held in *Comer* v. *Way*, 107 Ala. 300, 54 Am. St. Rep. 93, that an account stated is an account balanced, and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance. See also, 2 Ency. Pl. & Pr. 1024.

We also refer to some of the earlier authorities. It is said in 1 Saund. Pl. & Ev. 5th ed., page 47, in respect to a recovery upon this count, that it must be proved that the account was "of money or a debt." It is also there said that an account stated does not alter the nature of the original debt. It was held in *Knowles* v. *Mitchell*, 13 East 249, that an admission by the defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, would support a count upon an account stated. It was decided in *Whithead* v. *Howard*, 5 Moore 105, cited in Saunders, that a recovery could not be had upon this count because there was no existing antecedent debt due from the defendant to the plaintiff. *Willis* v. *Jernegan*, 2 Atk. 251; *Peacock* v. *Harris*, 10 East 106.[98]

If the defendant in the present case was primarily liable to the plaintiff it was in an action of trespass on the case for a tort. The damages consequent upon the wrongful act were not a proper subject of book account and were not treated as such by the plaintiff. He paid for the repairs and took receipted bills for such payments.

The plaintiff relies upon this sentence in the opinion in *Powers* v. *Insurance Co.*, 68 Vt. on page 396, 35 Atl. 333, "It is unnecessary, in order to support this count (account stated), to show the nature of the original debt, or prove the specific items constituting the account, but it must appear that at the time of the account a

---

[98] An account stated must be founded on previous transactions of a monetary character, creating the relation of debtor and creditor. *Allen* v. *Cook*, 2 Dowl. 546 (1834); *Clarke* v. *Webb*, 2 Dowl. 671 (1834); *Lubbock* v. *Tribe*, 3 M. & W. 607 (1838); *Lockwood* v. *Thorne*, 11 N. Y. 170 (1854); *Mellon* v. *Campbell*, 11 Pa. 415 (1849); *Chase* v. *Chase*, 191 Mass. 556 (1906); *Fisse* v. *Blanke*, 127 Mo. App. 422 (1907).

certain claim existed, of and concerning which an account was stated." That the court was not considering the right of a party to recover for a tort in an account stated is apparent from the fact that the plaintiff in that case was seeking to recover upon an insurance contract and an amount that he claimed had been agreed upon.

Bradley v. *Phillips*, 52 Vt. 517, is distinguishable from the present case. There the parties, being owners of adjoining lands, each had cut logs over the line on the other's land. They settled by an agreement that each should pay the other at specified rates for the logs taken, and the plaintiff had paid the defendant. But the latter, though having taken the property and having promised to pay for it and having induced the plaintiff to pay for what he had taken, refused to pay the plaintiff. The court held that the question was one purely of contract; that the defendant's agreement was to pay the plaintiff for what logs he had taken; that nothing remained for him to do but pay over the money, and that the plaintiff could recover upon the common counts. The defendant's liability was the same as if he had bought the logs and promised to pay the plaintiff for them. The parties, in legal effect, waived their respective claims for torts, settled their claims and promised to pay each other the sums agreed upon for the logs each had taken, whereupon each became the other's debtor. In the case before us the defendant did not become the plaintiff's debtor, and upon the authorities he can not recover upon the count for an account stated.

Judgment reversed and cause remanded.[99]

(i) Trespass.

WHITTAKER *v.* STANGVICK.

SUPREME COURT OF MINNESOTA, 1907.

100 *Minn.* 386.

Action in the district court for Otter Tail County to enjoin defendants from constructing certain covers or blinds, from hunting or shooting ducks or other water fowl therefrom, and from shooting over or across plaintiff's land. The case was tried before

---

[99] In *Page* v. *Page*, 21 N. H. 389 (1850), assumpsit was brought on an account stated for damage done by defendant's cattle and for a ladder taken without leave and broken. On the trial evidence was introduced that defendant had promised to pay for the damage without fixing any sum. A verdict for these items was set aside, as not recoverable in general *indebitatus assumpsit*. The court, however, added: "It would be difficult, we think, to frame any special declaration according to these facts, that would show a legal consideration for the defendant's promise. There was no liquidation of the amount to be paid, no acceptance of the defendant's promise by the plaintiff in discharge of the trespass; nothing that in law would amount to an accord; nothing that the defendant could plead in bar to an action of trespass for the original injury." See, also, *Gills* v. *Laing*, 4 Camp. 80 (1814); *Allen*

Baxter, J., who found in favor of the defendants. From an order denying a motion for a new trial, plaintiff appealed.[1]

JAGGARD, J.: The plaintiff and appellant sought to perpetually enjoin defendants and respondents from constructing covers or blinds on the surface of a lake in front of a strip of land, to which plaintiff claimed ownership, separating two navigable lakes; from hunting or shooting ducks or other water fowl therefrom; and from shooting across or over the strip of land. The court ordered judgment for the defendants, after trial. This appeal was taken from the order denying a motion for a new trial. The essential question here is whether the decision was justified by the evidence and was consistent with law.

The court found the facts as follows: The plaintiff owned the long, narrow strip, and accretions, extending to a creek connecting the waters of the lakes, which formed what is known as a "duck pass." Although there was a public highway over the duck pass, by virtue of an agreement with the supervisors of the township the plaintiff had the right of fishing and hunting thereon to the same extent as though the road had not been laid out. The defendants and other persons wrongfully had previously gone on plaintiff's land at the highway and shot ducks and water fowl, and now threaten to continue to do so. The effect of the acts was to practically monopolize the shooting privileges and to largely impair the value of the privileges to the plaintiff and her guests. The defendants had been previously restrained by an order of the district court from going upon the highway for the purpose of hunting, and from hunting or shooting ducks or other water fowl upon the highway. "That the said defendants have heretofore erected, and intend and threaten to hereafter erect, upon the surface of Upper Ten Mile lake, directly in front of the said pass, and at a distance of about three hundred twenty-five feet from the shore line thereof, certain covers or blinds, with the purpose and intention of shooting therefrom the wild ducks and other water fowl flying over said pass, and that in hunting said game defendants are liable to shoot over plaintiff's said land. That said lake is of large extent, and it is not necessary for the mere purpose of hunting or shooting the said wild fowl, that said defendants should locate such cover or blinds at the place above mentioned. That the probable result of such acts on the part of the defendants will be to injuriously affect the facilities for shooting wild fowl afforded by said pass; and as a consequence thereof the value of said shooting privileges will be to a considerable extent impaired."

There was testimony to the effect that a shotgun would carry shot "probably four hundred feet, maybe more than that." In consequence, when persons in the blind would shoot towards plaintiff's

---

v. *Woodward*, 22 N. H. 544 (1851); *Knickerbocker, etc., Co.* v. *Hall*, 3 Nev. 194 (1867); *Ingersoll* v. *Moss*, 44 Ill. 72 (1891).

One who would recover under a common count must use a count appropriately framed with reference to the cause of action. *Wertheim* v. *Fidelity, etc., Co.*, 72 Vt. 326 (1900); *Sandusky* v. *Oil Co.*, 63 W. Va. 260 (1907).

[1] Part of the opinion of the court is omitted.

place, "the shot could not help but drop around [plaintiff's] place, on the point, in the woods, or in the timber, or across this point here. A certain amount of the shot would go over the pass. * * * From thirty to fifty per cent. of the shot would go over the land and on the pass. It depends on the winds, and which way the ducks fly. * * * In shooting ducks flying from the north, south, some of these ducks in the ordinary course of shooting naturally would fall when they were killed, on this pass."

1. The first question is whether the facts found show a trespass. Defendants urge that the falling of the shot and of ducks on plaintiff's land not having been shown to "become a nuisance, could not be sufficient to constitute a trespass on the part of the defendants. The old maxim that 'the law does not concern itself with trifles' might well be invoked here." This contention involves a misapprehension of the law of trespass.

With respect to damages as an essential, the common law recognizes two kinds of actions. In the first class there is a direct invasion of another's person or property without permission, which is actionable per se, or which gives rise to a presumption of at least some damage, without proof of any actual damage. Unpermitted contact with the person constitutes assault and battery. Unpermitted invasion of premises constitutes a trespass *quare clausum fregit.* In the second class, actions on the case, in which the damages are indirect and consequential, there can be no recovery unless the plaintiff shows, as an essential part of his case, that damages, pecuniary in kind, proximate in sequence, and substantial in extent have resulted. In trespass *quare clausum fregit,* it is immaterial whether the *quantum* of harm suffered be great, little, or unappreciable. It is true that in *McConico* v. *Singleton,* 2 Mill, Const. 244 (S. C. 1818), Mr. Justice Johnson held that the owner can not prevent others from hunting wild game on uninclosed and uncultivated lands, because to recover in trespass you must prove some actual injury. One quaint reason assigned was the public concern that there should be hunters to form a competent militia to oppose that great danger to free institutions, a standing army. It is elementary that the general rule is otherwise. For example, in *Patrick* v. *Greenway* (see *Mellor* v. *Spateman,* 1 Saund. 346b), the defendant angled in plaintiff's several fishery, but caught nothing. Plaintiff had a verdict, which was sustained because of the infringement of the right which could hereafter be evidence of the exercise of the right by the defendants." And see, as to fisheries, 13 A. & E. Ency. (2d ed.) 584. As to general rule, *Cooper* v. *Crabtree,* per Jessel, M. R., 20 Ch. Div. 592; *Feize* v. *Thompson,* 1 Taunt. 121; 1 Street, Foundation of Liability for Tort, p. 19; 46 Cent. Dig. "Trespass," § 15, col. 271; Id. § 141, col. 480. Nowhere is the doctrine better expressed than by Lord Holt, in *Ashby* v. *White,* 2 Ld. Raym. 938, 1 Smith's Lead. Cas. 268: "If a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have an action; for it is a personal injury. So a man shall have an action against another for driving over his ground, though it do him no

damage; for it is an invasion of his property, and the other has no right to come there."[2]

It is also entirely immaterial by means of what instrumentality the trespass is committed. See 46 Cent. Dig. "Trespass," § 8, col. 256. One maliciously annoying another by means even of loud noises, consisting of pounding on tin pans, etc., and thereby injuring the health and business of the latter, is guilty of trespass and liable for the injuries sustained. *Shellabarger* v. *Morris*, 115 Mo. App. 566, 91 S. W. 1005. To the same effect, see *Donahue* v. *Keystone*, 181 N. Y. 313, 317, 73 N. E. 1108 (holding specifically that escape of gas from street mains may constitute a trespass), and *Adams* v. *Rivers*, 11 Barb. 390. "No doubt," said Landon, J., in *Forbell* v. *City*, 164 N. Y. 522, 526, 58 N. E. 644, 646, 51 L. R. A. 695, 79 Am. St. 666, "trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosion are familiar instances."[3]

More specifically, in the celebrated case of *Pickering* v. *Rudd*, 1 Starkie 56, 1 Ames' Cases on Torts, 42, Lord Ellenborough said: "I recollect a case where I held that firing a gun loaded with shot into a field was a breaking of the close. The learned judge on the circuit with me doubted upon the point, but many with whom I afterwards conversed on the subject thought I was right, and the judge himself who at first differed with me was afterwards of the same opinion; but I never yet heard that firing in *vacuo* could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained; but it may be questionable whether an action on the case would not be the proper form." To the same effect, see *Prewitt* v. *Clayton*, 5 T. B. Mon. 4. If a hunter shoot where he has a right to kill a bird in the air, and step upon the land of another to pick up the dead bird, the act of going onto the land to pick up the bird relates to the act of shooting, and the whole act one transaction, constituting a trespass at common law apart from the statute. Earl, C. J., in *Osbond* v. *Meadows*, 12 C. B. (N. S.) 10, 15. And see *Mayhew* v. *Wardley*, 14 C. B. (N. S.) 550; *State* v. *Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599.

It is true that in some of the cases referred to, and in *L. Realty Co.* v. *Johnson*, 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439, 104 Am. St. 677, the holding that trespass or some other enjoinable wrong existed was based upon an abuse of the highway. And see

---

[2] Accord: *Dixon* v. *Cow*, 24 Wend. (N. Y.) 188 (1840); *New England T. & S. C.* v. *Mather*, 68 Vt. 378 (1895); *Quillen* v. *Betts*, 1 Penne. (Del.) 53 (1897); *Fisher* v. *Maysmith*, 106 Mich. 71 (1895); *Hurley* v. *Jones*, 165 Pa. 34 (1894); *Timanus* v. *Leonard*, 121 Md. 583 (1913).

[3] Where a street car leaves the track and knocks down a telephone pole, standing on the side of the street, against a person on his own premises, a trespass is committed. *Louisville R. Co.* v. *Sweeney*, 157 Ky. 620 (1914). So, where animals escape and trespass on the land of another, their owner is liable in trespass q. c. f. *Dolph* v. *Ferris*, 7 W. & S. (Pa.) 367 (1844); *Van Leuven* v. *Lyke*, 1 N. Y. 515 (1848).

Harrison v. *Duke* (1893), 1 Q. B. Div. 142; *Hickman* v. *Maisey* (1900), 1 Q. B. Div. 752; *Queen* v. *Pratt*, 4 El. & Bl. 865.

Such cases are, however, at least significant illustrations of the extent to which the strictness of the law of trespass to realty, greater than in cases of trespass to the person, has been carried. 1 Street on Foundation of Liability for Tort, 24.

Moreover, here the defendants proposed to inclose and make several to themselves that which belonged to the many. Did not the blind amount to "a clandestine encroachment and appropriation of navigable waters, which should be common to the public?" The precise nature, however, of defendants' act, whether it amounted to a purpresture (23 A. & E. Ency. (2d ed.) 528; 7 Words & Phrases, 5867), or to nuisance (see *People* v. *Park*, 76 Cal. 156, 18 Pac. 141), or to both (see *People* v. *Vanderbilt*, 26 N. Y. 287; *People* v. *Gold Run*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; The Idlewild, 64 Fed. 603, 12 C. C. A. 328), or to neither, need not be here determined. The defendants' right to properly use the navigable lakes did not give them any more right to shoot over plaintiff's land than a neighboring proprietor would have had to so shoot from his own premises. It has been definitely determined in this court that the neighboring proprietor may not lawfully do so. *Lamprey* v. *Danz*, 86 Minn. 317, 90 N. W. 578.

The mere fact that damage from falling shot or birds would be insignificant, as has been shown, has no logical bearing at all upon the question. The record, besides, conclusively shows substantial damage to the premises. At common law, trespass or case would have lain.[4] The inherent danger to landowners from guns in the hands of hunters, often irresponsible and reckless, and sometimes malicious, must be adequately guarded against if the law is to be more than a name. As the hazard from the use or threatened use of dangerous instrumentalities increases, in all branches of the law, the responsibility of the person employing them becomes stricter and may amount to insurance of safety. All remedial resources of law and equity may be exercised to prevent such peril to persons or property, or conduct likely also to result in breach of peace.

Order reversed.[5]

---

[4] Liability for consequential injuries may result from an act which is itself a trespass, in which case the injured person may sue in trespass or may waive the trespass and sue in case for the consequences. *Branscomb* v. *Bridges*, 1 B. & C. 145 (1823); *Smith* v. *Goodwin*, 2 N. & M. 115 (1833); *Knott* v. *Davis*, 6 H. & J. 230 (1824); *Dalton* v. *Favour*, 3 N. H. 465 (1826); *Schuer* v. *Veeder*, 7 Blackf. (Ind.) 342 (1845); *Claflin* v. *Wilcox*, 18 Vt. 605 (1846); *Jordan* v. *Wyatt*, 4 Gratt. (Va.) 151 (1847); *Bixby* v. *Harris*, 26 N. H. 125 (1852); *Van Dresor* v. *King*, 34 Pa. 201 (1859); *Wyant* v. *Crouse*, 127 Mich. 158 (1901). At common law a count in trespass can not be joined with a count in case in the same declaration. *Cooper* v. *Bissell*, 16 Johns. 146 (1819); *Smith* v. *Rhode Island Co.*, 26 R. I. 24 (1904), but counts in trespass and case may be joined where they relate to the same subject matter under some codes. *Louisville & N. R. Co.* v. *Higginbotham*, 153 Ala. 334 (1907). Compare: *Gulf Yellow Pine L. Co.* v. *Monk*, 153 Ala. 358 (1907).

[5] The principal classes of trespass are:

Trespass to the person, as an assault and battery, false imprisonment,

LEAME *v.* BRAY.

COURT OF KING'S BENCH, 1803.

3 *East* 593.

This was an action of trespass, in which the plaintiff declared that the defendant with force and arms drove and struck a single-horse chaise which the defendant was then driving along the king's highway with such great force and violence upon and against the plaintiff's curricle drawn by two horses, and upon and against the said horses so drawing, etc., and in which said curricle the plaintiff was then and there riding with his servant, which servant was then driving the said curricle and horses along the king's highway aforesaid, that by means thereof the plaintiff's servant was thrown out of the curricle upon the ground, and the horses ran away with the curricle, and while the horses were so running away with the curricle the plaintiff, for the preservation of his life, jumped and fell from the curricle upon the ground and fractured his collar bone, etc. Plea, not guilty.

It appeared in evidence at the trial before Lord Ellenborough, C. J., at the last sittings at Westminster, that the accident described in the declaration happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury. But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury having happened from negligence, and not wilfully, the proper remedy was by an action on the case and not of trespass *vi et armis;* and the plaintiff was thereupon nonsuited.[6]

LORD ELLENBOROUGH, C. J.: The true criterion seems to be according to what Lord C. J. DeGrey says in *Scott* v. *Shepherd,* 2 Wm. Blackstone's Rep. 892, whether the plaintiff received an injury *by force* from the defendant. If the injurious act be the immediate

---

etc. *Hurst* v. *Carlisle,* 3 P. & W. (Pa.) 176 (1831); *Petit* v. *Colmery,* 4 Penn. (Del.) 266 (1903).

Trespass *de bonis asportatis,* the unlawful appropriation of or interference with personal property. *Phillips* v. *Hall,* 8 Wend. (N. Y.) 610 (1832); *Crawford* v. *Waterson,* 5 Fla. 472 (1854); *Erisman* v. *Walters,* 26 Pa. 467 (1856). The action is frequently concurrent with trover. *Stanley* v. *Gaylord,* 1 Cush. (Mass.) 536 (1848); see, also, *Dame* v. *Dame,* 43 N. H. 37 (1861).

Trespass *quare clausum fregit,* an unlawful entry upon or an immediate injury to real property in the possession of the plaintiff. *Gregory* v. *Pipe,* 9 B. & C. 591 (1829); *Rucker* v. *McNeely,* 4 Blackf. (Ind.) 179 (1836); *Sturgis* v. *Warren,* 11 Vt. 433 (1839); *Maxwell* v. *Maxwell,* 31 Maine 184 (1850); *Collins* v. *Beatty,* 148 Pa. 65 (1892); *Kent C. A. Society* v. *Ide,* 128 Mich. 433 (1901); *Moore* v. *Duke,* 84 Vt. 401 (1911); *Collier* v. *Ulster & Del. R. Co.,* 72 Misc. (N. Y.) 274 (1911); *Beasley* v. *Byrum,* 163 N. Car. 3 (1913). It applies to an interest in land only. *Burleigh* v. *Ford,* 59 N. H. 536 (1880); *Stocks* v. *Booth,* 1 T. R. 428 (1786).

[6] The arguments of counsel are omitted.

result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my brother Grose, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. Such also was the case of *Weaver* v. *Wood,* in Hob. 134, where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in *Scott* v. *Shepherd* did wilfulness make any difference. If the injury were received from the personal act of another, it was deemed sufficient to make it trespass. In the case of *Day* v. *Edwards,* 5 Term Rep. 648, the allegation of the act having been done *furiously* was understood to imply an act of *force* immediately proceeding from the defendant. As to the case of *Ogle* v. *Barnes,* 8 Term Rep. 188, I incline to think it was rightly decided; and yet there are words there which imply force by the act of another; but, as was observed, it does not appear that it must have been the personal act of the defendants; it is not even alleged that they were on board the ship at the time; it is said indeed that they had the care, direction, and management of it; but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case, because there were no words in the declaration which necessarily implied that the damage happened from an act of force done by the defendants themselves. I am not aware of any case of that sort where the party himself sued having been on board this question has been raised. But here the defendant himself was present, and used the ordinary means of impelling the horse forward, and from that the injury happened. And therefore there being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass; and wilfulness is not necessary to constitute trespass.

GROSE, J.: I am of the same opinion. Looking into all the cases from the year book in the 21 H. 7 down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass. The case mentioned from Strange, that in Hobart, and those in the Term Reports, all agree in the principle.

LAWRENCE, J.: I am of the same opinion. It is more convenient that the action should be trespass, than case; because if it be laid in trespass, no nice points can arise upon the evidence by which the plaintiff may be turned round upon the form of the action, as there may in many instances if case be brought; for there if any of the witnesses should say that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being nonsuited. But in actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of

the party doing it to commit the injury; but, as mentioned by Mr. Justice Blackstone in the case of *Scott* v. *Shepherd,* 2 Blac. Rep. 895, on the difference between injuries *direct and immediate,* or *mediate and consequential;* in the one instance the remedy is by trespass, in the other by case. The same principle is laid down in *Reynolds* v. *Clarke,* 2 Ld. Raym. 1402. As to *Ogle* v. *Barnes,* I certainly did not mean to say that the distinction turned on the wilfulness of the act; I only made use of the word *wilful* to distinguish that from other cases which had been mentioned where the injurious acts were averred to be *wilfully* done, and where as the acts complained of were charged as intentional, and the injuries done immediately referred to them, trespass was determined to be the proper remedy. And so I understand what was there said by my brother Grose. What I principally relied on there was, that it did not appear that the mischief happened from the personal acts of the defendants; it might have happened from the operation of the wind and tide counteracting their personal efforts at the time; or indeed they might not even have been on board. Alleging that the defendant negligently did such an act may be sustained by proof that it was done by his servant in his employ in the absence of the master, according to *Michael* v. *Alestree,* 2 Lev. 172, followed up by *Brucker* v. *Fromont,* 6 Term Rep. 659. Those were actions on the case, and are reconcilable with *M'Manus* v. *Crickett,* 1 East. 106, in which case the court held that trespass would not lie against a master for the wilful act of his servant in driving his master's carriage against another's carriage, against the will of his master.

Le Blanc, J.: In many of the cases the question has come before the court upon a motion in arrest of judgment, where the court in determining whether trespass or case were the proper remedy, have observed on the particular language of the declaration. But in all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put of a man's throwing a log into the highway; if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case.[7] Neither does the degree of violence with which the act is done make any difference; for if the log were put down in the most quiet way upon a man's foot, it would be trespass; but if thrown into the road with whatever violence, and one afterwards fall over it, it is case and not trespass. So here, if the defendant had simply placed his chaise in the road, and the plaintiff had run against it in the dark, the injury would not have been direct, but in consequence only of the defendant's previous improper act. Here, however, the defendant was driving the carriage at the time with the force necessary to move it along, and the injury to the plaintiff happened from that immediate act; there-

[7] This illustration is given by Fortescue, J., in *Reynolds* v. *Clarke,* 1 Str. 634 (1725).

fore the remedy must be trespass; and all the cases will support that principle. It is chiefly in actions for running down vessels at sea that difficulties may occur; because certainly the force which occasions the injury is not so immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon; and whether that may make any difference in that case I will not now take upon me to determine. But here, where the personal force is immediately applied to the horse and carriage, the things acted upon and causing the damage, like a finger to the trigger of a gun, the injury is immediate from the act of driving, and trespass is the proper remedy for an immediate injury done by one to another; but where the injury is only consequential from the act done, there it is a case.

Rule to set aside nonsuit made absolute.[8]

(j) Case.

ADAMS *v* HEMMENWAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1804.

1 *Mass.* 145.

In this case, "the defendant was attached to answer to the plaintiff in a plea of trespass, for the plaintiffs, at K., on the — day of —, being owners and proprietors of a certain schooner called the Charles, of the burden of ——, then and there, on the said day, despatched the said vessel, duly fitted and equipped, under the command of one Charles Adams, master of said vessel, on a voyage for P., in order to bring back a cargo of lumber from said P., and while said vessel was so proceeding on her voyage aforesaid, on the — day of — aforesaid, about three leagues from the land, to wit, at Plymouth aforesaid, the defendant being then and there sailing in a certain boat or vessel, the name of which is to the plaintiffs unknown, then and there, with force and arms, made an assault on

[8] Accord: *Gates* v. *Miles*, 3 Conn. 64 (1819); *Percival* v. *Hickey*, 18 Johns. (N. Y.) 256 (1820); *Rappelyea* v. *Halse*, 12 N. J. L. 257 (1831); *Painter* v. *Baker*, 16 Ill. 103 (1854). Compare *Williams* v. *Holland*, 10 Bing. 112 (1833). Trespass will lie for beating a drum in the highway where a wagon and team are passing, causing the horses to take fright and run away. *Loubz* v. *Hafner*, 1 Dev. (N. Car.) 185 (1827). See, also, *Cole* v. *Fisher*, 11 Mass. 137 (1814); *Guille* v. *Swan*, 19 Johns. (N. Y.) 381 (1822); *Johnson* v. *Perry*, 2 Humph. (Tenn.) 569 (1842); *Brennan* v. *Carpenter*, 1 R. I. 474 (1849); *Maher* v. *Ashmead*, 30 Pa. 344 (1858); *Ricker* v. *Freeman*, 50 N. H. 420 (1870).

While statutes have in many states abolished the procedural distinction between trespass and case, it is generally held that the substantive rights and liabilities of the parties are not thereby affected. *Blalock* v. *Randall*, 76 Ill. 224 (1875); *Chicago T. & T. Co.* v. *Core*, 223 Ill. 58 (1906); *Cannon* v. *Horsey*, 1 Houst. (Del.) 440 (1857); *Pruitt* v. *Ellington*, 59 Ala. 455 (1877); *Rogers* v. *Duhart*, 97 Cal. 500 (1893); *Lawry* v. *Lawry*, 88 Maine 482 (1896); *Busch* v. *Calhoun*, 14 Pa. Super. Ct. 578 (1900); *Suter* v. *Wenatchee W. P. Co.*, 35 Wash. 1 (1904). Compare *Coe* v. *English*, 6 Houst. (Del.) 456 (1881).

the aforesaid vessel called the Charles, owned by the plaintiffs as aforesaid, and fired and discharged at the said vessel, and master and crew therein, a musket or fire-arm loaded with gunpowder and lead, and with the same grievously and dangerously wounded the said Charles Adams, master of the plaintiffs' vessel, so that, for the preservation of the life of said Charles Adams, the crew on board the plaintiffs' vessel were compelled to return therein to K. aforesaid, and the plaintiffs' intended voyage aforesaid has been broken up and defeated, and the plaintiffs have thereby lost all the freight-money which they might have earned and gained in the intended voyage aforesaid, together with the passage-money for sundry passengers, who had then and there taken and engaged a passage to P. in said vessel; and other outrages the defendant then and there committed on the plaintiff's vessel, against the peace, etc."

Upon hearing the declaration read, the whole court (Strong, Sedgwick, Sewall and Thacher, justices) said it would be in vain to go on with the action; that the action should have been case, and not trespass; and that even if a verdict should be found for the plaintiffs, the court must arrest the judgment.

The plaintiffs discontinued upon payment of costs.

Attorney-General (Sullivan) and Thomas for the plaintiffs.

Parsons and B. Whitman for the defendants.[9]

Note.—In an action of assault and battery, brought by the master, Charles Adams, against the defendant, (for the injury done him by the discharge of the musket,) which was tried at this term, the jury found a verdict for the master—$3,391 damages.

---

[9] *Logan* v. *Feasor*, 1 Yeates (Pa.) 586 (1795); *Stump* v. *Kelly*, 22 Ill. 140 (1859); *Cotteral* v. *Cummins*, 6 Serg. & R. (Pa.) 343 (1821); *Bath* v. *Caton*, 37 Mich. 199 (1877); *Meyer* v. *Horst*, 106 Pa. 552 (1884); *Vogel* v. *McAuliffe*, 18 R. I. 791 (1895); *Welch* v. *Seattle & M. R. Co.*, 56 Wash. 97 (1909). For injuries by servants in the course of their employment, case is the proper remedy. *Sharrod* v. *London & N. W. R. Co.*, 4 Exch. 580 (1849); *Barnes* v. *Hurd*, 11 Mass. 57 (1814); *Phila. G. & N. R. Co.* v. *Wilt*, 4 Whart. (Pa.) 142 (1838); *Havens* v. *Hartford & N. H. R. Co.*, 28 Conn. 69 (1859); *Mossessian* v. *Callender*, 24 R. I. 168 (1902).

ACTION ON THE CASE.

"In 1537, some two hundred and fifty years after the introduction of this writ, Sir Anthony Fitzherbert, in his treatise *de Natura Brevium*, the earliest authoritative abridgement of the common law gives a list of the then known actions on the case. There is no attempt at classification, but on analysis they will be found to fall into certain definite classes.

1. Cases illustrating what may be termed the primary use of the writ—the normal extension of the principles underlying the formed writs of trespass to conditions closely analogous to those for which remedy was given by such writs, but where one or another of the precise technical requirements for the operation of such writs being lacking no redress was possible under them: (a) either because the harm resulted indirectly and not directly as required in trespass *vi et armis*, or (b) the property which was destroyed had been given to the defendant and not taken from the possession of the plaintiff as required in trespass *de bonis asportatis*, or (c) the property invaded was not within the protection of the writ of trespass *quare clausum fregit;* being a term of years or a franchise.

2. The second class of case deals with the secondary use of the writ, the use of it not to extend trespass, but to enforce duties and obligations having

GREGOIR *v.* LEONARD.

SUPREME COURT OF VERMONT, 1899.

71 *Vt.* 410.

CASE: Heard on general demurrer to the declaration, at the December term, 1898, Addison county, Ross, C. J., presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepted.

WATSON, J.: The only contention made by the defendant upon his general demurrer to the declaration is that if the plaintiff has any right of action in the premises, it is in trespass and not in an action on the case.

The allegations in the declaration show a right in the defendant, his servants, and agents, to pass and repass to and from the lands owned and occupied by the defendant, over and described premises

---

no kinship to trespass or at best only a remote analogy. These again fall into two distinct groups.

A. Those which deal with certain positive duties, obligations to act affirmatively. Where the only injury sustained is the loss of the benefit which would have been derived from the proper performance of the duty; where the only right invaded is the right to the beneficial fulfillment of the obligation. These cases stand at the very opposite pole from those just discussed in which there is a mere extension of the field of punishable misconduct. There is here no element of personal guilt. While the word *'negligentia'* is used, it does not signify negligence in the modern sense of the personal breach of social duty. It is the mere failure, from whatsoever cause, to fulfill an obligation only satisfied by performance that is the basis of recovery. Of these Fitzherbert gives several instances; one group, and that the earliest, are those attached by custom as an incident to the tenure of a particular estate or the incumbency of an office. A second group are those which in the modern classification of the common law are segregated into a distinct class, and treated as the very antitheses of tort liabilities. These are modern contractual obligations; duties having as their basis the consent of those who assume them. As instances of these are given cases of warranties and the case of one who having promised to build certain wagons and having been paid the price fails to do so; the damage laid being the loss of their profitable use. To Fitzherbert these appear to differ in nothing substantial from similar positive obligations annexed by custom to the tenure of real estate. Evidenty the time has not yet come when the fact that such obligations rest not on custom or some general policy of law, but upon the expressed consent of the individual, serves to mark them as radically different from all other positive obligations.

B. A class of case is given lying, it may be said, midway between the new broader conception of trespass and positive obligations. These contain the germ and root from which has developed modern social duty to act, if one acts at all, with due regard for the safety of others, and in relations consciously assumed to take precautions to provide for the safety of those with whom one is thereby associated. In Fitzherbert this idea exhibits itself in a duty of proper performance recognized as attaching to the exercise of certain trades and calling; many of them the prototypes of modern public or quasi public-service trades. These duties are of varying degrees of stringency. In the case of innkeepers the obligation approaches the absolute duty of affording full protection to the guest and his property. In other cases, as that of carpenters or farriers, the duty is rather that of care in conduct of the business to secure the safety of its patrons." Moral Duty to Aid Others as a Basis of Tort Liability, by Francis H. Bohlen, 56 Univ. of Pa. Law Review, 223 (April, 1908).

of the plaintiff, in and over the way in question, upon the condition that in so passing over the plaintiff's premises they should keep the gates, bars, and fences, which they shall pass or repass, closed and put up in as good condition as they found them at the time of such passing.

The plaintiff alleges in substance, that at the time in question, he had constructed and maintained good and sufficient bars across the discontinued road near the southerly boundary of his farm, and also about thirty rods south of the north end of the discontinued road on his farm, and that the bars were then in good repair; that it was the duty of the defendant, his servants, and agents, upon passing along the road, in accordance with the conditions of the right of way, "to carefully lower said bars, without injury to them, and to place them up, after passing through;" that to obstruct the plaintiff in the use and enjoyment of his farm, on the days in question, the defendant, with his servants and agents, passed over the discontinued road, along the right of way, and through the bars, and threw them down in a careless and wrongful manner, and broke and ruined them, and, with his servants and agents, passed through and left the bars down and did not put them up, or place any barrier to prevent horses and cattle and other stock from going through the bars and upon the land of the plaintiff; and that cattle and horses did escape through them and upon his farm, trod down grass and grain growing thereon, etc., by means whereof, the plaintiff was damaged in the use and enjoyment of his farm, etc.

The plaintiff was the servient and the defendant the dominant owner of the land covered by the right of way, with a right in the defendant to enter upon and pass over the plaintiff's premises in and over the right of way, and, in so doing, the defendant had a right to take down the bars across the way to enable him to pass through.

The defendant, having the right to enter upon and pass over the plaintiff's premises in the legitimate use of his easement, in the exercising of that right within its limitations he was not guilty of breaking and entering, and whatsoever was done thereafter being but aggravation of damages, the action of trespass on the freehold will not lie. *Goodrich* v. *Judevine*, 40 Vt. 190; *Grout* v. *Knapp*, 40 Vt. 163; *Howard* v. *Black*, 42 Vt. 258.[10]

The throwing down of the bars by the defendant, his servants, and agents, in a careless and wrongful manner, did not work a forfeiture of the defendant's right in the easement; it was but the careless and negligent exercise of a lawful right, for which trespass will not lie. *Sabin* v. *Vermont Cent. R. Co.*, 25 Vt. 363.

The bars having been let down by the defendant, to pass through, it was his duty, after passing through, to put them up, but his fail-

[10] See, Six Carpenters' Case, 8 Coke 216 (1611), and annotations to that case in 1 Smith's Leading Cases. In actions for seduction it has been held that where the offense was accompanied by an illegal entry of the plaintiff's house, he might bring trespass or case, *Bennett* v. *Allcott*, 2 T. R. 166 (1817). But case seems the more appropriate remedy. *Ream* v. *Rank*, 3 Serg. & R. (Pa.) 215 (1817); *Moran* v. *Dawes*, 4 Cow. (N. Y.) 412 (1825); *Furman* v. *Applegate*, 23 N. J. L. 28 (1850).

ure so to do, was only the omission of an act which he ought to have performed—a mere nonfeasance—for which trespass will not lie. *Stone* v. *Knapp*, 29 Vt. 501; *Stoughton* v. *Mott*, 25 Vt. 668; 1 Chit. Pl. 126.[11]

The injuries for which the plaintiff seeks to recover damages, were committed by cattle and horses, which escaped through the bars, left down by the defendant, upon the plaintiff's farm, treading down grass, grain, etc., there growing. Such injuries were not done by the act of throwing down the bars in a careless and wrongful manner, and therefore immediate, but arose after that act was completed, and were more particularly occasioned by the failure of the defendant to put up the bars, after passing through, and were the collateral consequences thereof.

For the careless and negligent exercise of a lawful right and for the omission of an act which it is the duty of a party to perform, resulting in a collateral injury to another, whose relations thereto are such that he may insist upon the proper exercise of such lawful right, and upon the performance of the act omitted, but which ought to have been performed, the party so injured may recover his consequential damages in an action on the case. That is the proper remedy. 1 Chit. Pl. 133; *Sabin* v. *Vermont Central Railroad Co.*, 25 Vt. 363. No question having been raised, in argument, as to the sufficiency of the declaration if an action on the case is the proper remedy, we express no opinion thereon.

Judgment affirmed and cause remanded.[12]

(k) Detinue.

DAME *v.* DAME.

SUPREME COURT OF NEW HAMPSHIRE, 1861.

43 *N. H.* 37.

This was an action of detinue, brought to recover a house and barn[13] alleged to be the property of the plaintiff, and situated on the

---

[11] In *Kissecker* v. *Monn*, 36 Pa. 313, 78 Am. Dec. 379 (1860), trespass q. c. f. was sustained against one who having a license to enter took down a gate and neglected to restore it to its place whereby his swine entered and committed the injuries complained of.

[12] *Shapcott* v. *Mugford*, 1 Ld. Raym. 187 (1698); *Riddle* v. *Proprietors, &c.*, 10 Mass. 169 (1810); *Maull* v. *Wilson*, 2 Harr. (Del.) 443 (1838); *Church of Ascension* v. *Buckhart*, 3 Hill (N. Y.) 193 (1842); *Linsley* v. *Bushnell*, 15 Conn. 225 (1842); *Shrieve* v. *Stokes*, 8 B. Mon. (Ky.) 453 (1848); *Cate* v. *Cate*, 50 N. H. 144 (1870); *Carleton* v. *Cate*, 56 N. H. 130 (1875); *Fallon* v. *O'Brien*, 12 R. I. 518 (1880); *Petcy M. Co.* v. *Dryden*, 5 Penn. (Del.) 166 (1904); *Birkhead* v. *Wood*, 35 Pa. Super. Ct. 235 (1908); *Birmingham W. Co.* v. *Martini*, 2 Ala. App. 652 (1911); *Bagaglio* v. *Paolino*, 35 R. I. 171, (1913); *Nirdlinger* v. *Amer. D. T. Co.*, 240 Pa. 571 (1913); *Crosby* v. *Plummer*, 111 Maine 355 (1913).

[13] Detinue lies only for the recovery of a specific chattel and not for real

land of the defendant, in Farmington, in said county, all of which is fully set forth in the plaintiff's declaration, which is as follows:

"In a plea of detinue for that, whereas the plaintiff heretofore, to wit, on the first day of July, 1856, at Farmington aforesaid, was lawfully possessed of a certain house and a certain barn, both situated on the land of the said Daniel Dame, being the house built by the plaintiff in the year 1842, said house being about thirty-six feet long and about twenty-six feet wide, and one story and one quarter high, and of the value of $300; and said barn being about twenty-four feet long and about twenty feet wide, and of the value of $200, situated between the house of Eleazer Rand and the house now owned by Benjamin Chesley, on the left hand side of the road leading from the Bay road, so called, to the Ten Rod road, so called, as one goes toward the Ten Rod road, as of his own house and barn, and being so possessed, the said plaintiff afterward, to wit, on the third day of July, 1856, casually lost the same out of his possession, which thereafterward, to wit, on the same day, came into the hands and possession of the said Daniel Dame, by finding; and the plaintiff further saith, that although the said Daniel Dame well knew that the said house and barn were the proper house and barn of the plaintiff, and although requested by the said plaintiff, to wit, at said Farmington, on the nineteenth day of May, 1860, to deliver the same to the plaintiff, yet the said Daniel Dame hath not delivered up the said house and barn to the plaintiff, but wholly refuses so to do, and still unlawfully detains the same."

To this declaration the defendant filed a general demurrer, and the plaintiff joined in demurrer, and the question of law was reserved.

SARGENT, J.: The only question here raised is whether in this state an action of detinue can be maintained. It is claimed by the defendant that this form of action was never introduced into this state, or if it ever has been used or authorized here, that it has from recent entire disuse become obsolete so that it can not now be maintained.

This action was early held to be an appropriate remedy in a certain class of cases. It would seem that the original distinction between replevin and detinue was very similar to that between trespass and trover. Trespass *de bonis asporatis* was brought, not to recover the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property where the original taking was lawful and proper.

So replevin was originally brought to recover the possession of a chattel *in specie* when the original taking was wrongful, and detinue

---

property, *Coupledike* v. *Coupledike*, Cro. Jac. 39 (1605), or for fixtures attached to the soil, *McFadden* v. *Crawford*, 36 W. Va. 671 (1892), but things severed from the realty and converted into personalty may be recovered in this form of action, *Cooper* v. *Watson*, 73 Ala. 252 (1882); *Adler* v. *Prestwood*, 122 Ala. 367 (1898). So also in trover and conversion, *Quitman Co.* v. *Conway*, 63 Fla. 253; (1912); *Anderson* v. *Todesca*, 214 Mass. 102 (1913); *Melton* v. *Fullerton R. Co.*, 157 App. Div. (N. Y.) 525 (1913); *Strickland* v. *Miller*, 12 Ga. App. 671.

to recover the article *in specie* when the original taking was lawful. 3 Black. Com. 144-152. Hence we find that the form of the declaration in trover and detinue are similar, it being alleged in both that the property came to the hands and possession of the defendant by finding. To be sure Blackstone says that replevin can be maintained only in one instance of unlawful taking, to wit, that of an unlawful distress. 3 Black. Com. 145. However this may have been in early times, when personal property was of but small consequence, and when legal remedies were mainly if not solely sought to acquire possession of real estate, or to enforce some right connected therewith, or to collect the rents chargeable thereon, yet in modern times it is held that the law is otherwise, and numerous authorities of the greatest weight lay it down that this action lies in all cases of illegal taking.

Chitty says, by replevin the owner of goods unjustly taken and detained from him, may recover possession thereof. It is principally used in cases of distress, but it seems that it may be brought in any case where the owner has goods taken from him by another. 1 Chit. Pl. 162. And again, "It has been said that replevin lies only in one instance of an unlawful taking; namely, that of an unlawful distress of cattle, damage feasant, or of chattels for rent in arrears; but as before observed, it appears that this action is not thus limited, and if goods be taken illegally, though not as a distress, replevin may be supported." 1 Chit. Pl. 164, and authorities cited. 2 Saund. Pl. & Ev. 760; 2 Wheat. Selw. N. P. 1194. Replevin was generally a co-extensive remedy with trespass *de bonis asportatis. Pangburn* v. *Partridge,* 7 Johns. 143, and authorities cited. *Thompson* v. *Button,* 14 Johns. 87.

There is one exception stated by Blackstone (vol. 3, 151), where he says, "If I distrain another's cattle damage feasant, and before they are impounded he tenders me sufficient amends, now, though the original taking was lawful, my subsequent detainment of them, after tender of amends is wrongful, and he shall have an action of replevin against me to recover them." But that this is an exception to the general rule would seem evident from the manner and position in which it is stated. On page 145, an unlawful taking is stated as the first injury to the right of personal property or possession, for which the remedy is by action of replevin. On page 151, he speaks of the second injury, which is an unjust detainer of another's goods when the original taking was lawful, for which the remedy in all cases stated, with the single exception above mentioned, is either detinue or trover. Now the learned commentator cited as his authority for the exception above named, Fitzherbert's Nat. Brev. 69, where the doctrine is stated thus: "If a man take cattle for damage feasant, and the other tenders him amends and he refuseth it, etc.; now if he sueth a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking of them, for that the same was lawful, therefore no return shall lie." Baron Gilbert, in his treatise on distresses and replevin, says, this is the only instance in which replevin lies where the original taking was not tortious. Hammond (in his Nisi Prius 334) says the same, and

assigns the reason, namely, "that replevin is the proper action to try all questions arising out of a distress." Here is the cause why this single exception to the general rule was made, because this was the remedy so universally applied in all cases of distress, and so seldom in any other case, that Blackstone (erroneously) lays it down that it is applicable only there; it was held, therefore, as a matter of convenience in practice that it should be extended to cover all cases of distress, even though in a single instance it should thus be carried beyond its original and appropriate limits.

With this single exception the common law is believed to be uniform that replevin does not lie unless the original taking was unlawful in fact, or made so in law by relation, under such circumstances as would have made the taking a trespass *ab initio*. Our statute makes other exceptions. *Kimball* v. *Adams*, 3 N. H. 182. To sustain these views, see, in addition, Com. Dig., Replevin, A.; Buller's N. P. 52; 3 Wooddeson's Lectures 219; 2 Rolle's Abr. 441; Lord Redesdale in *Ex parte Mason*, 1 Sch. & Lef. 320, note; and also in *Ex parte Chamberlain*, 1 Sch. & Lef. 322; and in *Shannon* v. *Shannon*, 1 Sch. & Lef. 324; 7 Johns. 140; Story's Pl. 422, note; *Osgood* v. *Green*, 30 N. H. 210; *Gardner* v. *Campbell*, 15 Johns. 401.

But we find in different states that these actions have been generally regulated by statute and made to apply often to very different uses and purposes from those for which they were originally designed. To be sure we find in all the states, perhaps, the actions of trespass and trover retained, trover being generally extended in practice, so as to cover all cases of wrongful detention and conversion, without regard to the fact as to whether the original taking were legal or illegal; but we find that the actions of replevin and detinue have met with very unequal favor in the different states.

In Massachusetts, it has been held that replevin may be maintained in all cases of wrongful detention of the plaintiff's goods, although the original taking may have been justifiable. *Badger* v. *Phinney*, 15 Mass. 359; *Baker* v. *Fales*, 16 Mass. 147; *Marston* v. *Baldwin*, 17 Mass. 606; and in that state, too, it is held that detinue is obsolete. *Baker* v. *Fales*, 16 Mass. 154; Colby's Prac., and Howe's Prac., Detinue. But these decisions in Massachusetts, so far as they claim to rest upon the common law, have been so often and so seriously questioned, and are opposed by such an overwhelming weight of authority, both English and American, that they may well be considered as having very little weight upon the question. See argument of Webster and Metcalf, in *Baker* v. *Fales* (page 148), and authorities cited, and, also, the numerous notes by the editor, and authorities cited upon this case of *Baker* v. *Fales*, in the recent editions of Massachusetts Reports; and particularly, note 23, upon the action of detinue. See also Wheat. Selw. N. P. 1194, and note and authorities.

But it is said that these decisions in Massachusetts are authorized by their statute; and if that were so, they would stand well enough, whether they accord with the common law or not. Mellen, C. J., in *Seaver* v. *Dingley*, 4 Greenl. 315, in speaking of these Massachusetts cases, says, that the court, after mature consideration,

decided "that whatever might be the strict principles of the common law, the statute of 1789 had so altered the common law, that an action of replevin may be maintained in case of an unlawful detention, though the taking was not tortious and unlawful." But even this position is disputed, and it is claimed, with apparent reason, that these decisions can not be sustained either upon the principles of the common law or upon the statute of that state. See notes 36 and 37 to *Baker* v. *Fales*, and authorities cited, where it is said, that neither the form of the writ, as prescribed in that state, nor their statute "give any countenance to the notion that replevin may be maintained for an unlawful detention; but, on the contrary, extend only to cases of supposed unlawful taking." And, also, "that it is quite clear that at the common law no action of replevin could be maintained in this case."

Judge Story also seems to doubt whether these decisions in Massachusetts can stand even upon the statute of that state, and he does not hesitate to pronounce their doctrines as innovations upon the common law (Story's Pl. 442, note), where, in speaking of the doctrine that replevin may be maintained for goods unlawfully detained, although there may have been no tortious taking, he says, "this innovation on the common law, whether attributable to the statute or to the construction given to it, is to be regretted. The gist of the action is altered. It is no longer an unlawful taking, but an unlawful detention. The general issue, ***non cepit***, though it can hardly be overruled as a good plea in replevin, has ceased to be a logical defense; indeed is no more to the purpose than ***nil debet***, in assumpsit. It unsettles former decisions, unless some exceptions are set up without any other reason than a desire to avoid overruling former cases. Thus, it was formerly held that replevin would not lie on a bailment by the plaintiff; but if replevin will lie in all cases of unlawful detention, then it may be maintained in many cases of bailment and, lastly, it has destroyed the analogy between the actions of trespass and replevin, where it existed before."

In Pennsylvania, it was decided at an early day that replevin would lie wherever one man claimed goods in the possession of another, no matter how the possession was acquired. But in that state the action of replevin is authorized and regulated only by statute. *Weaver* v. *Lawrence*, 1 Dall. 157. And the law continues the same. *Staughton* v. *Rappalo*, 3 S. & R. 562; *Keite* v. *Boyd*, 16 S. & R. 300. There could of course be little necessity for the action of detinue in that case.[14]

In Virginia, it has been held that at common law replevin lay in all cases where goods were unlawfully taken. And this was the law in that state till 1823, when an act of the legislature confined the writ to the case of distress for rent. *Vaiden* v. *Bell*, 3 Randolph

[14] Replevin lies in Pennsylvania "wherever one man claims goods in the possession of another without regard to the manner in which the possession was obtained," per Agnew, J., in *Herdic* v. *Young*, 55 Pa. 176 (1867). Detinue is a neglected action, although there are occasional instances of its use. *Bernbridge* v. *Turner*, 2 Yeates (Pa.) 129 (1799); *Rementer* v. *Erwin*, 11 W. N. C. 194 (1882); *Maxler* v. *Hawk*, 233 Pa. 316 (1912).

448. In that state we find the action of detinue in very common use, as it is believed to be in all the southern and some of the western states.

In South Carolina, while detinue was in common use, it is said in *Byrd* v. *O'Harlin*, 1 Rep. Con. Ct. 401, that it is not decided in that state whether replevin will lie in any other case than that of a distress for rent.

So in Connecticut, while it is admitted that by the English authorities, as well as those of some of the contiguous states, replevin lies for any tortious or unlawful taking of goods and chattels, yet it is held that, under their statute, it lies only in cases of attachment and distress. *Watson* v. *Watson*, 9 Conn. 140; s. c. 10 Conn. 75.

In New York, previous to their revised statutes, they adhered strictly to the common-law distinction between replevin and detinue, and both actions were used. See 7 Johns. 140; 10 Johns. 373; 14 Johns. 87, and 15 Johns. 402, before cited, which were cases of replevin; and *Todd* v. *Crookshanks*, 3 Johns. 432, which was detinue. But by their Revised Statutes (vol. 2, 553), the action of detinue was abolished, and the action of replevin was made, by express provision of law, to cover the same ground, or nearly so, that detinue had before covered.[15]

But in North Carolina, on the other hand, it is held that detinue lies in every case in which the property is wrongfully detained, without regard to the manner in which the defendant acquired possession. *Johnson* v. *Preston*, Cameron & Norwood 464.

It is said in 3 Black. Com. 151, that there is one disadvantage which attends this action (detinue), namely, that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff in his remedy, and that for this reason the action itself is much disused, and has given place to the action of trover. See, also, Bac. Abr., Detinue. But the 3 and 4 Wm. IV, ch. 42, § 13, abolished the wage of law in all cases; since which, this action has been much in use in England, and is said to be a very advantageous remedy, especially where it is material to embrace in the same action with a count in detinue, another count in debt, for a money demand as due upon a contract. 1 Chitt. Pl. 121 and 125.[16]

It does not seem to be clearly settled upon authority, whether the action of detinue should be confined to those cases where the

---

[15] The recovery of chattels is now provided for by the Code of Civil Procedure, §§ 1689 to 1736. *Barnett* v. *Selling*, 70 N. Y. 492 (1877); *National S. Co.* v. *Sheahan*, 122 N. Y. 461 (1890).

[16] Prior to the abolition of wager of law in 1833, a defendant availed himself of this privilege as late as 1824. *King* v. *Williams*, 2 B. & C. 538 (1824). "Wager of Law, if it ever had a legal existence in the United States, is now completely abolished," per Story, J., in *Childress* v. *Emory*, 8 Wheat. (U. S.) 642 (1823). See also, Troubat & Haly's Practice, Wharton's Edition, Vol. II, page 15 note.

While detinue, as an action, has been abolished in England, the name is still retained, in practice, to describe the modern statement of claim in an action based on the same wrong, Rules of Supreme Court, Appendix C, Section 2, No. 2. See also, *Eberles Hotel & R. Co.* v. *Jones*, L. R. (1887), 18 Q. B. Div. 459.

possession was at first rightful, and only the detention wrongful, or whether that remedy, like trover, should be extended to all cases where the detention is wrongful, without regard to the quality of the original possession. The earlier authorities all favor the former view. Lord Coke says, "that detinue lyeth where any man comes to goods either by delivery or finding." Coke Litt. 286, b. Blackstone lays down this rule, that in order to maintain detinue the first point to be proved is, that the defendant came lawfully into possession of the goods, as either by delivery to him or by finding them. 3 Bl. Com. 151. Bac. Ab., Detinue; Wheat. Selw. N. P. 665.[17]

But it is said by Chitty (1 Chit. Pl. 123) that it is a common doctrine in the books, that this action can not be supported if the defendant took the goods tortiously; but he pronounces the reasoning upon which that opinion is founded as fallacious, and holds that it may be maintained in any case where the detention was wrongful, without regard to the manner in which the defendant acquired possession. And while there would seem to be no good reason for enlarging the remedy by replevin, any more than there is that of trespass *de bonis;* yet it may well admit of a *quaere* whether, as a matter of convenience in practice, and not inconsistently with principle, the action of detinue should not be so far enlarged beyond its original limits, as to keep pace with its kindred action of trover.[18]

It is alleged that detinue has never been used or authorized in this state, and that replevin, trespass, and trover, afford ample remedies for all cases and classes of injuries. But trespass and trover are no substitute for detinue, for they only give damages for the goods taken or converted, without giving the party any chance to recover the chattel *in specie.* In regard to replevin, we understand that the common law is in force here, and that this action only lies in case of a wrongful taking in fact, or by intendment of law with the single common-law exception of cases of cattle taken damage feasant, when amends are tendered before impounding, and other exceptions made by our statute in case of animals impounded, where it is held that it lies for a wrongful detention as well as a wrongful taking; *Kimball* v. *Adams,* 3 N. H. 182; but it must be against the person impounding, and can not be against the pound-keeper while the creatures are in his legal custody; *Bills* v. *Kinson,* 21 N. H. 448, where it is said that our statute has added to the causes for which this action may be instituted at common law, not only in the above case of animals impounded, but in case of goods attached on mesne

[17] The gist of the action is the detention of the goods, to the immediate possession of which the plaintiff is entitled, *Kettle* v. *Bromall,* Willes 118 (1697); *Miller* v. *Graham,* 1 B. & P. N. S. 140 (1804); *Gledstate* v. *Hewitt,* 1 Cromp. & J. 565 (1831); *Clements* v. *Flight,* 4 Dowl. & L. 261 (1846); *Miller* v. *Dell,* L. R. (1891), 1 Q. B. Div. 468; *Stewart* v. *Guy,* 138 N. Car. 176 (1902); *Williams* v. *Lay,* 184 Ala. 54 (1913).

[18] The American cases generally hold that, as the gist of the action is the detainer, it is immaterial whether or not the defendants' possession was originally tortious. *Owings* v. *Frier,* 2 A. K. Mar. 268 (1820); *Bernard* v. *Herbert,* 3 Cranch. (U. S.) 346 (1828); *Pierce* v. *Hill,* 9 Porter (Ala.) 151 (1839); *Schulenberg* v. *Campbell,* 14 Mo. 491 (1851); *Shomo* v. *Caldwell,* 21 Ala. 448 (1852).

process, when claimed by a third person, and in case of goods exempt from attachment. Rev. Stat., ch. 204, §§ 1, 2 and 3; Comp. Laws 520.

In accordance with these views is the form of the writ prescribed by law in the action of replevin (Rev. Stat., ch. 182, § 14; Comp. Laws 464), commanding the sheriff to replevy the goods belonging to A. P., of, etc., "wrongfully taken and detained," as it is said, etc. It would seem that this form embraces the common law, as nearly as may be, as stated in the English cases, replevin there being held to be the proper remedy in cases where property has been wrongfully taken and detained, whether as a distress or in any other way.

Replevin then does not encroach upon the common-law ground of detinue, but leaves all that ground for the application of that remedy. It is only when replevin is carried beyond the common-law limit, as in Massachusetts, by the court, and as it is in some states, as in New York, by statute, that it can be said at all to supersede the necessity of detinue as a remedy where the original taking was lawful, and it is desired to recover the thing detained, *in specie*.

Nor do we find our statutes silent concerning the action of detinue. In the statute of limitations of 1791, detinue is twice mentioned and enumerated with trespass, trover, and replevin, and the time of limitation is fixed for each. N. H. laws of 1815, 164 and 165. In the later statute of limitations, passed in 1825, we find similar provisions, and the same enumeration of action, in which detinue is twice repeated, as before. N. H. laws of 1830, 76. And in the Revised Statutes, after specifying that certain actions, such as for words, etc., shall be brought within two years, it is provided, that all other personal actions shall be brought in six years. Rev. Stat., ch. 181, §§ 3 and 4. Although detinue is not here enumerated specifically, yet the same is true of trover, trespass, debt, and all other actions having the same term of limitation.

It would seem that detinue was a remedy as fully recognized by our laws, and provided for as specifically as any of the other forms of personal actions. Nor is its place superseded by any other form of action. There are also good and sufficient reasons why it should be used, even if it were a concurrent remedy with replevin. In the latter, the plaintiff resumes the property in the first instance, and if he does not prevail, he must pay the defendant the value of the property, as by our practice there is no judgment for a return. *Bell* v. *Bartlett*, 7 N. H. 188. But in detinue, though the claim be to recover the specific chattel, yet it is not taken from the hands of the defendant till the right is determined, and the plaintiff takes his property on his execution.[19] No bonds are required.

Detinue may also be joined with debt in the same declaration, which, in a large class of cases, is a decided advantage.[20] It may

[19] But, in Alabama, see *Jacobs* v. *State*, 61 Ala. 448 (1878); *United States* v. *Bryant*, 111 U. S. 499 (1884). In West Virginia, replevin having been abolished, a replevy bond and counter forthcoming bond have been made part of the proceedings in detinue. *Robinson* v. *Woodford*, 37 W. Va. 377 (1892).

[20] *Dalston* v. *Janson*, 5 Mod. 90 (1696); *Rucker* v. *Hamilton*, 3 Dana (Ky.) 36 (1835); *Calvert* v. *Marlow*, 18 Ala. 67 (1850); *Jones* v. *Gordon*, 124 Pa. 263 (1889); *Tiefel Bros.* v. *Maxwell*, 154 S. W. 319 (Tex. 1913).

also be brought for several articles, part of which are in existence, and can be recovered, and a part of which may have been converted, conveyed away, or destroyed; as the judgment in detinue is in the alternative, first, that the plaintiff do recover the goods in question specifically; or, secondly, if the plaintiff can not have the goods, that he recover the value thereof, and his damages for the detention.[21]

The jury must therefore find the value not only of all the goods in the aggregate, but of each article separately, so that the plaintiff may have all that can be found of his property *in specie,* and for the balance, whatever it may prove to be, he may recover his damages, and this all in one suit and by a single judgment and execution. 1 Wheat. Selw. N. P. 667; Saund. Pl. & Ev., *ante.*[22]

The difference in the course of proceedings, in the two cases (replevin and detinue), results naturally from the different injuries for the redress of which these remedies were invented. Where the taking was illegal and wrongful, the redress was by replevin, in which the possession of the property was immediately returned to the party from whom it had been thus wrongfully taken; and the parties were then left to determine their several rights. But where the possession was legally and rightfully obtained, as by a bailment or a finding, but the further detention was claimed to be wrongful, the plaintiff was not allowed to take the property in any summary manner from the hands of the defendant, to whom, perhaps, he had himself committed it; but he must first try his title and establish his right, and if he proved the detention to be wrongful, he then recovered his goods.

We think, then, that there are sufficient grounds, both upon the statute and upon authority and reason, as well as convenience, for holding that detinue in this state can be maintained.

The demurrer is overruled.[23]

---

[21] Where the defendant, in detinue, was in possession of the plaintiff's goods under such circumstances that he was bound to return them on demand, it is no defense to say that he has lost them, the burden is on him to show that he was not at fault. *Reve* v. *Palmer,* 5 C. B. (N. S.) 84 (1858); *Goodman* v. *Boycott,* 2 B. & S. 1 (1862); *Lynch* v. *Thomas,* 3 Leigh (Va.) 682 (1832); *Robb* v. *Cherry,* 98 Tenn. 72 (1896). Where the chattel was destroyed by casualty before suit is brought it was held that the action would not lie. *Lindsey* v. *Perry,* 1 Ala. 213 (1841). On the other hand where the chattel was destroyed after suit brought the defendant was not relieved from liability. *Wilkerson* v. *McDougal,* 48 Ala. 517 (1872); *Carrel* v. *Early,* 4 Bibb (Ky.) 270 (1815); *Barksdale* v. *Appleberry,* 23 Mo. 389 (1856). Contra: *Bethea* v. *McLennon,* 23 N. Car. 523 (1841); *Whitefield* v. *Whitefield,* 44 Miss. 254 (1870).

[22] When the verdict is for the plaintiff the jury finds the value of the chattles and damages for their detention. *Williams* v. *Archer,* 5 M., G. & S. 318 (1847); *Lenox* v. *Pike,* 2 Ark. 14 (1839); *Rambo* v. *Wyatt,* 32 Ala. 363 (1858); *Averett* v. *Milner,* 75 Ala 505 (1883); *Higgenbotham* v. *Rucker,* 2 Call (Va.) 313 (1800); *New Era L. Co.* v. *Daniels,* 143 Ky. 207 (1911). The judgment should be in the alternative, for the specific chattels sued for, or for the value thereof as assessed by the jury, with the damages. *McCullough* v. *Floyd,* 103 Ala. 448 (1893); *Kirkland* v. *Pilcher,* 174 Ala. 170 (1911). If the goods are delivered up after suit brought, the plaintiff recovers merely damages for their detention. *Crossfield* v. *Such,* 8 Exch. 159 (1852).

[23] In detinue "(1) the plaintiff must have property in the thing sought to

(1) Trover.[24]

DAVIS *v.* HURT.

SUPREME COURT OF ALABAMA, 1896.

114 *Ala.* 146.

This was an action of trover brought by the appellee, Peter T. Hurt, against the appellants, W. F. Davis & Son, warehousemen, to recover damages for the alleged conversion by the defendants, of three bales of cotton. Issue was joined upon the plea of the general issue.

On the trial of the cause, as is shown by the bill of exceptions, the testimony for the plaintiff tended to show that he had purchased from certain parties warehouse certificates for the three bales of cotton, which the holders of said certificates had stored with the defendants; that these certificates belonged to the plaintiff, and that subsequently upon his making demand upon the defendants for the cotton, which said certificates represented, the defendants were unable to find the cotton in their warehouse, and that after a diligent search by the plaintiff's agent and the defendants, the cotton was never found. It was further shown that the plaintiff had instructed

---

be recovered; (2) he must have the right to its immediate possession; (3) it must be capable of identification; (4) it is essential that the property be of some value; and (5) the defendant must have had possession at some time before the institution of the action," per Sanders, J., in *Hefner* v. *Fidler,* 58 W. Va. 159 (1905). Thus, detinue lies for a "six-barreled pistol, called a six-shooter or revolver," *Wright* v. *Ross,* 2 Greene (Iowa) 266 (1849); or a deed, *Goodman* v. *Boycott,* 2 B. & S. 1 (1862); or a promissory note, if of any value, *Todd* v. *Crookshanks,* 3 Johns. (N. Y.) 432 (1808); *Hefner* v. *Fidler,* supra. It will lie for a specific bag of money, *Spence* v. *McMillan,* 10 Ala. 583 (1846). See *Southern H. Co.* v. *Lester,* 166 Ala. 86 (1910), but not for money which, it is alleged, the defendant owes the plaintiff. *Brown* v. *Ellison,* 55 N. H. 556 (1875). So, also, the plaintiff must be entitled to immediate possession. *Bowers* v. *Parker,* 58 N. H. 565 (1879); *Seals* v. *Edmandson,* 73 Ala. 295 (1882).

[24] "The action of trover or conversion was, in its origin, an action of trespass on the case for recovery of damages against a person who had found goods, and refused to deliver them on demand to the owner, but converted them to his own use; from which word finding (trouver) the remedy is called an action of trover. The circumstance of the defendant not being at liberty to wage his law in this action, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue (which before 3 & 4 W. 4, c. 42, was subject to the defense of law wager), that by a fiction of law actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action and the statement of the finding or trover is now immaterial, and not traversable." Chitty on Pleading, Vol. I, page 163. See History of Trover by James Barr Ames, Harvard Law Review, Vol. XI, page 277, reprinted in Select Essays in Anglo-American Legal History, Vol. III, page 417. *Cooper* v. *Chitty,* 1 Burr. 20 (1756); 38 Cyc. 1997.

the defendants to ship to his cotton merchant 45 bales of cotton, in which were included the three bales involved in this suit, and that only 42 bales of cotton were received by his cotton merchants; the three bales which were not received being those involved in this suit.

The testimony for the defendants tended to show that the defendants made a search for the cotton, with the agent of the plaintiff, and failed to find it, and that they afterwards made a diligent search in their warehouse for said cotton without finding it; and that the cotton was never shipped by the defendants after a demand was made by the plaintiff for said cotton, nor was it delivered to any one else; and that the cotton was not in the possession of the defendants at the time the suit was brought.

Upon the introduction of all the evidence, the court of its own motion instructed the jury as follows: "If the jury believe from the evidence that the cotton in controversy was stored with the defendants as warehousemen for a reward, and the said defendants, upon demand failed to deliver said cotton, or to account for its absence, then the defendants are liable in this action to the plaintiff for the value of the cotton and interest thereon from the time of such demand."[25] Verdict and judgment for plaintiff. Defendants appeal.

BRICKELL, C. J.: When the bailee fails to return the goods, on demand, the principal has an election of remedies; he may sue in assumpsit for a breach of contract, or in case for negligence, or if there has been a conversion of the goods, in trover for the conversion. Story on Bailments, §§ 194-269; *Salt Springs Nat. Bank* v. *Wheeler*, 48 N. Y. 492, 8 Am. Rep. 564; *Magnin* v. *Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608. The gist of the action of trover is the conversion; the right of property may reside in the plaintiff, entitling him to pursue other remedies, but trover can not be pursued without evidence of a conversion of the goods.[26] *Glaze* v. *McMillion*, 7 Port. 279; *Connor* v. *Allen*, 33 Ala. 516; *Bolling* v. *Kirby*, 90 Ala. 215. In *Connor* v. *Allen*, *supra*, it was said by Rice, C. J.: "Trover is one of the actions the boundaries of which are distinctly marked and carefully preserved by the code.[27] A conversion is now, as it has ever been, the gist of that action, and without proof of it, the plaintiff can not recover, whatever else he may prove, or whatever may be his right of recovery in another form of action." And he

---

[25] Parts of the statement of facts and opinion of the court are omitted.

[26] *Thorogood* v. *Robinson*, 6 Ad. & E. (N. S.) 769 (1845); *Bryne* v. *Stout*, 15 Ill. 180 (1853); *Frome* v. *Dennis*, 45 N. J. L. 515 (1883); *Spooner* v. *Manchester*, 133 Mass. 270 (1882); *Evans* v. *Mason*, 64 N. H. 98 (1886); *McPheters* v. *Page*, 83 Maine 234 (1891); *Industrial & G. T.* v. *Tod*, 170 N. Y. 233 (1902); *Walker* v. *First N. Bank*, 43 Ore. 102 (1903); *Port Huron E. & T. Co.* v. *Otto G. E. W.*, 89 Minn. 393 (1903).

[27] Accord: *Bixel* v. *Bixel*, 107 Ind. 534 (1886). In England the fictitious averment of finding was abolished by the Common Law Procedure Act of 1852, 15 & 16 Victoria, ch. 76, § 49. And, although the distinctions between the forms of action have, since the Judicature Act of 1873, ceased to exist, the substantive rights are preserved. *Henderson* v. *Williams*, L. R. (1895), 1 Q. B. 521.

adopts the definition or description of a conversion given by Mr. Greenleaf: "A conversion in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of title inconsistent with his own." 2 Greenl. Ev., Sec. 642. *In Glaze* v. *McMillion, supra,* it was said: "It is believed that all conversions may be divided into four distinct classes: 1. By a wrongful taking. 2. By an illegal assumption of ownership. 3. By an illegal user or misuser. 4. By a wrongful detention."[28] In *Bolling* v. *Kirby, supra,* there was a very full examination of the authorities, and discussion of the essential elements or facts which must concur to constitute conversion in the sense of the law of trover, by McMillan, J.; and the result declared was, that "conversion upon which recovery in trover may be had, must be a positive, tortious act. Nonfeasance or neglect of legal duty, mere failure to perform an act obligatory by contract, or by which property is lost to the owner will not support the action."[29] The case is republished, with elaborate and instructive annotation by Mr. Freeman, 24 Am. St. Rep. 789-819. In *Ala. & Tenn. Rivers R. R. Co.* v. *Kidd,* 35 Ala. 209, it was held, that "trover will not lie for a bare nondelivery of goods by a warehouseman, unless they are in his possession, and he refuses to deliver them on demand." In *Abraham & Bro.* v. *Nunn,* 42 Ala. 51, it was held, that trover would not lie against a warehouseman, for the conversion of goods taken from his possession by an armed force, without negligence or complicity on his part. In *Salt Springs Nat. Bank* v. *Wheeler, supra,* the defendant had received for acceptance certain bills of exchange, and at the demand of the person entrusting them to him, failed to return them, saying he could not find them, and might have torn them up with papers he considered of no value; it was held, he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills; though he was liable upon his implied promise to present the bills for acceptance, and if not accepted or paid, to give notice to the plaintiff.

---

[28] A mere assertion of title to a chattel will not amount to a conversion. *Lowry* v. *Walker,* 4 Vt. 76 (1831); *Fernald* v. *Chase,* 37 Maine 289 (1853); *Gillet* v. *Roberts,* 57 N. Y. 28 (1874); *Shaw* v. *Swope,* 8 Pa. Super. Ct. 491 (1898). So a mere asportation, although wrongful, is not necessarily a conversion unless the party taking the goods intends some use to be made of them by himself or those for whom he acts, or, unless owing to his act the goods are destroyed or consumed to the prejudice of their lawful owner. *Fouldes* v. *Willoughby,* 8 M. & W. 540 (1841); *Mattice* v. *Brinkman,* 74 Mich. 705 (1889); *Farnsworth* v. *Lowery,* 134 Mass. 512 (1883); *Hammond* v. *Sullivan,* 99 N. Y. S. 472 (1906); *Lee Tung* v. *Burkhart,* 59 Ore. 194 (1911).

[29] Accord: *Mulgrave* v. *Ogden,* Cro. Eliz. 219 (1591); *Heald* v. *Carey,* 11 C. B. 977 (1852); *Johnson* v. *Strader,* 3 Mo. 586 (1832); *Hawkins* v. *Hoffman,* 6 Hill (N. Y.) 586 (1844); *Forehand* v. *Jones,* 84 Ga. 508 (1899); *Way* v. *Dennie,* 174 Mass. 43 (1899); *Andrews* v. *Carl,* 77 Vt. 172 (1904). Otherwise where there has been positive misconduct, *Phillips* v. *Brigham,* 25 Ga. 617 (1859); *Wheelock* v. *Wheelwright,* 5 Mass. 104 (1809); *Woodman* v. *Hubbard,* 25 N. H. 67 (1852); *Donnell* v. *Canadian P. R. Co.,* 109 Maine 500 (1912).

Without pursuing further an examination of authorities, it may safely be said, that a mere failure by a bailee on demand made, to deliver goods which have been entrusted to him, is not a conversion which will support an action of trover, if he sets up no title hostile to or inconsistent with the title of the bailor, or has not appropriated them to his own use, or to the use of a third person, or exercised over them a dominion inconsistent with the bailment. All that can be fairly predicated of the facts found in the record, is the mere failure to deliver the cotton upon the demand[30] of the plaintiff; possession of it not remaining with the defendant. There was no denial of the title of the plaintiff, nor a dominion exercised over the cotton inconsistent with the terms of the bailment, no evidence of a conversion or appropriation of it to their own use, or to the use of any third person by the defendants. The failure to deliver, unexplained, raises a presumption of negligence against them, and may involve them in a liability for a breach of the contract of bailment, or for negligence in the performance of the duty springing from the contract, but it is not the conversion; the positive, tortious act, indispensable to maintain trover.[31] From this view, it results there was error in the instruction given voluntarily by the court below.

Reversed and remanded.[32]

---

[30] Where the original taking is tortious no demand is necessary before suit. *Farrington* v. *Smith*, 15 Johns. (N. Y.) 431 (1818); *Earle* v. *Vanburen*, 7 N. J. L. 344 (1799); *Magnyer* v. *Hawthorn*, 2 Harr. (Del.) 71 (1836); *Bruner* v. *Dyball*, 42 Ill. 34 (1866); *Gilmore* v. *Newton*, 91 Mass. 171 (1864); *Claflin* v. *Gurney*, 17 R. I. 185 (1890). But where the possession of the defendant was originally lawful, and he has done nothing that constitutes an actual conversion, then demand must be shown. *Dietus* v. *Fuss*, 8 Md. 148 (1855); *Cutter* v. *Fanning*, 2 Iowa 580 (1856); *Yeager* v. *Wallace*, 57 Pa. 365 (1868); *Castle* v. *Corn Exchange Bank*, 148 N. Y. 122 (1895); *Moore* v. *Monroe R. Co.*, 128 Ala. 621 (1900); *Marcus* v. *Chicago, M. & S. P. R. Co.*, 167 Ill. App. 638 (1912).

[31] Accord: *Rogers* v. *Huie*, 2 Cal. 571, 56 Am. Dec. 363 (1852); *Sturges* v. *Keith*, 57 Ill. 451, 11 Am. Rep. 28 (1870); *Dearbourn* v. *Union N. Bk.*, 58 Maine 273 (1870); *Berman* v. *Kling*, 81 Conn. 403 (1908); *Cohen* v. *Koster*, 133 App. Div. (N. Y.) 570 (1909). But trover is the proper action where there has been a wrongful delivery of goods to one not entitled to them. *Devereux* v. *Barclay*, 2 B. & Ald. 702 (1813); *Cerkel* v. *Waterman*, 63 Cal. 34 (1883); *Louisville & N. R. Co.* v. *Barkhouse*, 100 Ala. 543 (1892); *People's Bank* v. *Mo., K. & T. R. Co.*, 158 Mo. App. 519 (1911); *First N. Bank* v. *Ransford*, 158 Mo. App. 519 (1911).

[32] Trover may be maintained for every species of personal property which is the subject of private ownership and has value. *Nebraska* v. *Omaha N. Bank*, 59 Nebr. 483 (1899); *Alexander* v. *Goldstein*, 13 Pa. Super. Ct. 518 (1900), money; *Davis* v. *Funk*, 39 Pa. 243 (1861), promissory note; *Amory* v. *Flynn*, 10 Johns. (N. Y.) 102 (1813), wild geese that had been tamed; *Cummings* v. *Perham*, 1 Metc. (Mass.) 555 (1840), a dog; *Ayres* v. *French*, 41 Conn. 142 (1874); *Neiter* v. *Kelly*, 69 Pa. 403 (1871); *Daggett* v. *Davis*, 53 Mich. 35 (1884); *Reading F. Co.* v. *Harley*, 186 Fed. 673 (1911), certificates of stock; *Vaughn* v. *Wright*, 139 Ga. 736 (1913), tax receipts. It does not lie for a public record. *Keeler* v. *Fassett*, 21 Vt. 539 (1849), nor for chattels that have for their object the violation of law, *Spalding* v. *Preston*, 21 Vt. 9 (1848); *Morrill* v. *Goodenow*, 65 Maine 178 (1876); *Robertson* v. *Porter*, 1 Ga. App. 223 (1907).

To maintain trover the plaintiff must have a property in the chattel, general or special, and the actual possession or the right to immediate possession.

(m) Replevin.[33]

SINNOTT *v.* FEIOCK.

COURT OF APPEALS OF NEW YORK, 1901.

165 *N. Y.* 444.

Replevin to recover certain chattels which it was alleged the plaintiff was induced to sell to the defendant by fraud on the part of the latter. On the trial it was conceded that prior to a demand for the return of the goods and before the commencement of the action the chattels had been taken from the defendant on an execution against him and sold, so that at the time of the demand and commencement of the action they were not in the defendant's possession, custody or control. There was no suggestion of collusion with the execution creditor. The trial court dismissed the complaint and the judgment entered on such dismissal was affirmed by the appellate division of the Supreme Court. Plaintiff appeals.[34]

CULLEN, J.: Originally at common law the action of replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the action was to recover possession of the specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels where it was sought to recover the chattels in specie.[35] In many cases where the plaintiff was unable to obtain the return of the chattels he could recover in the action their value.

Martin v. *Megargee*, 212 Pa. 558 (1905); *Abbott* v. *Cremer*, 118 Wis. 377 (1903); *Nettleton* v. *Kerr*, 167 Ill. App. 74 (1912). As against a stranger possession alone is sufficient to maintain trover. *Gunzburger* v. *Rosenthal*, 226 Pa. 300 (1910).

[33] "Replevin is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what we usually term a mixed action, being partly *in rem* and partly *in personam*—*in rem* so far as the specific recovery of the chattels is concerned, and *in personam* as to the damages. To sustain the action plaintiff must have the right to immediate and exclusive possession at the time of the commencement of his suit." *Fredericks* v. *Tracy*, 98 Cal. 658 (1893). See, also, *Fisher* v. *Whoollery*, 25 Pa. 197 (1855); *Maclary* v. *Turner*, 9 Houst. (Del.) 281 (1891); *Robb* v. *Dobrinski*, 14 Okla. 563 (1904); *Pedrick* v. *Kuemmell*, 74 N. J. L. 379 (1907); *Hitch* v. *Riggin*, 26 Del. 84 (1911); *Shantz* v. *Shriner*, 167 Mo. App. 635 (1912). Replevin differs from trover and trespass in that it is for the recovery of the specific property, and not primarily for damages; it differs from detinue in that it restores the property to the plaintiff at the beginning of the action. *Mennie* v. *Blake*, 6 Ell. & Bl. 841, and authorities there cited; *Herdic* v. *Young*, 55 Pa. 176 (1867); *La Vie* v. *Crosby*, 43 Ore. 612 (1903).

[34] The arguments of counsel and part of the opinion of the court are omitted. The statement of facts is derived from the opinion.

[35] The statement in III Blackstone's Commentaries, 146, that replevin only applied in one instance of unlawful taking, that of wrongful distress, is now admitted to have been incorrect. *Shannon* v. *Shannon*, 1 Sch. & Lef. 324 (1804); *George* v. *Chambers*, 11 M. & W. 149 (1834); *Minnie* v. *Blake*, 6 Ell. & Bl. 841 (1856). Replevin in England is now almost entirely governed by

Still, the action remained essentially one to recover the possession of chattels as distinguished from actions in trespass or trover to recover damages for the seizure or for the value of the property. There were many technical rules in force relating to this form of action, which at times made proceedings under it difficut, and in 1788 a statute was passed in this state (1 R. L. 1813, p. 31) to simplify the procedure. It directed the form of plaint before the sheriff in which the plea was "of taking and unjustly detaining" beasts, goods or chattels.[36] Afterwards the Revised Statutes prescribed the rules governing actions of replevin and the procedure therein. The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled claim and delivery of personal property, operated as a substitute for those of the Revised Statutes. They direct that at the commencement of the action the plaintiff may replevy the chattels, but in the affidavit to obtain the writ there is required the statement that the defendant "unjustly detains" them. The provisions of the present Code of Civil Procedure in the article entitled "Action to recover a chattel" (Sec. 1689 to Sec. 1730), are substantially the same as those of the old code.[37]

---

the County Courts Act of 1888, 51 & 52 Victoria, ch. 43, §§ 133-137, and the rules of court under that act.

In America the weight of authority is that the remedy never was restricted to cases of wrongful distress but was proper for any unlawful taking. *Bruen* v. *Ogden*, 11 N. J. L. 370 (1830); *Daggett* v. *Robins*, 2 Blackf. (Ind.) 415 (1831); *Ely* v. *Ehle*, 3 N. Y. 506 (1850). And now by judicial decision or statute the rule generally prevails that the action will lie for unlawful detention merely, in cases where the original taking was not tortious. *Ohio* v. *Jennings*, 14 Ohio St. 73 (1862); *Whitman* v. *Merrill*, 125 Mass. 127 (1878); *Gildas* v. *Crosby*, 61 Mich. 413 (1886); *Hart* v. *Boston & M. R. Co.*, 72 N. H. 410 (1903). In Pennsylvania it was held at an early date that the action would lie "whenever a plaintiff claims goods in the possession of another." *Weaver* v. *Lawrence*, 1 Dall. (Pa.) 156 (1785); *Shearick* v. *Huber*, 6 Binn. (Pa.) 2 (1813).

A mere taking, however, will not support the action, the gist of which is tortious detention. *Page* v. *Crosby*, 41 Mass. 210 (1835); *Johnson* v. *Johnson*, 4 Harr. (Del.) 171 (1844); *Hickey* v. *Hinsdale*, 12 Mich. 99 (1863); *Kierbow* v. *Young*, 20 S. Dak. 414 (1906); *Petchenik* v. *Rich*, 84 N. J. L. 592 (1913).

[36] The general rule is that all personal property of a tangible nature may be the subject of replevin, *Eddy* v. *Davis*, 35 Vt. 247 (1862), cattle; *Flentge* v. *Priest*, 53 Mo. 540 (1873), seal of court; *First Church* v. *Stearns*, 38 Mass. 148 (1838), church records; *Bush* v. *Groomes*, 125 Ind. 14 (1890), promissory note. Replevin will not lie for fixtures attached to realty, *Roberts* v. *Dauphin D. Bank*, 19 Pa. 71 (1852); *Niblet v. Smith*, 4 T. R. 504 (1792); nor for property in the custody of the law, *Smith* v. *Huntingdon*, 3 N. H. 76 (1824); *Pott* v. *Oldwine*, 7 Watts (Pa.) 173 (1838); nor for corporate stock as distinguished from the certificates. *Ashton* v. *Heydenfeldt*, 124 Cal. 14 (1809); nor for articles on the person of the defendant, *Maxham* v. *Day*, 82 Mass. 213 (1860); nor for money incapable of specific identification, *Spear* v. *Ark. Nat. Bank*, 163 S. W. 508 (Ark. 1914); nor for a coffin with the corpse enclosed after burial, *Guthrie* v. *Weaver*, 1 Mo. App. 136 (1876), but as to the right to possession of a corpse, see *Pettigrew* v. *Pettigrew*, 213 Pa. 313 (1904); *Doodeward* v. *Spence*, 6 Commonwealth Reports (Australia) 406 (1908); *Miner* v. *Canadian P. R. Co.*, 15 Western Canada Law Reporter 161 (1910).

[37] The name "claim and delivery" derived from the New York Code of 1848 has been adopted in many code jurisdictions to describe the statutory

The question several times arose under the Code of Procedure whether replevin could be maintained against a party who was not in possession, either actual or constructive, of the chattels, and was the subject of conflicting decisions in the Supreme Court and in the Superior Court of New York. It finally came to this court in *Nichols* v. *Michael* (23 N. Y. 264). This was also a case of fraudulent purchase of goods in which the defendant, before the action was brought, had voluntarily transferred the goods to his assignee. It was held that the action could be maintained. This decision was based on the authority of two English cases, *Garth* v. *Howard* (5 Car. & P. 346) and *Jones* v. *Dowle* (9 M. & W. 19). In the case in this court Judge Selden wrote: "The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention." This doctrine has been steadily adhered to by this court. (*Burnett* v. *Selling*, 70 N. Y. 492; *Dunham* v. *Troy Union R. R. Co.*, 3 Keyes, 543.)[88] These decisions, however, do not control the present case. They are authorities to the effect that where the defendant has wrongfully parted with possession the action will lie. As already stated, the defendant did not part with possession by any act on his part, but the property was taken from him by process of law valid as to him and which he could not resist. To uphold a recovery in replevin under such circumstances we must go further, and decide that whenever property has been taken or obtained wrongfully an action of replevin may be main-

---

remedy given in lieu of replevin, California Code of Civil Procedure, §§ 509-521, *Ellinghoe* v. *Brakken*, 36 Minn. 156 (1886); *Hall* v. *Hall*, 1 Idaho 361 (1871); *Fredericks* v. *Tracy*, 98 Cal. 658 (1893); *Hooker* v. *Latham*, 118 N. Car. 179 (1896). The technical action of replevin has been abolished in many of the states and supplied by a statutory equivalent. In others the name has been retained but the action has been modified so as to enlarge its scope and simplify its procedure. Cobbey on Replevin (1900), § 9; A. & E. Encyc. of Law (1st ed.), vol. 20, p. 1041; Pa. Act of April 19, 1901, P. L. 88; *Harris* v. *Krause*, 60 N. J. L. 72 (1897); *King* v. *Morris*, 73 N. J. L. 279 (1906).

[88] To maintain replevin the general rule is that the defendant must have either actual or constructive possession of the property sued for at the time of bringing suit. *Bradley* v. *Gamelle*, 7 Minn. 331 (1862); *Mitchell* v. *Roberts*, 50 N. H. 486 (1871); *Calnan* v. *Stern*, 153 Mass. 413 (1891). As to whether the action will lie where the defendant has wrongfully parted with possession before suit there is a conflict of opinion. In accord with the New York decisions are *Bower* v. *Tallman*, 5 W. & S. (Pa.) 556 (1843); *Pomeroy* v. *Trimper*, 90 Mass. 398 (1864); *Harkey* v. *Tillman*, 40 Ark. 551 (1883); *Helman* v. *Withers*, 3 Ind. App. 532 (1891); *McBrian* v. *Morrison*, 55 Mich. 351 (1884); *Andrews* v. *Hoeslich*, 47 Wash. 220 (1907). Contra: *Feder* v. *Abrahams*, 28 Mo. App. 454 (1888); *Webb* v. *Haysty*, 80 N. Car. 305 (1879); *Warren* v. *Leiter*, 24 R. I. 36 (1902); *Glass* v. *Basin & B. S. M. Co.*, 31 Mont. 21 (1904); *Kierbow* v. *Young*, 20 S. Dak. 414 (1906).

tained against the taker regardless of whether the property is in his possession or whether he has been lawfully deprived of it, and, as a logical sequence, as we think,. also regardless of the fact that the property sought to be replevined may have ceased to exist without fault on the defendant's part; in other words, that the action can be maintained under all circumstances to the same extent as an action for conversion. Such a doctrine would substantially destroy the characteristics of an action of replevin which distinguish it as an action to recover possession of specific property, and we find no authority for it in the decisions of this or of our sister states. In Massachusetts the rule seems absolute that the defendant must be in possession when the action of replevin is brought. (*Richardson* v. *Reed*, 4 Gray 441; *Hall* v. *White*, 106 Mass. 599.) In the earlier case it is said: "By the common law replevin can not be maintained where trespass can not; for, by that law, an unlawful taking of goods is a prerequisite to the maintenance of replevin. But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly *in rem*, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept." In the later case it was held that the action would not lie against a sheriff who had seized goods but parted with possession before the date of the plaintiff's writ. The same rule obtains in New Hampshire (*Mitchell* v. *Roberts*, 50 N. H. 486), Iowa (*Coffin* v. *Gephart*, 18 Iowa 256), Missouri (*Feder* v. *Abrahams*, 28 Mo. App. 454; *Davis* v. *Randolph*, 3 Mo. App. 454), Maine (*Howe* v. *Shaw*, 56 Maine 291), Minnesota (*Ames* v. *Miss. Boom Co.*, 8 Minn. 467), and in North Carolina (*Haughton* v. *Newberry*, 69 N. Car. 456).[39]

In Virginia there is a very early case on the subject (*Burnley* v. *Lambert*, 1 Wash. 308) argued by Mr. (afterwards Justice) Washington and Mr. (afterwards Chief Justice) Marshall. It was there held that the defendant could not, by transferring the property before the commencement of the action, defeat the writ. In the opinion it is said that "Possession of the defendant prior to the suit was sufficient to charge him unless he was legally evicted." In *Pool* v. *Adkisson* (1 Dana 110) the Court of Appeals of Kentucky, following the decision in *Burnley* v. *Lambert*, held that the voluntary transfer of the defendant before suit did not defeat an action in replevin. It is there said: "According to the case of *Burnley* v. *Lambert*, the fact that the plaintiff was not possessed of

[39] The cases are collected and discussed in a note in 18 Lawyers' Reports Annotated N. S., p. 1266. "The Writ of Replevin is not regarded in Pennsylvania altogether as a proceeding *in rem*, but is a proceeding also against the defendant in the writ personally; and under this view of it, the practice has uniformly been to insert in the writ a summons to the defendant to appear; and, for the greater security and convenience of the owners of personal property from whom the possession is improperly withheld, the action of replevin may be maintained by such owners in all cases, and may proceed on the summons alone, where the property has been eloigned or disposed of." Per Sergeant, J., in *Baldwin* v. *Cash*, 7 W. & S. (Pa.) 425 (1844).

the slaves when this suit was brought can not change or affect the remedy, unless he had been 'legally evicted.' This doctrine, if interpreted literally, may be too restrictive. But it seems to be free from just exception, if understood as we suppose it ought to be, to mean that the plaintiff had been divested of the possession in a manner authorized by law, and which would, therefore, exonerate him from the charge of tortious conduct." It was held by the court, in *Caldwell* v. *Fenwick* (2 Dana 333), that detinue could not be maintained for a slave dead before the commencement of the action, though otherwise if he had died subsequent to the commencement of the action, or the defendant had improperly parted with his possession. The court said: "Detinue is a mode of action given for the recovery of a specific thing and damages for its detention, though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing can not be had; yet the recovery of the thing itself is the main object and inducement to the allowance of the action. * * * The action is not adapted to the recovery alone of the value of a thing detained; nor can it be maintained therefor."

We have thus reviewed the leading cases in this country in reference to the circumstances under which an action of replevin can be maintained. None of them authorizes the maintenance of the action under the circumstances of the present case. In all of them replevin is held to be essentially a possessory action. In many of the states it is unqualifiedly requisite for the maintenance of the action that the defendant should be in possession of the chattels sued for at the time the action was commenced. In others, as in our own state, an exception is made to the general rule where the defendant has voluntarily parted with the property. Still the exception goes only to the extent stated. The law in Virginia and Kentucky is substantially the same as our own, and the cases cited from those states are well reasoned on principle. The case at bar falls within the rule stated in those cases, that where the defendant is evicted by legal process before suit brought the action will not lie, and we are, therefore, of opinion the disposition of the case by the courts below was correct.[40]

Judgment affirmed.

---

[40] At common law where the goods were delivered to the plaintiff, the judgment in his favor was for damages for the detention; the judgment if for defendant was *pro retorno habendo*. *Easton* v. *Worthington*, 5 Serg. & R. (Pa.) 130 (1819); Morris on Replevin, 213. If the defendant kept the goods under a claim of property the judgment for plaintiff was for the value of the goods and damages and the defendant had no option to return the goods. *Field* v. *Post*, 38 N. J. L. 346 (1876). While the practice differs in the different jurisdictions the tendency of modern statutes is to permit an election between a recovery of the goods or their value. *Reber* v. *Schroeder*, 221 Pa. 152 (1908); *Westinghouse Co.* v. *Harris*, 237 Pa. 203 (1912); *Bates* v. *Capital S. Bank*, 21 Idaho 141 (1912); *Kerman* v. *Leeper*, 172 Mo. App. 286 (1913). The Pennsylvania Act of April 14, 1905, P. L. 163 permits the court to order the property impounded in the custody of the sheriff, where the defendant gives bond and the plaintiff shows that by reason of the special nature of the property damages will not compensate him.

SECTION 2. ABOLITION AND CONSOLIDATION OF FORMS OF ACTIONS.

NEW YORK CODE OF CIVIL PROCEDURE.

Sec. 3339. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished.[41]

BROWDER *v.* PHINNEY.

SUPREME COURT OF WASHINGTON, 1902.

30 *Wash.* 74.[42]

DUNBAR, J.: This is an action for damages for wrongful and forcible eviction from leased premises. Plaintiffs obtained from the defendant, on the 31st day of August, 1899, a contract or lease of two store rooms in Seattle, described, for a term of three years, with stipulated rent, which contract or lease was signed by defendant, Nellie Phinney, through her agent, Daniel Jones, and delivered to plaintiffs. Plaintiffs alleged that they were put in possession of said premises by defendant on October 1, 1899; that they paid rent

[41] The California Code of Civil Procedure, Sec. 307, provides: "There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs." The various codes of the other states follow, in the main, the language of the New York or California Codes. Burns' Ann. Stat. Ind. (1914) § 249. In some states, however, for example Iowa, while the forms of action are abolished, proceedings may be of two kinds, legal and equitable. Code of Iowa (1897) §§ 3426, 3427. See generally Pomeroy's Code Remedies (4th ed.) p. 5.

In England, the Judicature Act of 1873, § 100, provides: "Action shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court; and shall not include a criminal proceeding by the Crown." The rules of the Supreme Court, order II, rule 1, provides: "Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action." Order I, rule 1, provides that proceedings formerly commenced in the common-law courts by writ, in the court of chancery by bill or information, in the court of admiralty by a cause *in rem* or *in personam*, or in the probate court by citation shall be instituted in the High Court by a proceeding to be called an action.

In Massachusetts, there are three divisions of personal actions (1) contract, which includes assumpsit, covenant and debt; (2) tort, which includes trespass, trespass on the case, trover and actions for penalties; (3) replevin. Revised Laws (1902) ch. 173, § 1. No equity suit is to be defeated because there is an adequate remedy at law nor shall an action at law be defeated on the ground that relief should be sought in equity, but the proceedings shall be amendable before final judgment or decree. See *Worthington* v. *Waring*, 157 Mass. 421 (1892), Revised Laws (1902), ch. 159, § 6.

In New Jersey, the practice act of 1912 provides: "There shall be but one form of civil action in the courts of common law, which shall be denominated an 'action at law,' but this shall not apply to proceedings upon prerogative writs; provided that subject to rules, a writ of mandamus may be awarded in such an action. The process and pleadings in all actions shall be according to rules of court."

[42] Part of the opinion is omitted.

therefor for the months of October and November of said year to said defendant, and said rent was accepted by said defendant; in short, that they were incommoded during the time of their lease by the improvements which were made upon the premises for the lessors, and were finally, on the 12th day of January, 1900, forcibly evicted from the premises by defendant. At the opening of the trial, defendant's counsel objected to the introduction of any testimony under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which motion was denied. At the close of plaintiffs' testimony defendant moved for a nonsuit on the ground that the instrument sued on was invalid, and that the plaintiffs had not shown any facts to take it out of the statute of frauds,[43] and for the further reason that authority in the agent to execute the lease was not shown. This motion was denied by the court. Counsel for defendant then moved the court to instruct the jury to return a verdict for defendant on the ground that a court of law has no power to entertain this suit. This motion was granted, and the case dismissed, the court taking the view that the lease was invalid in law because it was not acknowledged,[44] and that the facts showing part performance of the contract could be enforced in equity, but could not be shown in an action at law.

We think the court erred in dismissing the action. Whether or not the contract or lease was originally illegal, it is not necessary for the purpose of this discussion to determine. But if illegal, a part performance of the contract, either by the plaintiffs taking possession of the premises under the lease or by the payment and acceptance of rent under the terms of the lease, would render the lessor liable for damages for its violation by him; and the court, in holding that part performance could not be shown in an action for damages, lost sight of the rule of concurrent jurisdiction with which courts are clothed, especially under the reformed procedure. Our statute (Bal. Code, Sec. 4793)[45] provides that there shall be in this state but one form of action for the enforcement of private rights and the redress of private wrongs, which shall be called a "civil action"; and this statute evidently means something. It was not intended by this enactment of the law-making power to leave in force or to perpetuate the old distinctions which existed at the common law between legal actions and equitable procedures, so far as the manner of bringing the actions is concerned. It was plainly the intention thereby to abolish such distinctions, and to substitute for all other forms of complaint a statement of facts, for it provides that the complaint shall contain a plain and concise statement of facts constituting the cause of action, and this plain and concise statement of facts must necessarily be the same (if it is a concise statement of facts) whether the relief or remedy sought by the action be equitable or legal in its nature. In this case, if the plaintiffs had demanded specific performance, the statement of facts on

[43] Remington & Ballinger's Code (1909), § 5289.
[44] Remington & Ballinger's Code (1909), § 8802.
[45] Remington & Ballinger's Code (1909), § 153.

which the demand would have been based would have been identically the same statement as that upon which the demand made was based. It is not in accordance with the spirit of the code to turn a litigant out of court, and subject him to the costs and delays of bringing another action before the same tribunal on the same pleadings. If there could be any doubt as to the meaning of the statute in this respect, it is set at rest by the further provision that the defendant may set forth by answer as many defenses and counterclaims as he has, whether they be such as have heretofore been denominated legal or equitable, or both; for it can not be presumed that the legislature intended to make provisions for the determination in one action of legal and equitable rights alleged in an answer, and to preclude the determination in the same action of legal and equitable rights alleged in the complaint. It may not have been the intention of the legislature to abolish all the distinctions which have so long existed between legal and equitable proceedings and the rules governing them. That question it is not necessary to discuss here. But it was the evident intention to provide for the trial and determination of all rights, whether denominated legal or equitable, in one action, and to relieve from the necessity of a multiplicity of suits to determine controversies between litigants. The superior court is a court of general jurisdiction. It has the power to try either legal or equitable proceedings, having concurrent jurisdiction in both. It is not a law court, nor an equity court, nor a probate court, but it is all the time the superior court of general jurisdiction, empowered to try all these differently termed causes under the title of a civil action; and when it has once acquired jurisdiction of that civil action it may proceed in an orderly way to determine equitable, legal, or probate controversies.

When the court, which has jurisdiction over both equitable and law proceedings, discovered in the complaint the statement of facts which formed the basis of the controversy between the litigants, he should have proceeded to settle the issues, and not have dismissed the plaintiffs out of court and imposed upon them the delays, costs and annoyance of bringing another suit, which would necessarily have been based upon the same statement of facts; for at all times, if the plaintiffs had a cause of action at all, it was based upon the contract or lease, coupled with the part performance alleged. The principle evidently sought by the legislature to be engrafted upon our procedure is intelligently stated by Mr. Pomeroy in his work on Equity Jurisprudence (2d ed.), Sec. 183, where it is said:

"The fundamental principle of this reformed system is, that all distinctions between legal and equitable actions are abolished, the one 'civil action' is the single judicial means of enforcing all rights in a court clothed with both jurisdictions of law and of equity in combination, and in this civil action legal and equitable primary rights, causes of action, and defenses, may be united, and legal and equitable remedies may be obtained. In applying this principle the following results have been well established: Whenever a plaintiff is clothed with primary rights, both legal and equitable, growing out of the same transaction or condition of facts which thus constituted

a cause of action, and is entitled thereon to an equitable remedy, and also to a further legal remedy based upon the supposition that the equitable relief is granted, and he sets forth all these facts in his petition, and demands a judgment awarding both species of relief, the action will be sustained; the court will, in its judgment, formally grant both the equitable and the legal relief.[46]"

And again in Sec. 87:

"Wherever the reformed procedure has been administered according to its plain intent, the necessity of this double judicial proceedings has been obviated; indeed, if the true spirit of the new procedure is accepted by the courts, such a separation of equitable and legal rights and remedies, and their prosecution in distinct actions, will not perhaps be allowed. The plaintiff brings one civil action in which he alleges all the facts showing himself entitled to both the equitable and the legal reliefs needed to complete his legal right, and asks and obtains a double judgment, granting, first, the proper equitable remedy, and secondly, the legal remedy, by which his juridical position with respect to the subject-matter is finally perfected."

There was sufficient testimony in the case for the consideration of the court or jury on the question of agency and of part performance.

The judgment will be reversed, with instructions to the lower court to try the cause and determine the issues.[47]

---

[46] But see *Disbrow* v. *Creamery P. M. Co.*, 104 Minn. 17 (1908), as to the necessity for adopting a theory to control the trial of the case.

[47] Where the plaintiff proceeds on the theory that his remedy is by a suit in equity, but his complaint fails to state facts sufficient to entitle him to equitable relief, but does state facts sufficient to entitle him to a money judgment, he will not be dismissed from court, but will be given the relief to which he appears entitled. *Donovan* v. *McDevitt*, 36 Mont. 61 (1907); *Madden* v. *McKenzie*, 144 Fed. 64 (1906). Compare *Barnes* v. *Quigley*, 59 N. Y. 265 (1874); *Moore* v. *Coyne*, 115 App. Div. N. Y. 52 (1906). So, also, where in an action based on legal rights it becomes necessary to administer equitable relief, that relief is to be afforded. *Trost* v. *Davis*, 31 Ind. 34 (1869); *Hall* v. *Sugo*, 169 N. Y. 109 (1901); *Madden* v. *McKenzie*, 144 Fed. 64 (1906). See, also, *Wright* v. *Wright*, 40 N. Y. 437 (1873); *Akin* v. *Davis*, 11 Kans. 580 (1873); *Hall* v. *Guilford County*, 74 N. Car. 130 (1876); *De Lacy* v. *Hurst*, 83 Ga. 223 (1889); *Whitehead* v. *Sweet*, 126 Cal. 67, 58 Pac. 376 (1899); *Todd* v. *Bettingen*, 98 Minn. 170 (1906); *Kazebeer* v. *Nunemaker*, 82 Nebr. 732 (1908). The federal courts preserve the distinction between actions at law and suits in equity. *Armstrong Cork Co.* v. *Merchants R. Co.*, 184 Fed. 199 (1910). By act of congress March 3, 1915, equitable defenses may be given at law.

The abolition of forms of action does not, however, alter the substantive rights of the parties. The principles of law and equity remain unaltered. *De Witt* v. *Hays*, 2 Cal. 463 (1852); *Smith* v. *Rowe*, 4 Cal. 6 (1853); *Reubens* v. *Joel*, 13 N. Y. 488 (1856); *Cole* v. *Reynolds*, 18 N. Y. 74 (1858); *Wilson* v. *Green*, 135 N. Car. 343 (1904). If a legal cause of action is disclosed, legal principles apply; if purely equitable, equitable principles apply and will control the case. *Stevens* v. *New York*, 84 N. Y. 296 (1881); *Merrill* v. *Dearing*, 47 Minn. 137 (1891); *Fitzsimons* v. *Drought*, 16 App. Div. (N. Y.) 464 (1897); *Emmons* v. *Kiger*, 23 Ind. 483 (1864); *Cadell* v. *Allen*, 99 N. Car. 542 (1888); *Loeb* v. *Supreme Lodge*, 198 N. Y. 181 (1910); *Niehaus* v. *Niehaus*, 125 N. Y. S. 1071 (1910); *Southern R. Co.* v. *Howell*, 89 S. Car. 391 (1911). In *Britain* v. *Rossiter*, L. R. (1879), 11 Q. B. Div. 123, it is said

JOSEPH ROGERS *v.* JEAN DUHART.

SUPREME COURT OF CALIFORNIA, 1893.

97 Cal. 500.

Appeal from a judgment of the Superior Court of Los Angeles in favor of the plaintiff.

The complaint averred that the executors of Miguel Leonis let and demised to the plaintiff certain lands for the term of eight months beginning February 1, 1891, and thereupon plaintiff took possession, that defendant entered on plaintiff's said described property with cattle and sheep, depastured and destroyed the grass and remained until April 17, 1891. The facts, which were not disputed, showed that defendant had been pasturing cattle on the land, but was notified by the executors to remove them by December 31, 1890; that defendant without the knowledge of the executors or the plaintiff kept his cattle on the land until April 17, 1891; that the land was unenclosed and neither the plaintiff nor any one on his behalf took possession until April 12, 1891, and that plaintiff had been damaged in the sum of $900.[48]

PATTERSON, J.: The briefs are devoted chiefly to a discussion of the question whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners—where the title draws to it the possession for the purpose of redressing injuries to the estate.

It would be a useless thing to attempt to reconcile the cases on the subject. Decisions adhering to the common-law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the code, and sometimes lead to serious departures from its letter and spirit. With us, mere forms of action are cast aside. Every action is now, in effect, a special action on the case. (*Jones* v. *Steamer Cortes,* 17 Cal. 487, 79 Am. Dec. 142; *Goulet* v. *Asseler,* 22 N. Y. 225; *Matthews* v. *McPherson,* 65 N. Car. 189; *Brown* v. *Bridges,* 31 Iowa 145.) And the rigid formalism and subtle distinctions found in the rules governing the common-law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and smybolic gestures of the formulae prescribed for the five forms of civil actions by the decemvirs of ancient Rome.

---

by Lord Esher at page 129: "I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the courts of law or in equity; if they did more, they would alter the rights of parties, whereas, in truth, they only change the procedure."

[48] The facts are abridged from the opinion of the court, a part only of which is printed.

Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum,* trespass *vi et armis,* or any other technical form of action, *ex delicto* or *ex contractu.*

The common-law rule is, that if plaintiff declares in trespass *quare clausum,* where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be.

The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the case, which includes torts not committed with force actual or implied, injuries committed to property of which plaintiff has the reversion only, and, in fact, all injuries not provided for in other forms of action. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action has not been changed, nor has the amount of damages recoverable been affected, but the special and technical rules which govern the use of the two common-law actions mentioned ('trespass' and 'case') have certainly been abrogated." (Pomeroy's Remedies and Remedical Rights, Sec. 232.) The damages recoverable in the common-law action of trespass *quare clausum* are for the wrong done to the plaintiff's possession, as well as to the inheritance, and where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common-law "action of case." To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions.[49]

Judgment affirmed.

POSTAL *v.* COHN.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1903.

83 *App. Div.* (*N. Y.*) 27.

WOODWARD, J.: The return certifies that the pleadings in this action were oral; that the complaint was "for deceit and fraud in the sale of a horse"; that the answer was a general denial and counterclaim, and that both parties demanded bills of particulars. The

[49] See also, *Reed* v. *Scott,* 30 Ala. 640 (1857); *Wilson* v. *Rybolt,* 17 Ind. 391, 79 Am. Dec. 486 (1861); *Huffman* v. *Parsons,* 21 Kans. 467 (1879); *Hawkins* v. *Overstreet,* 7 Okla. 277, 54 Pac. 472 (1898); *Dunnett* v. *Thornton,* 73 Conn. 1, 46 Atl. 158 (1900); *Brunheim* v. *Stratton,* 145 Wis. 271 (1911). Compare *Hill* v. *Barrett,* 14 B. Mon. (Ky.) 83 (1853).

record on appeal also contains a written complaint setting forth all the elements of a cause of action for fraud, and a bill of particulars filed by the plaintiff restating in substance the facts alleged in the complaint. The court charged the jury that if they believe no fraud was committed there could be no recovery by the plaintiff, and a verdict was rendered for the plaintiff upon evidence affording no proof of the essential element of *scienter*. (2 Kent's Comm. [13th ed.] *482, *489; *Atwood* v. *Small*, 6 Cl. & Fin. 444; *Oberlander* v. *Spiess*, 45 N. Y. 175.) The only evidence tending to prove that the defendants had knowledge of the alleged unsoundness of the horse was to the effect that on the day of the delivery to the plaintiff the horse was seen "wringing wet" while in the defendants' possession. There is no evidence that this condition had continued for any length of time or that it had been noted on any previous occasion. The defendants, in explanation, say the horse was "soft." This evidence was, we think, wholly insufficient as proof of *scienter*. "A party, therefore, relying upon the establishment of a cause of action or a right to a remedy against another, based upon the alleged commission of a fraud by such person, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt in order to maintain his claim. When the evidence is capable of an interpretation which makes it equally as consistent with the innocence of the accused party as with that of his guilt, the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent." (*Morris* v. *Talcott*, 96 N. Y. 100, 107.) It does not appear that the tort was at any time waived, and the authorities in this state do not allow this complaint to be considered as setting forth a cause of action for breach of warranty. "Where fraud is alleged as the basis of the action it must be proved. The law will not permit a recovery by proof of a right of action upon contract or of some other character, and this though facts may be stated or may appear which in proper form might sustain such an action." (*Truesdell* v. *Bourke*, 145 N. Y. 612, 617.) The same rule is declared in *Degraw* v. *Elmore* (50 N. Y. 1); *Ross* v. *Mather* (51 N. Y. 108); *Barnes* v. *Quigley* (59 N. Y. 265); *Salisbury* v. *Howe* (87 N. Y. 128). *Conaughty* v. *Nichols* (42 N. Y. 83) is not out of harmony with these views.[50] As was pointed out in *Greentree* v. *Rosenstock* (61 N. Y. 583), that case maintains only that an action upon contract does not cease to be such because the pleading contains an incorrect conclusion of law, having the aspect of a tort. For the same reason *Town of Green Island* v. *Williams* (79 App. Div. 260) does not aid the plaintiff. The case at bar is in all material respects similar to *Ross* v. *Mather* (*supra*). In that case the plaintiff had judgment in an action to recover damages upon the sale of a horse. The complaint contained

[50] In the case referred to the action was brought against the defendants as factors to recover the proceeds of merchandise consigned for sale. The complaint contained an averment that defendants had "converted" the sum due. The plaintiff having established a cause of action in contract merely, the referee refuse to allow an amendment and entered a nonsuit. Judgment was reversed.

all the elements of a cause of action for fraud; not as averments of conclusions of law, but, as in the case here under review, statements of specific facts. Only a cause of action for breach of warranty was proved. In reversing the judgment of the general term, entered upon an order denying defendant's motion for a new trial and directing judgment upon the verdict, the Court of Appeals said: "The code never intended that a party who had failed in the performance of a contract merely, should be sued for a fraud, or that a party who had committed a fraud should be sued for a breach of contract, unless the fraud was intended to be waived. The two causes of action are entirely distinct, and there can be no recovery as for a breach of contract, where a fraud is the basis of the complaint."

Section 107 of the Municipal Court Act (Laws of 1902, ch. 580) requiring that the allegations of a pleading must be liberally construed, does not contemplate such looseness of construction as would be necessary to take this case out of the condemnation of the rule of these decisions. There was rather an entire failure of proof of the cause of action alleged within the meaning of section 173 of that act.

We think the judgment should be reversed.[51]

HARTFORD *v.* SMITH.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT, 1912.

199 *Fed.* 763.

In error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by P. C. Hartford against Roland H. Smith and another, doing business as A. J. Davis & Co. Judgment for defendants, and plaintiff brings error. Affirmed on condition.

J. B. MCPHERSON, Circuit Judge: The Pennsylvania act of 1887 (P. L. 271; 3 Pepp. & Lew. Dig. Laws, 5819, 5825) undertakes to abolish the distinctions theretofore existing between actions *ex contractu* and actions *ex delicto*, but only so far as related to pro-

---

[51] Accord: *Bermel* v. *Harnischfeger*, 97 App. Div. N. Y. 402 (1904). Compare *Tyndall* v. *Beatty*, 57 Misc. (N. Y.) 646 (1908).

Although the distinctions in the forms of actions *ex contractu* and *ex delicto* are abolished and one form of action substituted, it is generally said that the principles of law which govern remain unchanged. *Lubert* v. *Chanviteau*, 3 Cal. 458 (1853); *Sampson* v. *Shaeffer*, 3 Cal. 196 (1853); *Anderson* v. *Case*, 28 Wis. 506 (1871); *Pierce* v. *Carey*, 37 Wis. 232 (1875); *Minneapolis H. W.* v. *Smith*, 30 Minn. 399 (1883); *Howard* v. *Gunnison*, 12 Ohio Dec. 684 (1902); *Jones* v. *Winsor*, 22 S. Dak. 480 (1908); *Norton* v. *Reed*, 253 Mo. 236 (1913); *Welch* v. *Seattle & M. R. Co.*, 56 Wash. 97 (1909); *Maronen* v. *Anaconda C. Co.*, 48 Mont. 249 (1913); *Cullen* v. *Dickenson*, 33 S. Dak. 27 (1913). The distinction between real and personal actions is not so abolished as to permit the title to real property to be determined in replevin. *Ricketts* v. *Dorrel*, 55 Ind. 470 (1876).

cedure. Sections 1 and 2 put this restriction affirmatively[52]—"so far as relates to procedure"—while section 8 with greater emphasis puts it negatively as well as affirmatively:

"The true intent and meaning of this act is that * * * as to the action (evidently actions) herein recited, it applies to the procedure only, and the legal rights of the party are not in any way to be affected thereby."

As a contribution to the history of the act, the writer of this opinion may state of his own knowledge that a draft of the statute was submitted to the late Judge Simonton, of Dauphin County, for consideration and criticism, and that the sentence just quoted from section 8 was inserted at his suggestion, in order that no doubt might exist about the limited scope of the legislation. And the appellate courts of Pennsylvania have taken this view in several cases. *Fritz* v. *Hathaway,* 135 Pa. 280, 19 Atl. 1011; *Winkleblake* v. *Van Dyke,* 161 Pa. 7, 28 Atl. 937 (a decision concurred in by Justice Williams of Tioga County, who has always been understood to be the draftsman of the act); and *Busch* v. *Calhoun,* 14 Pa. Super. Ct. 582. The mere label of the action is not decisive. As was said by Justice Mitchell in *Fritz* v. *Hathaway*:

"Accurracy and technical precision have no terrors, except for the careless and the incompetent; and the act of 1887 was not intended to do away with them. As to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

See also, *Osborn* v. *Bank,* 154 Pa. 137, 26 Atl. 289; *Corry* v. *Railroad,* 194 Pa. 219, 45 Atl. 341, and *Brandmeier* v. *Pond Creek Co.,* 229 Pa. 284, 78 Atl. 273.

It is clear, therefore, that, although the name of the action now before us is "trespass," the legal rights of the parties are to be determined as if it were the old action of trover and conversion. Indeed, this is conceded, and we may turn at once to the statement of claim in order to discover what particular wrong is complained of. The statement is not ambiguous. It recites that the defendants were stock-brokers; that the plaintiff gave them certain orders to buy stocks on a margin; that he put up whatever margin was demanded, this being always sufficient to protect them; that he was not notified that the shares would be sold, and gave no order to sell; and that the sale produced a balance in his favor of $5,527.71, "which it was the duty of defendants, as plaintiff's brokers, so as aforesaid to immediately pay over to plaintiff upon or without demand." The statement continues:

[52] The sections of the act of 1887 referred to are as follows: "So far as relates to procedure, the distinctions heretofore existing between actions ex contractu be abolished, and that all demands, heretofore recoverable in debt, assumpsit or covenant, shall hereafter be sued for and recovered in one form of action to be called an "action of assumpsit." § 1. So far as relates to procedure, the distinctions heretofore existing between actions ex delicto be abolished, and that all damages, heretofore recoverable in trespass, trover, or trespass on the case, shall hereafter be sued for and recovered in one form of action to be called an "action of trespass." § 2.

"Plaintiff further says that defendants wholly disregarded their duties to him, as hereinbefore mentioned, to keep and maintain the proceeds of the sale of said stocks and the margins deposited with them by plaintiff as a fund solely and entirely applicable for the purpose of carrying out these particular transactions, but did, with intent to defraud plaintiff, convert and appropriate said fund to their own use, or the use of some other person or persons, and that on November 12, 1909, and continuing from that time until the present, defendants, with intent to defraud plaintiff, neglected, failed and refused to deliver or pay over to plaintiff the balance of said fund amounting as above mentioned, to wit, $5,527.71, which sum defendants have illegally, unlawfully, and fraudulently misappropriated and converted to their own use, or to the use of some other person or persons."

The action is trover for the conversion of money, although the plaintiff in error desires to treat it as an action for the conversion of the stocks. The learned judge held that in its present form it could not be maintained, and we agree with this conclusion. It should have been assumpsit, and if the suit had been dismissed for this reason, without prejudice to the plaintiff's right to bring the proper action, we might affirm the judgment at once. It is easy to understand why the action was brought in tort. Under the Pennsylvania practice some kinds of tort may still be redressed in a suit begun by a *capias ad respondendum,* which requires the entry of bail to the action. This suit was so begun, and, as a judgment for the plaintiff would also have supported a *capias ad satisfaciendum,* the defendants might have been committed to prison, until discharged according to law. But no such result would follow a recovery in assumpsit, and, as already stated, the suit should have been in that form of action. So far as appears from the uncontradicted evidence, the defendants were under no obligation to return specific money to the plaintiff, but owed him a duty that might be discharged by the payment of money generally. See *Little* v. *Gibbs,* 4 N. J. L. 211; *Davis* v. *Thompson,* 10 Sad. (Pa.) 563, 14 Atl. 169; *Aurentz* v. *Porter,* 56 Pa. 115; *Life Ass'n* v. *Catlin,* 2 Walk. (Pa.) 338, 38 Cyc. 2014, H, note 53; A. & E. Encyc. of Law (2d ed.) 652, § 5, note 7.

The practical reason against affirming the judgment as it stands is this: It is not a mere dismissal of the suit without prejudice, but a judgment in favor of the defendants, and with the present record the doctrine of *res judicata* might give the plaintiff trouble if he brought another suit. This would be unjust, for the defendants concede that they owe the money, and are only defending against the drastic remedy that has been invoked. Indeed, they offered the plaintiff a note for the full amount of his claim, although the note was afterwards returned. In order, therefore, that the litigation may perhaps end here, we shall enter no judgment for the present; but we direct the clerk of this court to notify counsel that, if the defendants shall confess judgment to the plaintiff on or before November 30, 1912, in an action *ex contractu* for $5,527.71, with interest from November 12, 1909, and if the district court shall cer-

tify us that this has been done, we will then affirm the judgment. Otherwise, we shall be obliged to reverse it formally, with leave to the plaintiff to apply to the district court for permission to change the form of action under the Pennsylvania statute of 1871 (P. L. 265; 3 Pepper & Lewis' Digest Laws, col. 5894). The act reads as follows:

"In all actions pending or hereafter to be brought in the several courts of this commonwealth, said courts shall have power at any stage of the proceedings to permit an amendment or change in the form of action if the same shall be necessary for a proper decision of the cause upon its merits," etc.

—and seems to provide a remedy for the existing situation.[53]

SECTION 3. PUBLIC CIVIL ACTIONS.[54]

(a) Quo Warranto.

THE PEOPLE *ex rel.* RASTER *v.* HEALY.

SUPREME COURT OF ILLINOIS, 1907.

230 Ill. 280.

E. O. Raster filed in the Circuit Court of Cook County a petition for a mandamus against J. J. Healy, state's attorney for that county, commanding him to sign a petition for leave to file an information in the nature of a quo warranto against one H. L. Brand charged with having usurped the office of treasurer of the Illinois Publishing Company, an Illinois corporation. It appeared from relator's affidavit attached to the petition for leave to file the information that Raster was secretary of that company and a director; that the board of directors consisted of ten persons; that by the by-laws a majority of the board was required to constitute a quorum, that Brand had been elected at a meeting held by five directors only and had never been properly and legally elected as trasurer, but had intruded into and unlawfully held the office. To the petition for a mandamus Healy demurred. The demurrer was sustained by the circuit court and the petition dismissed. Raster appealed.[55]

SCOTT, J.: This controversy involved the construction of section 1 of chapter 112, Hurd's Revised Statutes of 1905, which reads: "That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this state (or any person shall hold or claim to hold or exercise any privilege, exemption or license, which

---

[53] See also, *Duffield* v. *Rosenweig*, 144 Pa. 520, 23 Atl. 4 (1891); *Miller* v. *Lehigh Co.*, 181 Pa. 622, 37 Atl. 824 (1897); *Raymond Syndicate* v. *Guttentag*, 177 Mass. 562 (1901); *Pratt* v. *Davis*, 118 Ill. App. 161 (1905).

[54] See generally High's Extraordinary Legal Remedies.

[55] The arguments of counsel and part of the opinion of the court are omitted.

has been improperly or without warrant of law issued or granted by any officer, board, commissioner, court, or other person or persons authorized or empowered by law to grant or issue such privilege, exemption or license), or any public officer, shall have done, or suffered any act which, by the provisions of law, works a forfeiture of his office, or any association or number of persons shall act within this State as a corporation without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, or if any railroad company doing business in this state shall charge an extortionate rate for the transportation of any freight or passenger, or shall make any unjust discrimination in the rate of freight or passenger tariff over or upon its railroad, the attorney-general or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the state of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue. When it appears to the court or judges that the several rights of divers parties to the same office or franchise, privilege, exemption or license, may properly be determined on one information, the court or judge may give leave to join all of such persons in the same information, in order to try their respective rights to such office, franchise, privilege, exemption or license."

It is contended by the appellee that this statute vests the state's attorney of the proper county with an arbitrary discretion in reference to seeking leave to file an information in the nature of a quo warranto in the name of the people; that in the exercise of that discretion he can not be controlled by the courts, and that he may refuse to seek the leave for any reason which to him seems sufficient or may refuse when no reason at all can be assigned for so doing; while appellant argues that in a case such as that now before us, where the proposed individual relator has a personal and private interest in the litigation which he desires to set on foot and where the interest of the public is purely or largely theoretical, the only discretion vested in the legal representative of the people is a discretion to determine whether the documents presented to him by the individual are in proper legal form, and whether the party seeking the institution of the suit presents evidence of such facts as establish his legal right to the remedy to be afforded by judgment against the respondent in the quo warranto proceeding.

Originally a proceeding of this character was by writ of quo warranto against any one who claimed or usurped any office, franchise or liberty, to inquire by what authority he supported his claim, in order to determine the right. Later the practice was changed and an information in the nature of a writ of quo warranto succeeded

the former method. (3 Blackstone's Com. 262, 263.) By the common law the proceeding in quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation of franchises or liberties granted by the crown, and never as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise or desiring to establish a private right. In England the information, as a means of investigating and determining civil rights between parties, owes its origin to the statute of 9 Anne, chapter 20, which authorized and required the proper officer to file the information by leave of court, upon the relation of any person desirous of prosecuting the same, against any person usurping or intruding into any municipal office or franchise in the kingdom.[56] (High on Extraordinary Legal Remedies, 3d ed., sec. 602.) That statute, however, having been passed in the year of our Lord 1710, has never been in force in this state.[57]

It will be observed from examination of section 1, supra, that the proceeding is made the vehicle for the assertion of many rights, both private and public, which could not have been vindicated by this method at the common law. As originally used, the proceeding was criminal in character, and the offender, upon conviction, was liable both to fine and imprisonment, as well as ouster from the franchise or liberty which he had wrongfully usurped. Under our statute the proceeding is, in fact, a civil remedy when used for the protection of private rights, and in the event of a judgment in favor of the defendant, costs may be awarded against the relator.[58] (Ch. 112, sec. 6, supra.)

---

[56] See opinion of Tindal, C. J., in *Darley* v. *The Queen,* 12 Cl. & F. 520 (1846) at p. 536. Proceedings under the old writ of quo warranto were civil. When proceedings by information in the nature of quo warranto were substituted these were at first deemed criminal, as they involved fine or imprisonment in addition to the ouster. Nevertheless, proceedings at the instance of private relators were soon regarded as merely civil. *King* v. *Francis,* 2 T. R. 484 (1788). And now by the act of 1884, 47 and 48 Victoria, ch. 61, § 15, amending the judicature act, proceedings in quo warranto are deemed to be civil. For a recent case, see *The King* v. *Beer,* L. R. (1903) 2 K. B. Div. 693.

[57] In Illinois, acts of parliament made in aid of the common law prior to the fourth year of the reign of James I (1607) are in force until repealed. *M'Cool* v. *Smith,* 1 Black (U. S.) 459 (1861).

[58] In the United States the remedy by quo warranto is generally regarded as a purely civil proceeding. *Foster* v. *Kansas,* 112 U. S. 201 (1884); *Commercial Bank* v. *The State,* 12 Miss. 439 (1845); *State* v. *Ashley,* 1 Ark. 279 (1839); *State* v. *McDaniel,* 22 Ohio St. 354 (1872); *Attorney-General* v. *Delaware & B. B. R. Co.,* 38 N. J. L. 282 (1876); *Respublica* v. *Wray,* 2 Yeates (Pa.) 429 (1799); *Attorney-General* v. *Sullivan,* 163 Mass. 446 (1895); *State* v. *Standard Oil Co.,* 218 Mo. 1 (1909).

In New York, the writ of quo warranto is abolished, but the same relief may be had in an action brought in the name of the people of the state. Code of Civil Procedure, §§ 1983-1986; *People* v. *McLaughlin,* 174 N. Y. 450 (1903); *People* v. *Loew,* 19 Misc. (N. Y.) 248 (1897); *People* v. *Hinsdale,* 43 Misc. (N. Y.) 182 (1904). And in code jurisdictions although the form of the writ is abolished the substance of the proceeding remains unaltered. *Territory* v. *Hauxhurst,* 3 Dak. 205 (1882); *Wishek* v. *Becker,* 10 N. Dak. 63 (1900); *State* v. *Masons and Odd Fellows Joint Stock Assn.,* 91 Kans. 9 (1913).

By the common law, and in England prior to the passage of the statute of Anne, arbitrary discretion was lodged in the attorney-general to determine whether he would move, and that discretion could not be controlled or reviewed. (*Attorney-general* v. *Ironmongers' Co.*, 2 Beav. 314; *Attorney-general* v. *Wright*, 3 Beav. 447; *People* v. *Attorney-general*, 22 Barb. 114; *People* v. *Fairchild*, 8 Hun. 334; *In re Gardner*, 68 N. Y. 467; *Everding* v. *McGinn*, 23 Ore. 15.) In extending the scope of this proceeding the legislature of this state has not by express words changed or altered the common law so far as the discretion vested in the attorney-general or state's attorney is concerned, but the character of the discretion possessed by these officers must be determined, to some extent, by consideration of the rights which the law-making power has committed to that discretion.

By the common law the information in the nature of a quo warranto was solely a prerogative remedy. No suit was ever prosecuted by that remedy at the instance of a private person or for the assertion of a private right. It was used only where a wrong had been done, or was alleged to have been done, to the king, and it was therefore the rule that only the king, or his representative, should determine whether a suit should be brought to enforce the right of the king. Where jurisdiction is given the courts to enforce the rights of private individuals by this method it is manifest that the power to determine whether the suit should be brought should not be lodged in the legal representative of the sovereign power, when, as here, the right of the citizen is substantial and the concern of the state with regard to the litigation is practically or entirely theoretical. In such case, the reason for the rule having failed the rule itself should fail.

When the legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the state's attorney to sign and present a petition for leave to file an information in the nature of a quo warranto where evidence of facts is properly presented to him by a proposed relator which shows prima facie that the relator is legally entitled to the relief, in reference to a private right, which would be offered him by a judgment in his favor in a quo warranto proceeding, is an absolute one. It follows, therefore, that where he declines to act for any reason other than the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion, conceding that his construction of the statute be correct, and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law.

Courts of last resort in our sister states have frequently found themselves confronted with the same difficulty which we are now

considering, where legislatures have extended the scope of the remedy by quo warranto to include the enforcement of private right but have failed to impose by express words a positive duty upon the attorney-general or state's attorney to proceed at the instance of the individual relator, or have failed to provide that the proceeding may be instituted without the co-operation of those officers. It has sometimes been held that the arbitrary discretion of the public prosecutor still exists as at common law, and that if he refuses to lend his name to the proceeding the individual relator is without remedy, even though the refusal of the officer results from political, selfish or other improper considerations. In other states relief for the relator has been suggested by various methods, not substantially different, so far as the result to be attained is concerned.[59]

The statute of Anne does not expressly require the officer of the crown to file the application for leave, and yet *Rex* v. *Trelawney,* 3 Burr. 1616, and *Rex* v. *Wardroper,* 4 Burr. 1964, hold that under that statute the officer is without discretion in the matter but must apply at the instance of the private relator, and that the only discretion is in the court; and in *State* v. *Elliott,* 13 Utah 200, it was said that "except when changed by statute the rule of procedure is practically the same in this country as in England" under the statute of Anne.

It is, of course, true, that in many cases where the individual relator has a private and personal interest in the suit which he seeks to set on foot the public also has a substantial interest therein. No injury can result to the public in such instances, however, by requiring the prosecutor to proceed, for the reason that the court, or the judge thereof, when the petition for leave to file the information is presented, is vested with a sound legal discretion to be exercised in determining whether leave to file the information should be granted, and the court or the judge thereof may, in the exercise of

[59] Under statutes confirming the right to petition for a quo warranto to the attorney-general, the consent of that officer is necessary although the proceedings are at the instance of a private relator. *Wallace* v. *Anderson,* 5 Wheat. (U. S.) 291 (1820); *Barnum* v. *Gilman,* 27 Minn. 466 (1881); *State* v. *Cook,* 39 Ore. 377 (1901); *People* v. *McClellan,* 118 App. Div. (N. Y.) 177 (1907). But it has been intimated in some cases and held in others that the court will in a proper case compel the state officer to file the information. *State* v. *Deliesseline,* 1 McCord (S. Car.) 52 (1821); *In re Bank of Mount Pleasant,* 5 Ohio 250 (1831); *Lamoreaux* v. *Ellis,* 89 Mich. 146 (1891); *Cain* v. *Brown,* 111 Mich. 657 (1897); *State* v. *Frazier,* 28 Neb. 438 (1889); *State* v. *Withers,* 121 N. Car. 376 (1897); *State* v. *Dahl,* 69 Minn. 108 (1897).

In Pennsylvania, under the Act of June 14, 1836, P. L. 621, §§1-2, quo warranto for the usurpation of a public office must be at the suggestion of the attorney-general or some authorized agent of the commonwealth. *Commonwealth* v. *Burrell,* 7 Pa. 34 (1847), the rights of a private relator are confined to cases where his individual interests are involved. *Commonwealth* v. *Meanor,* 167 Pa. 292 (1895); *Commonwealth* v. *Bowditch,* 217 Pa. 527 (1907); Mathews Petition, 238 Pa. 419 (1913). A private relator, though having an interest is not entitled to the writ for the purpose of forfeiting a charter. *Commonwealth* v. *Philadelphia & C. C. R. Co.,* 10 W. N. Cas. 400 (1881); *Murphy* v. *Farmers' Bank,* 20 Pa. 415 (1853).

that discretion, fully protect the rights of the public, and may under some circumstances, where the public weal demands, refuse leave to file the information although the clear legal right of the relator is established. (*McPhail* v. *People*, 160 Ill. 77.)[60]. The rights and interests of the public being thus fully protected by a sound legal discretion lodged in the court, or the judge thereof in vacation, it is manifest that there is no occasion for the exercise by the state's attorney or attorney-general of a discretion to be used for the same purpose and for no other purpose.

The discretion possessed by the attorney-general at the common law is no doubt now possessed by the attorney-general or state's attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievance of the relator.[61] One such case is where the wrong is the usurpation of an appointive public office to which, in the event of judgment of ouster, no particular individual will have a right to succeed; and another example is where the object is to secure a judgment ousting a corporation from the enjoyment of all the franchises which it exercises. In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforceable by a proceeding in quo warranto, and where he presents to the state's attorney a proper petition for his signature with evidence of the facts necessary to establish the right, it is the duty of that officer to apply for leave to file an information in the nature of a quo warranto, and if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave.

Reversed and remanded.[62]

---

[60] *King* v. *Parry*, 6 Ad. & El. 810 (1837); *Queen* v. *Cousins*, L. R. (1873), 8 Q. B. 216; *Commonwealth* v. *Chiley*, 56 Pa. 270 (1870); *State* v. *Smith*, 48 Vt. 266 (1876); *Tillyer* v. *Mindermann*, 70 N. J. L. 512 (1904); *State* v. *Village of Kent*, 96 Minn. 255 (1905); *People* v. *Hepler*, 240 Ill. 196 (1909); *Koven* v. *Stanley*, 84 N. J. L. 446 (1913); *People* v. *Union Con. E. R. Co.*, 263 Ill. 32 (1914). The discretion must be exercised according to law and is reviewable. *People* v. *Anderson* 239 Ill. 266 (1909).

[61] *People* v. *Grand River B. Co.*, 13 Colo. 11 (1889); *Haupt* v. *Rogers*, 170 Mass. 71 (1898); *State Railroad Commission* v. *People*, 44 Colo. 345 (1908); *Thirteenth & F. S. P. R. Co.* v. *Broad Street R. T. Co.*, 219 Pa. 10 (1907); *Commonwealth* v. *Crow*, 218 Pa. 234 (1907).

[62] See further *State* v. *Stewart*, 6 Houst. (Del.) 359 (1881); *State* v. *Hancock*, 2 Penn. (Del.) 231 (1899); *Attorney-General* v. *N. Y., N. H. & H. R. R.*, 197 Mass. 194 (1908); *State* v. *Grimm*, 220 Mo. 483 (1909); *Anderson* v. *Myers*, 77 N. J. L. 186 (1908); *People* v. *Karr*, 244 Ill. 374 (1910); *Commonwealth* v. *Smail*, 238 Pa. 106 (1913); *State* v. *Kuhns*, 89 Atl. 1 (Del. 1913).

(d) Mandamus.

FISHER *v.* CITY OF CHARLESTON.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1881.

17 *W. Va.* 595.

Henry T. Fisher petitioned the Circuit Court of Kanawah County for a mandamus against the City of Charleston, averring that he had obtained judgment against the city for $744.80, which was unpaid, and that he knew of no property out of which the judgment could be made. The prayer was for a rule on the mayor and city officials to show cause why a writ of mandamus should not be issued, commanding the treasurer to pay the petitioner out of any money in his hands not appropriated, and for want of such funds commanding the mayor and councils to levy a tax sufficient to satisfy the judgment.

The mayor and other officials moved to quash the rule, which motion the court overruled. They then filed an answer averring that they had levied a tax sufficient to satisfy the judgment and had made sundry payments to Fisher.

To the answer the plaintiff demurred, and the demurrer having been overruled, replied generally. A jury sworn to try the issue found a special verdict to the effect that the city officers had made a levy which included the plaintiff's claim. There were other claims provided for in the same tax levy. On this verdict the court refused a peremptory mandamus and dismissed Fisher's petition. Fisher brought error.[68]

GREEN, P. J.: Originally a mandamus was a mandate issued directly by the King of England to his subjects, ordering the performance of some specified act. It was in no sense a judicial writ. Such mandates have long since become obsolete. Any such mandate was called originally a mandamus; but gradually a mandate ceased to be called a mandamus, and this name was applied to a judicial writ issued by the King's Bench in the name of the King. In this court the King originally sat in person, and when he ceased to do so, yet by a fiction of the law he was still presumed to be present. At first these writs were issued by the King's Bench only in cases in which the King or the public at large was interested, and for these reasons this writ was called a prerogative writ and was regarded as not issued of strict right but only at the will of the sovereign. But in modern times even in England there is a tendency to treat this writ as a writ of right, and to strip it of its prerogative character. In this country it has lost its prerogative nature and is regarded very much as a writ of right and in the nature of an ordinary suit between parties, when the aggrieved party shows himself entitled to this kind of relief. See *Gilman* v. *Bassnett*, 33 Conn. 298;

[68] The statement of facts is abridged from the opinion of the court, part of which is omitted.

Asberry v. *Beavers*, 6 Tex. 457; *Commonwealth* v. *Dennison*, 24 How. 66.[64]

It is true, that some of the courts in this country still appear to regard this writ as prerogative in its character. See *People* v. *Board of Metropolitan Police*, 26 N. Y. 316. This appears especially to be the case in Illinois. See *Inspectors of Peoria* v. *The People*, 20 Ill. 530; *People* v. *Hatch*, 33 Ill. 134-140; *City of Ottawa* v. *The People*, 48 Ill. 240. But the weight of American authorities is decidedly opposed to these views, and we may regard what Chief Justice Taney said in *The Commonwealth of Kentucky* v. *Dennison, Governor, etc.*, 24 How. 97, on this point as correctly stating the law. He says:

"It is well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative powers of the English crown and was subject to regulations and rules, which have long since been disused. But the right to the writ and the power to issue it has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases, to which it is applicable. It was so held by this court in the cases of *Kendall* v. *United States*, 12 Pet. 615; *Kendall* v. *Stokes et al.*, 3 How. 100."[65]

The use of this writ as a judicial writ issued by the King's Bench may be traced to the early part of the fourteenth century, but it was rarely used till the latter part of the seventeenth century. See *Middleton's Case*, 2 Dyer, 322 b. temp. 16 Elz.; *Bogg's Case*, 11 Coke 93; *Powers, J.*, in *Queen* v. *Heathcote*, 10 Mod. 48; *Dr. Widdington's Case*, 1 Lev. part I, 23, 13 Car. II; *Rex* v. *Askew*, Burr. 2186; *King* v. *City of Canterbury*, 1 Lev. part I, 119; *Sir Thomas Earle's Case*, Carth. 173; *Rex* v. *Mayor of Oxford*, 2 Salk. 428. The mode of proceeding in this early day to obtain a writ of mandamus was by a motion based upon an affidavit for a rule to show cause, why a writ of mandamus to perform a specified act should not be issued. The hearing of this motion was usually ex parte, no notice thereof being given to the other party. If the motion was

---

[64] *Rex.* v. *Barker*, 3 Burr. 1265 (1762); *People* v. *Steele*, 2 Barb. (N. Y.) 397 (1848); *Queen* v. *Church Wardens of All Saints, Wigan*, L. R. (1876) 1 App. Cas. 611.

[65] "The correct rule deduced from the modern practice, seems to be that mandamus, while no longer a mere prerogative writ, is yet somewhat of a discretionary writ and should be issued not in the exercise of an arbitrary and capricious discretion, but in the exercise of a sound legal discretion in accordance with the established rules of law." *State* v. *Gibson*, 187 Mo. 536 at page 555. Accord: *State* v. *Wilson*, 123 Ala. 259 (1898); *Knight* v. *Thomas*, 93 Maine 494 (1900); *State* v. *Board of Commissioners*, 162 Ind. 580 (1903); *Gay* v. *Torrance*, 145 Cal. 144 (1904); *People* v. *Olsen*, 215 Ill. 620 (1905); *Sherwood* v. *Rynearson*, 141 Mich. 92 (1905); *Shepard* v. *Oakley*, 181 N. Y. 339 (1905); *In re Freeman*, 75 N. J. L. 329 (1907); *Klinlein* v. *Baltimore*, 118 Md. 576 (1912); *Smith* v. *Commissioner of Boston*, 215 Mass. 353 (1913); *In re Welch Mfg. Co.*, 201 Fed. 519 (1913); *State* v. *Kansas City G. Co.*, 254 Mo. 515 (1914). In Washington, it is said that any person "has the same right to sue out the writ as he has to commence a civil action to redress a private wrong." *State* v. *McQuade*, 36 Wash. 579 (1905).

sustained, an order was made directing the rule to show cause to be issued. It was provided in the order, that the rule should be served by delivering to the defendant a copy of the order, which required him to appear at a certain time and show cause against the issuing of the writ of mandamus described, and on the return day the defendant was heard, and any counter affidavits filed by him were considered. The affidavits in support of the motion should according to this old practice contain a precise statement of the facts constituting the relator's right to the writ, and the allegations were required to be stated in this affidavit so positively that if false, the relator could be successfully prosecuted for perjury. Such affidavits should also show that the relator was entitled to the relief he asked; that he had complied with all the necessary forms to constitute his right; and that he had applied to the defendant to do that which he asked, and that he had refused or neglected to do it. If by the counter-affidavit of the defendant it was perfectly apparent that the relator was not entitled to the writ the rule was discharged; but if the relator's right to the writ after the receiving of the counter-affidavits was doubtful, the rule was made absolute, in order that the right might be formally tried, and an order was entered directing an alternative writ, or mandamus nisi, to be issued.

In this writ it was absolutely necessary to set forth the facts, which entitled the prosecutor to the relief prayed for. It was addressed to the person or persons, whose duty it was to perform the act, and it commanded him or them to do the thing required, which was accurately specified, or show some cause why he or they should not do it. To this writ the defendant was required to make a written return either denying the facts stated in the writ or setting forth other facts sufficient to defeat the relator's claim. If the alternative writ or mandamus nisi was defective in form merely, the defendant could move to quash, before he made his return; but for such defect he could not move to quash after he made his return; but for a defect of substance the writ of mandamus nisi would be quashed at any time, before a peremptory mandamus was awarded. If the return of the defendant was adjudged as insufficient answer, or if he made no return, a peremptory mandamus was awarded commanding absolutely the defendant to do the thing required; and if this writ was disobeyed, an attachment issued against the defendant. If the return was sufficient in law but false in fact, the relator could not traverse it, but was forced to resort to his action against the defendant for a false return. See Blackstone's Com. 111; Moses on Mandamus, 202, 203; High's Ex. Rem., sec. 500, p. 360; Field on Corporations, sec. 499, p. 571; *Commercial Bank of Albany* v. *Canal Commissioners,* 10 Wend. 30, 31.

As then the case was at common law determined entirely upon the alternative writ of mandamus and the return thereto, the utmost strictness was required in these. It has even been said, that in a return to a mandamus nisi the same certainty was required as in indictments or returns to writs of habeas corpus; but it is questionable, whether this was not carrying the rule too far; (see *King* v. *The Mayor, etc., of Lynn Regis,* Dough. 177) though Lord Chief

Justice Holt in *Rex* v. *Abingdon*, 12 Mod. 401, says: "That a return to a mandamus at common law requires the utmost certainty the law allows of." Bartol, Judge, says in *Harwood* v. *Marshall*, 10 Md. 464: "There is no branch of the law, in which more technical precision and nice discrimination are found, than the rules which governed the constructions of returns to writs of mandamus at common law." He then cites from Tapping on Mandamus, 353, the principles, which at common law govern in such cases, and which, he says, are sustained by the authorities he quotes. This citation is: "The averments of the return must be certain. The certainty required by the common law is by some of the cases stated to be certainty to every intent, and therefore greater certainty than is requisite to a plea. Other cases have decided, that the certainty or strictness, which prevailed at common law, was the same that governed estoppels, indictments or returns to writs of habeas corpus; and as to them it is laid down, that nothing is to be taken or construed by intendment or inference, so that all material facts should be positively and distinctly alleged." But in an older case in Maryland it was held, that the common law required the same certainty in a return to a mandamus as in declarations and pleadings. See *Brosius* v. *Reuter et al.*, 1 Harr. & J. 551.

The ancient strictness and certainty required in the return of a mandamus nisi was based in part on the fact that it could not be traversed, but was treated by the court as true. But in 1711, 9 Anne, ch. 20, this rule was changed. By the second section of said act it was enacted, "that when a return is made to a mandamus in certain cases, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus to plead to or traverse all or any of the material facts contained within the said return; to which the person or persons making such return shall reply, take issue or demur; and such further proceedings and in such manner shall be had therein for the determination thereof, as might have been had, if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place, as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon demurrer or by nil dicit or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner, as he or they might have done in such action on the case as aforesaid, and a peremptory writ of mandamus shall be granted without delay for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return, he or they shall recover his or their costs of suit."[66]

[66] In some jurisdictions the statute of 9 Anne, ch. 20, has been regarded either as part of the common law or as substantially adopted in the practice under the local laws. *United States* v. *Boutwell*, 84 U. S. 604 (1873);

In 1843, (see 6 and 7 Vic., ch. 67), a further act was passed to enable persons to sue out and prosecute writs of error in certain cases upon proceedings on writs of mandamus. In 1854, (see 17 and 18 Vic., ch. 125), was passed the common-law procedure act, which changed very much the proceedings in mandamus. These acts are all to be found in the appendix to High's Extraordinary Legal Remedies.

The effect of this statute of Anne was in cases falling within its provisions to assimilate the proceedings in mandamus to those in ordinary actions at law. The relator in his alternative writ of mandamus, sometimes called a mandamus nisi, set forth his right or cause of action in a formal manner, which corresponded to a declaration in an ordinary action. The respondent then set up his defence by way of return, corresponding to a plea in an ordinary action of law. The relator then traversed this return or replied to it by way of confession and avoidance, corresponding to a replication in an ordinary suit, or he might demur, and to this again the respondent might reply by traverse or by way of confession and avoidance; and so on till an issue of law or fact was joined, which was tried, as such an issue would be tried in an ordinary suit at law. This statute made the pleadings in certain mandamus cases substantially like those in ordinary suits at law; and the subsequent legislation in England rendered this likeness still more complete.

In some of the states of this country this statute of Anne has been recognized by the courts as a part of their law, while in other states from an early day it has been substantially re-enacted, while in a few of the states for some time at least no such statute existed, as in Pennsylvania.[67] We have always had such a statute in this state. It is the same as the Virginia statute, and is ch. 109 of our code. (See. p. 570.) It is in these words:

"1st. When a writ of mandamus is issued, the return thereto shall state plainly and concisely the matter of law or fact relied on in opposition to the complainant.

New Haven & N. C. v. *State*, 44 Conn. 376 (1877); *Fairbank* v. *Sheridan*, 43 N. J. L. 82 (1881); *Clement* v. *Graham*, 78 Vt. 290 (1905). In other jurisdictions the statute was held not to be in force, *Commonwealth* v. *Canal Commissioners*, 2 P. & W. (Pa.) 517 (1831); *Fitshugh* v. *Custer*, 4 Tex. 391 (1849); *Dane* v. *Derby*, 54 Maine 95 (1886); *Chumasero* v. *Potts*, 2 Mont. 242 (1875); *Lunt* v. *Davison*, 104 Mass. 498 (1870); *State* v. *Jefferson County*, 11 Kans. 66 (1873). The practice established by modern statutes and codes has assimilated the proceedings to those in an ordinary action. California Code Civil Procedure, §§ 1084-1097; New York Code Civil Procedure, §§ 2067-2090; General Code of Ohio (1910) § 12283; *State* v. *Crites*, 48 Ohio St. 142 (1891); *State* v. *Kellogg*, 95 Wis. 672 (1897); *People* v. *Best*, 187 N. Y. 1 (1907).

[67] Mandamus in Pennsylvania is now regulated by the Act of June 8, 1893, P. L. 345, and its supplements. *Commonwealth* v. *Huttel*, 4 Pa. Super. Ct. 95 (1897); *Davis* v. *Patterson*, 12 Pa. Super. Ct. 479 (1900); *Douglas* v. McLean, 25 Pa. Super. Ct. (1904); *McClintock* v. *Young Republicans*, 210 Pa. 115 (1904); *Shisler* v. *Philadelphia*, 239 Pa. 468 (1913). The writ of mandamus at the common law and under the statute must be distinguished from an order made by the court upon the treasurer of a municipality for the payment of a judgment against it, commonly called a mandamus. In re Sedgeley Avenue, 88 Pa. 509 (1879).

"2d. The complainant may thereupon demur to the return to plead specially thereto or both.

"3d. The defendant may reply to, take issue on or demur to the pleas of the complainant.

"4th. If a verdict be found or a judgment be rendered for the person suing out a writ on demurrer or by nil dicit or for want of a replication or other pleading, he shall recover his costs and such damages as the jury may assess, and final judgment thereupon shall be awarded without delay, as if the return to the writ had been judged insufficient.

"5th. If judgment be rendered for the defendant, he shall recover his costs."

This is a re-enactment substantially of the statute of 9th Anne with an extension of its provisions to all cases of mandamus, the statute of 9th Anne being confined to certain cases only of mandamus.

The practice in mandamus cases differs much in England and in the different states in this country, it being largely regulated by local rules, usages and statutes. Some of these diversities of practice are pointed out and commented on in *Ex parte Garland,* 42 Ala. 559. Without undertaking to point out or comment on these diversities of practice I will simply state, that the usual practice in this state, and the most usual practice in this country, is to begin the proceedings by presenting to the court an application in the form of a petition setting forth in detail the grounds, upon which the petitioner asks a writ or mandamus. This petition in this state is usually ex parte, no notice that it will be filed being given to the defendants, and it is always supported by affidavit, when presented by a private person. *Goshorn et al. v. Supervisors of Ohio County,* 1 W. Va. 312; *Board of Supervisors of Mason County* v. *Minturn,* 4 W. Va. 302; *Shields & Preston* v. *Bennett, auditor,* 8 W. Va. 76; *Barnett* v. *Meredith, Judge,* 10 Gratt. 651; *Sights* v. *Yarralls,* 12 Gratt. 293. If a prima facie case is presented by this petition warranting the relief sought, the court frequently issues a rule, which is served on the opposite party, requiring him to show cause, why a mandamus should not issue. *Smith* v. *Dyer,* 1 Call 563; *Dew* v. *Judges of Sweet Springs,* 3 H. & M. 1; *Barnett* v. *Meredith, Judge,* 10 Gratt. 652; *Harrison* v. *Emmerson and other Justices of Norfolk,* 2 Leigh. 764; *Board of Supervisors of Mason County* v. *Minturn,* 4 W. Va. 302; *The Ohio Valley Iron Works* v. *The Town of Moundsville,* 11 W. Va. 8.

But in this state the issuing of this rule is frequently dispensed with; and the most usual practice is to issue the alternative writ immediately on the filing of a proper petition supported by affidavit. See *Bridges* v. *Shallcross,* 6 W. Va. 662; *Shields & Preston* v. *Bennett,* 8 W. Va. 72; *Fisher* v. *The Mayor of Charleston,* 17 W. Va. 628. Where the court thinks proper to issue a rule, and it has been served, if the defendant fails to answer it or files an insufficient answer, the court either issues a peremptory writ of mandamus, enlarges the rule or compels an answer, as may be proper in the particular case. But if the answer denies the facts stated in the

petition or shows sufficient cause, why the rule should not issue, so that it appears, that there is a dispute of fact between the parties, an alternative writ of mandamus is ordered to be issued, in order that by the return to such alternative writ of mandamus a formal issue may be made up and tried. See *Dew* v. *Judges of Sweet Springs*, 3 H. & M. 1; *Douglas & Woodward* v. *Loomis, Judge*, 5 W. Va. 544. This alternative writ of mandamus, whether issued immediately on the filing of the petition or after the return of such a rule, here as elsewhere stands in lieu of a declaration in an ordinary suit. See *The People* v. *The Supervisors of Westchester*, 15 Barb. 612; *Canal Trustees* v. *The People*, 12 Ill. 254.[68] The facts, however, alleged in this alternative writ, may be alleged by way of recital; but it being in the nature of a declaration as well as of a writ, the sufficiency of these facts to entitle the plaintiff to the redress he seeks is called in question by a motion to quash the alternative writ or by a demurrer to it, and any defect in the recitals or allegations of this alternative writ can not be aided by the petition or affidavit thereto, for though they be the foundation, on which the writ was issued, they constitute no part of the pleadings in the case. See *Commercial Bank of Albeny* v. *Canal Commissioners*, 10 Wend. 25; *Johnson* v. *The Auditor of the State*, 4 Ohio St. 493; *People* v. *Baker*, 25 Barb. 105. If the petition does not state the necessary facts to justify the issuing of an alternative writ or a rule, neither ought to be issued, and if issued, on the return day this fatal defect should be taken advantage of not by demurrer but by motion to quash the alternative writ or to discharge the rule as improvidently awarded. The petition and affidavit bear to the mandamus nisi a relation similar to that, which an affidavit bears to an attachment.

When the alternative writ of mandamus has been issued, if the defendant does not do the act required, and the writ be not quashed on motion or dismissed on demurrer, the defendants, to whom it is addressed, and none others, must make a return thereto. This return under our statute is in the nature of a plea in an ordinary action at law, and it must be tested by the ordinary rules of pleading both as to its form and substance. It must therefore be in the nature of a traverse or a plea in confession and avoidance; and if insufficient in law, it may be demurred to by the complainant, or he may reply thereto; (see *Commercial Bank of Albany* v. *Canal Commissioners of the State of New York*, 10 Wend. 20; *The People* v. *Baker*, 25 Barb. 105; *The Commissioners ex rel. Middleton* v. *The Commis-*

[68] "The alternative writ corresponds in many particulars to a declaration at common law, and in a proper case may be demurred to, or the return may be demurred or pleaded to and an issue made by which the rights of the parties may be determined and the decision of the court reviewed, if desired, by writ of error." *Schnitzler* v. *Transportation Co.*, 76 N. J. L. 171 (1908). So also, *Williams* v. *New Haven*, 68 Conn. 263 (1896); *People* v. *Supervisors*, 142 N. Y. 271 (1894); *Welch* v. *State*, 164 Ind. 104 (1904). In Illinois the petition takes the place of the alternative writ and the plea or answer takes the place of the return, *People* v. *Hemstreet*, 156 Ill. 155 (1895). So also, in *Ohio* v. *Dalton*, 1 Ohio C. C. 119 (1885); *Chatters* v. *Coahoma County*, 73 Miss. 351 (1895).

sioners of Allegheny County, 37 Pa. St. 237; *Biggs* v. *Johnson*, 6 Wall. 185); and so the pleadings proceed as in an ordinary common-law suit, till the parties are at issue in fact or law, which issues are tried as in an ordinary action at law.

Judgment reversed and cause remanded with instructions to award a proper alternative writ of mandamus against the City of Charleston.[69]

(c) Prohibition.

STATE *v.* WHITAKER.

SUPREME COURT OF NORTH CAROLINA, 1894.

114 *N. Car.* 818.

The defendants applied for a writ of prohibition to issue to Thomas Badger, mayor of the city of Raleigh, upon the ground that the city ordinance for the violation of which they were being tried was invalid and because a trial by jury had been refused them.

CLARK, J.: The writ of prohibition existed at common law and is also authorized by the constitutional provision (Art. IV, sec. 8) which gives the Supreme Court "power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." In this state this writ can issue only from the Supreme Court. *Perry* v. *Shepherd*, 78 N. Car. 83.

The writ of prohibition is the converse of mandamus. It prohibits action, while mandamus compels action. It differs from an injunction, which enjoins a party to the action from doing the forbidden act, while prohibition is an extraordinary judicial writ issuing to a court from another court having supervision and control of its proceedings, to prevent it from proceeding further in a matter pending before such lower court. It is an original remedial writ and is the remedy afforded by the common law against the encroachment of jurisdiction by inferior courts and to keep them within the limits prescribed by law. 19 A. & E. Encyc., 263, 264; High, Extraordinary Rem., sec. 762.

It is settled that this writ does not lie for grievances which may

---

[69] See also, *Fitch* v. *McDiarmid*, 26 Ark. 482 (1871); *State* v. *Lewis*, 76 Mo. 370 (1882); *Swift* v. *Richardson*, 7 Houst. (Del.) 338 (1886); *State* v. *Young*, 102 N. E. 961 (Ind. 1913). Where an officer or a court has a judicial or quasi judicial discretion as to the performance of an act mandamus will lie to compel the officer to act, but will not lie to control his discretion or to compel its exercise in a particular manner. *United States* v. *Lawrence*, 3 Dall. (U. S.) 42 (1795); *Chase* v. *Blackstone C. Co.*, 27 Mass. 244 (1830); *Douglass* v. *Commonwealth*, 108 Pa. 559 (1885); *People* v. *Commissioners*, 149 N. Y. 26 (1896); *Enbank* v. *Boughton*, 98 Va. 499 (1900); *United States* v. *Hitchcock*, 190 U. S. 316 (1903); *Walker* v. *Superior Court*, 139 Cal. 108 (1903); *Chatfield Co.* v. *Reeves*, 87 Conn. 63 (1913); *People* v. *Craven*, 210 N. Y. 443 (1914); *West Jersey & S. R. Co.* v. *Public Utility Comm.*, 89 Atl. 1017 (N. J. 1914). Contra: *State* v. *Clausen*, 44 Wash. 437 (1906).

be redressed in the ordinary course of judicial proceedings by appeal or by recordari or certiorari in lieu of an appeal. Nor is it a writ of right, granted ex debito justitiae, like habeas corpus, but it is to be granted or withheld according to the circumstances of each particular case. Being a prerogative writ, it is to be used like all such, with great caution and forbearance to prevent usurpation, and secure regularity, in judicial proceedings where none of the ordinary remedies provided by law will give the desired relief, and damage and wrong will ensue pending their application. High on Extraordinary Remedies, secs. 765, 770.

In the present case the mayor's court has jurisdiction of the persons of the defendants and of the subject-matter, which is the alleged violation of a town ordinance. If the ordinance in question is invalid that matter can be determined on appeal to the Superior Court, and by a further appeal (if desired) thence to this court. This has been often done. There is no palpable usurpation of jurisdiction or abuse of its authority, nor likelihood of injury to defendants, which calls for the extraordinary process of this court by prohibition to stop the action of the lower court. It is more orderly to proceed in the regular way to have an alleged error of this kind corrected on appeal. The writ might properly issue where the court below has no jurisdiction of the subject-matter, as for instance, if a justice of the peace should attempt to try a defendant for larceny, or decree foreclosure of a mortgage; but even in that case it would rest in the discretion of the Supreme Court whether the matter should be left to correction by appeal or by treating such judgment as a nullity. As to the denial of a jury trial by the mayor, it is pointed out by Smith, C. J., in *State* v. *Powell,* 97 N. Car. 417, that under the present Constitution (Art. 1, sec. 13) the legislature is authorized to vest the trial of petty misdemeanors in inferior courts without a jury if the right of appeal is preserved. It was otherwise under the former Constitution, under which *State* v. *Moss,* 47 N. Car. 66 was decided. The guaranty of a trial by jury in the sixth and seventh amendments to the Constitution of the United States applies only to the federal courts, and is not a restriction on the states, which may provide for the trial of criminal and civil cases in their own courts, with or without jury, as authorized by the State Constitution. Cooley Cons. Lim. (6th ed.), 30; *Walker* v. *Sauvinct,* 92 U. S. 90; *Munn* v. *Illinois,* 94 U. S. 113.

There are instances, though infrequent, when this writ has been invoked. It has been granted where, after conviction for felony, the court has at a subsequent term granted a new trial upon the merits, without any legal authority for so doing. *Quimbo Appo.* v. *The People,* 20 N. Y. 531. It is also the appropriate remedy pending an appeal from an inferior to a superior court, to prevent the former from exceeding its jurisdiction by attempting to execute the judgement appealed from; or to prevent a circuit court exceeding its powers by issuing an unauthorized writ of error and supersedeas to a county court and interfering improperly with the jurisdiction of the latter. *Supervisors* v. *Gorrell,* 20 Grat. 484. Also, prevent an inferior court's interfering with or attempting to control the records

and seal of the superior court by injunction. *Thomas* v. *Meade*, 36 Mo. 232. It lies to prevent a probate court exercising jurisdiction over the estate of a deceased person when it can not lawfully do so. *United States* v. *Shank*, 15 Minn. 369. Or, where justices of the peace are proceeding without authority of law to abate a supposed nuisance, prohibition lies to stay their action. *Zylstra* v. *Charleston*, 1 Bay 382. These are cited as illustrations, but in each case it is in the discretion of the Supreme Court whether the writ shall be granted.

Prohibition does not issue to restrain ministerial acts, but only to restrain judicial action where the latter would be a usurpation and can not be adequately remedied by an appeal. 19 A. & E. Encyc. 268, 269. It issues to and acts upon courts as an injunction acts upon parties, and like an injunction it does not lie where adequate remedies can be had by the ordinary process of the courts. When entertained the usual course, unless prior notice of the petition has been given, is to issue a notice to the lower court to show cause why the writ should not issue and to order a stay of proceedings in the meantime. 19 A. & E. Encyc., 280, 281.

In the present case if the defendants are convicted upon an invalid ordinance there is ample remedy by appeal. The Constitution does not guarantee a jury trial in such case, since the defendants have the right of appeal. If there is aught in the charter of the city which grants the defendants a trial by jury, if demanded, the error in the refusal could be corrected by a jury trial in the superior court. There is no emergency which requires the court to issue the writ prayed for.

Petition denied.[70]

---

[70] For an account of prohibition at common law, see *Ex parte Williams*, 4 Ark. 537 (1842). See also, *Connecticut River R. R.* v. *County Commissioners*, 127 Mass. 50 (1879); *State* v. *Ward*, 70 Minn. 58 (1897); *DeWalts Petition*, 42 W. N. Ca. Pa. 114 (1898); *Valentine* v. *Police Court*, 141 Cal. 615 (1904); *People* v. *Wyatt*, 186 N. Y. 383 (1906); *Teham* v. *Municipal Court*, 191 Mass. 92 (1906); *Hindman* v. *Colvin*, 46 Wash. 317 (1907); *State* v. *Reynolds*, 209 Mo. 161 (1908); *Dunbar* v. *Bourland*, 88 Ark. 153 (1908); *Curtis* v. *Cornish*, 109 Maine 384 (1912); *Central Ga. P. Co.* v. *Ham*, 139 Ga. 569 (1913); *McLean* v. *District Court*, 24 Idaho 441 (1913); *Hirsh* v. *Twyford*, 40 Okla. 220 (1913); *State* v. *McQuillin*, 256 Mo. 693 (1914); *Succession of McDermott*, 134 La. 348 (1914). The unlawful act must be that of a judicial or quasi judicial body. The writ does not lie against private individuals. *Southern R. Co.* v. *Birmingham S. & N. R. Co.*, 131 Ala. 663 (1901); *Moore* v. *Holt*, 55 W. Va. 507 (1904); *Kump* v. *McDonald*, 64 W. Va. 323

SECTION 4. VENUE OF ACTIONS. [71]

HILL *v.* NELSON.

SUPREME COURT OF NEW JERSEY, 1904.

70 N. J. L. 376.

On demurrer to plea.

DIXON, J.: The first count of the declaration alleges that the plaintiff was possessed of a certain several fishery under the statutes of Pennsylvania, situate in the Delaware river opposite to the easterly bank of his farm, in Bucks county, and that the defendants, with force and arms, broke and entered that fishery and deposited large quantities of earth upon the land under the water of the river within the bounds of his fishery, and thereby the fishery was obstructed and the plaintiff was deprived of its use. The second count is in substance the same, except that it alleges possession by the plaintiff of a "certain pool and fishery." For the wrong thus perpetrated the plaintiff claims damages.

To this declaration the defendants plead that the supposed causes of action accrued to the plaintiff out of the jurisdiction of this court, in the county of Bucks, in the state of Pennsylvania, and therefore they pray judgment whether the court can or will take further cognizance of the action. Whereupon the plaintiff demurs.

In the brief submitted on behalf of the plaintiff it is stated that the only question is, "Is the action local or transitory?" in effect conceding that if it be local the plea is valid.

The decision of the question does not seem doubtful. A several fishery is necessarily attached to land and belongs to the owner of the land or his grantees. 2 Bl. Com. 39. It is as immovable as the land itself. The same thing is true of "a pool and fishery." Since, therefore, the property injured by the act of the defendants had a certain and fixed location, so the wrong done was necessarily local. The act charged, the depositing of earth on the land under the water in which the plaintiff had his right of fishery, is not legally distinguishable, as to locality, from any other trespass upon the land. According to all the authorities, actions for such injuries are local.

But the more important question, discussed in the oral argument and really involved in the demurrer, is whether, the cause of action being local and having arisen outside of New Jersey, this court has jurisdiction of a suit which seeks only damages for the tort.

In reaching our conclusion on this question, we have not been unmindful of the fact that an action might be brought over which we would undoubtedly have jurisdiction and which yet might require a decision of every point possible to be raised in this suit. For example, an action upon a contract whereby the defendants had

---

[71] See 3 Street's Foundations of Legal Liability 90, 40 Cyc. 10, 22 Enc. Pl. & Pr. 773; 1 Chitty on Pleading *279; Gould on Pleading (Wills ed.) 263; Stephen on Pleading (Andrews' ed.) 324.

agreed to indemnify the plaintiff for this injury in case he proved himself entitled to the fishery. Nor do we overlook the possibility that, if we have no jurisdiction, the plaintiff may be remediless, since elsewhere no court may be able to reach the defendants or their property. Nevertheless, we are obliged to decide the matter according to the prescriptions of the common law, which in this respect have not been changed by constitutional or legislative provisions.

On examining the subject we find an inveterate and imperative rule of the common law that if a local cause of action arises outside of the realm, the law courts have no jurisdiction over it.

Originally the pleader was required to state truly the place where each fact asserted by him occurred, and if issue was joined thereon the fact was tried by a jury summoned from that neighborhood or venue. Afterwards, when juries were no longer expected to decide issues of fact upon their own knowledge, a fictitious venue was in some actions permitted, and the pleader assigned to his facts, under a videlicet, the place in which he desired the trial to be held. These actions were then styled transitory. But this fiction was not allowed when the cause of action was so related to a certain piece of land that it must have arisen on or near that land. Actions for such causes were still local and triable only in the vicinity in which the land lay. One effect of this rule was that if the land was outside of the limits of England the law courts of that country had no jurisdiction. The truth of this statement is made evident by the cases.

As early as 1667 the question came before the house of lords in the remarkable controversy between Skinner and the East India Company (6 St. Tr. 710), when Skinner complained to the house that the company, among other wrongs, had unlawfully seized his warehouses in the East Indies and that he could not obtain redress in the ordinary tribunals. The opinions of the judges at Westminster being called for, they all replied that for the seizure of his realty he was not relievable in any ordinary court of law in England. On that opinion the house attempted to establish an original civil jurisdiction in itself and adjudged £5,000 to Skinner as damages, but such vigorous protest and opposition were made by the house of commons against this usurpation that finally, on the intervention of the king, the lords abandoned their position and the records of the proceedings in both houses were expunged.

In 1725 the question again arose at nisi prius before Chief Justice Eyre, in *Shelling* v. *Farmer*, 1 Str. 646, and he likewise ruled that the king's bench could not try an action of trespass for the seizure of a house in the East Indies, referring to a former decision to the same effect in a local action for a cause arising in Barbadoes.

Fifty years afterwards, Lord Mansfield, in *Mostyn* v. *Fabrigas*, Cowp. 161,[72] mentioned two nisi prius trials before himself, in which

[72] See English and American notes to this case in Smith's Leading Cases, and *Gardiner* v. *Thomas*, 14 Johns. (N. Y.) 134 (1817); *Barrell* v. *Benjamin*, 15 Mass. 354 (1819). The act of 21 James I, ch. 12, requiring actions of

the plaintiffs had recovered damages for injuries to realty beyond the sea within the dominions of the king, but he seems to have followed an erroneous report of the ruling of Chief Justice Eyre, in *Shelling* v. *Farmer*. When, a few years later, the question came before the king's bench, in *Doulson* v. *Matthews*, 4 T. R. 503, the nisi prius cases before Lord Mansfield were overruled, Lord Kenyon saying that the contrary had been held in the common pleas, and the decision being that an action for damages resulting from a trespass to land in Canada could not be tried in England, and that the plaintiff in such an action was rightly nonsuited.

In 1875 the point was again decided in *Whitaker* v. *Forbes*, L. R. 10 C. P. 583; 1 C. B. Div. 51, where it was held that an action of debt for an annuity charged upon land in Australia, and for which the defendant was responsible only because of his estate in the land, was local and could not be maintained in England.

Very recently the question was again before the English courts, in *Companhia de Mocambique* v. *British South Africa Co.*, 2 Q. B. 358 (1892); App. Cas. 602 (1893), and it was decided by the house of lords that, even since the judicature acts which abolished the distinction between transitory and local suits with regard to venue, the courts of England had no jurisdiction to entertain an action for damages caused by a trespass on lands abroad.

The same view has been upheld in this country. *Livingston* v. *Jefferson*, 1 Brock. 203 (before Chief Justice Marshall); *Watts* v. *Kenney*, 6 Hill 82; *Cragin* v. *Lovell*, 88 N. Y. 258; *Clark* v. *Scudder*, 6 Gray 122, and many cases cited in 1 Sm. Lead. Cas. 961 and 22 Encyc. Pl. & Pr. 776.[73]

Although in New Jersey the question seems never to have been decided, the distinction between transitory and local actions has always been observed, and in *Ackerson* v. *Erie Railroad Co.*, 2 Vroom 309, this court based its reasoning upon that distinction to sustain jurisdiction over a transitory cause of action arising out of the state, apparently assuming that if the cause had been local the suit could not have been maintained.

Our conclusion is that we have no jurisdiction to try the merits of this controversy.

The plaintiff urges that the plea is informal because it does not show what court has jurisdiction. But this is not necessary when the plea presents facts showing that the subject-matter is beyond the

---

case, trespass and false imprisonment against justices of the peace, mayors, constables, etc., to be brought in the county where the cause of action arose, was held not in force in several of the American states. *Pearce* v. *Atwood*, 13 Mass. 324 (1816); *Campbell* v. *Thompson*, 16 Maine 117 (1839); *Gardner* v. *Kiehl*, 182 Pa. 194 (1897). But in many of the states statutes require suits against public officers to be tried in the county where the cause of action arose. New York Civil Code of Procedure, §983; *Murphy* v. *Callan*, 69 App. Div. (N. Y.) 413 (1902); *Layne* v. *Sharp*, 32 Ky. L. 33 (1907). As to municipal corporations, see *Phillips* v. *Baltimore*, 110 Md. 431 (1909).

[73] Where an act in one state causes damages in another, as between the states the action is generally held transitory. *Thayer* v. *Brooks*, 17 Ohio 489, 49 Am. Dec. 474 (1848); *Mannville Co.* v. *Worcester*, 138 Mass. 89, 52 Am. Rep. 261 (1884); *Smith* v. *Southern Railroad*, 136 Ky. 162 (1909).

general jurisdiction of the courts of the state; it was required only when the denial of jurisdiction resulted from some special and exclusive jurisdiction residing elsewhere within the realm. See *Companhia de Mocambique* v. *South Africa Co.*, 2 Q. B. 358, 369 (1892). In circumstances like those present the question might be raised by demurrer to the declaration if the necessary facts were averred, or by plea in bar or by motion to nonsuit, as may be perceived on reference to the cases already cited.

The defendants are entitled to judgment.[74]

J. E. BRADY *v.* R. B. BRADY.

SUPREME COURT OF NORTH CAROLINA, 1913.

161 *N. Car.* 324.

Appeal from Webb, J., at Fall Term, 1912, of Hertford.

This action is to recover $900 in the possession of the defendant Bridger. The plaintiff alleges, in substance, that he is the owner of a tract of land in Virginia; that the defendant R. B. Brady has sold the timber on said land, and has caused the same to be cut and removed; that $900 of the money paid for the timber is now in the possession of the defendant Bridger, as attorney for the defendant Brady, and that he has made demand for said money, which has been refused. There is no allegation of an unlawful entry upon said land, nor that the cutting and removal was wrongful, and the plaintiff does not ask to recover damages to the land, but that he recover said sum of $900.

When the action was called for trial it was dismissed on the motion of the defendant, upon the ground that the courts of this state did not have jurisdiction thereof, and the plaintiff excepted and appealed.

ALLEN, J.: If the cause of action set out in the complaint is local, the courts of Virginia alone have jurisdiction of it, and if transitory, the action may be maintained in this state.

Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place. The distinction exists in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises. *Mason* v. *Warner*, 31

---

[74] *Livingston* v. *Jefferson*, 1 Brock. (U. S.) 203 (1811); *Eachus* v. *Trustees of Illinois & Mich. Canal*, 17 Ill. 534 (1856); *Bates* v. *Ray*, 102 Mass. 458 (1869); *Cragin* v. *Lovell*, 82 N. Y 258 (1882); *Du Brenil* v. *Pennsylvania R. Co.*, 130 Ind. 137, 29 N. E. 909 (1891); *Martin* v. *South Norwalk Sav. Bank*, 72 Conn. 698 (1899); *Munger* v. *Crowe*, 115 Ill. App. 189 (1904); *Peyton* v. *Desmond*, 129 Fed. 1 (1904); *Municipal Council of Sydney* v. *Bull*, L. R. (1909), 1 K. B. Div. 7; *Gem City Acetylene Co.* v. *Coblentz*, 86 Ohio 199 (1912); *Dhooghe* v. *Chicago, etc., R. Co.*, 91 Nebr. 613 (1912). Compare *Brisbane* v. *Penna. R. Co.*, 205 N. Y. 431 (1912) with *Little* v. *Chicago, etc., R. Co.*, 65 Minn. 48 (1896).

Mo. 510; *McLeod* v. *R. R.*, 58 Vt. 732; *Perry* v. *R. R.*, 153 N. C. 118.

The subject of the injury complained of by the plaintiff is the refusal by the defendants to surrender to him money, the proceeds of the sale of certain timber, which he alleges belonged to him, and there is nothing in the complaint which would entitle him to recover, here or elsewhere, damages for injury to the land. He does not allege an unlawful and wrongful entry or other trespass upon the land, nor that the land was injured, and contents himself with a statement of a cause of action for money in the hands of the defendants in this state.

We have said recently, in *Williams* v. *Lumber Co.*, 154 N. C. 309: "If one entered upon the land of another and cut trees thereon, the owner of the land and of the trees had his election at common law to sue in trover and conversion or in trespass *de bonis asportatis* for the value of the trees, or in trespass *quare clausum fregit* for injury to the freehold, the land, or to the possession of it," and the first two of these actions are transitory, and the last local.

If the owner elects to sue for the recovery of damages to the land, he must allege a trespass, but can waive the trespass, consider the trees as personality after severance from the land, and sue for the wrongful conversion or wrongful carrying away of the trees, in which event he would recover their value.

The reason the action *quare clausum fregit* is local is that the injury to the land can only be done on the land, and the other actions are transitory because the trees, after severance, may be carried away and converted elsewhere.

The question has arisen in other jurisdictions and has been decided in accordance with these views.

In *McGonigle* v. *Atchison*, 33 Kans. 726, the plaintiff sued in the courts of Kansas to recover damages for the removal of sand from land in Missouri, and the court, discussing the right to maintain the action, said: "If the facts show a cause of action in the nature of trespass *de bonis asportatis, or trover*, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit*, then the action is admittedly local * * * He (the plaintiff) seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and removal of the sand was any injury to either, and sues only for the value of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit;* but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis*, and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory. * * * When the sand was severed from the real estate, it became personal property, but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand, and had the right to follow it

and reclaim it, into whatever jurisdiction it might be taken. He could recover it in an action of replevin (*Richardson* v. *York*, 14 Me. 216; *Harlan* v. *Harlan*, 15 Pa. St. 507; *Halleck* v. *Mixer*, 16 Cal. 574); or he could maintain an action in the nature of trespass *de bonis asportatis*, for damages for its unlawful removal (*Wadleigh* v. *Janvrin*, 41 N. H. 503, 520; *Bulkey* v. *Dolbeare*, 7 Conn. 232); or he could maintain an action in the nature of trover, for damages for its conversion, if it were in fact converted (*Tyson* v. *McGuineas*, 25 Wis. 656; *Whidden* v. *Seelye*, 40 Me. 247, 255, 256; *Riley* v. *Boston W. P. Co.*, 65 Mass. 11; *Nelson* v. *Burt*, 15 Mass. 204; *Forsyth* v. *Wells*, 41 Pa. St. 291; *Wright* v. *Guier*, 9 Watts 172; *Mooers* v. *Wait*, 3 Wend. 104); or he could maintain an action in the nature of assumpsit for damages for money had and received, if the trespasser sold the property and received money therefor (*Powell* v. *Rees*, 7 Ad. & L. 426; *Whidden* v. *Seelye*, 40 Me. 255; *Halleck* v. *Mixer*, 16 Cal. 574.)"

In *Tyson* v. *McGuineas*, 25 Wis. 658, the court said of a cause of action to recover damages in the courts of Wisconsin for the cutting of trees on lands in Michigan: "The cause of action stated in the complaint is for appropriating and converting by the defendants, to their own use, three million feet of pine timber and sawlogs, the property of the plaintiff. To sustain this cause of action, various witnesses were sworn upon the part of the plaintiffs, who gave evidence tending to show that these logs were cut upon lands belonging to them in Michigan. But the cause of action relied on is manifestly not trespass to the realty. It is not claimed that there can be any recovery for damages to the real estate in this action. But it is said, in answer to the objection that the action is local, that as soon as the trees and timber were severed from the realty, they became personal property, and that trover will lie against any one removing and converting them. The authorities cited by the counsel for the plaintiffs certainly establish the principle that when the trees on the plaintiffs' land were severed from the freehold and carried away, they became personal property, and that an action of trover might be maintained for their value. *Whidden* v. *Seelye*, 40 Me. 247; *Moody* v. *Whitney*, 34 Me. 563; *Pierrepont* v. *Barnard*, 5 Barb. 364; *Sampson* v. *Hammond*, 4 Cal. 184, and cases there cited. It must be admitted that trover is a transitory action, and may be maintained in this state for a conversion of personal property in another state. *Whidden* v. *Seelye*, *supra*; *Glen* v. *Hodges*, 9 Johns. 66; 1 Chitty Pl., 269; Gould, Pl., ch. 3."

In *Whidden* v. *Seelye*, 40 Me. 255, the plaintiff sued in the courts of Maine to recover damages for cutting and removing timber from lands in New Brunswick, and the court said: "The trees on the plaintiff's land, when severed from the freehold and carried away, became personal property, and his title thereto was not divested by the wrongful acts of the defendant. * * * When there has been a severance of what belongs to the freehold, and an asportation, the action of trover may be maintained. 3 Stephens N. P., 2665. The title to the property severed remains unchanged and the owner may regard it as personal property and maintain replevin. *Richardson*

v. *York*, 14 Me. 216. So, the tort being waived, if the property severed has been sold, the action of assumpsit may be maintained. * * * The jury have found that the plaintiff was in possession of the mortgaged premises and that the defendant cut thereon the logs in controversy.

The logs having been severed from the freehold, and after such severance being personal property, and having been carried away and converted by the defendant to his own use, trover is the fitting and appropriate form of action in which to recover the damages resulting from their conversion. It is a transitory action and may be maintained in this state for a conversion of personal property in a foreign jurisdiction."

It thus appears that the plaintiff could maintain this action under the forms of action at common law, and if so, his right to do so can not be doubted under a system, like ours, which has abolished forms of action, and, looking only to the substance, requires a simple, concise statement of the facts, and affords the party relief to which he is entitled upon the facts.

Pleadings are now construed liberally, with a view to substantial justice between the parties, and if it can be seen from their general scope that a party has a cause of action, although not stated with technical accuracy, the pleading will be sustained. *Stokes* v. *Taylor*, 104 N. Car. 395; *Blackmore* v. *Winders*, 144 N. Car. 215; *Brewer* v. *Wynne*, 154 N. Car. 471.

The cases of *Cooperage Co.* v. *Lumber Co.*, 151 N. Car. 455, and *Perry* v. *R. R.*, 153 N. Car. 117, are not in conflict with this position, because in each the cause of action was to recover damages for injury to the land.

Being of opinion, therefore, that the cause of action stated in the complaint is to recover the value of the trees and is transitory, we hold that it can be maintained in this state.[75]

Reversed.

STATE EX REL. MACKEY *v.* DISTRICT COURT ET AL.

SUPREME COURT OF MONTANA, 1910.

40 *Mont.* 359.

Original application for prohibition, by the state on the relation of William T. Mackey, against the district court of the fifth judicial district to forbid further proceedings in the case of *Lillie E. Lemcke* v. *G. F. McConnell, A. B. Widney* and *W. T. Mackey*. The suit was on promissory notes executed at Portland, Oregon, and payable in

---

[75]Accord: *Bradley-Watkins Co.* v. *Kalamazoo Judge*, 144 Mich. 142, 107 N. W. 875 (1906). Compare *Walker* v. *Beury*, 7 Pa. C. C. 258 (1889).

In *American Union Tel. Co.* v. *Middleton*, 80 N. Y. 408 (1880), the defendant cut down telegraph poles and carried them to the ditches and side fences of the road where he left them. Held an action would not lie outside of the state where the cause of action arose.

that city. It appeared that the plaintiff Lemcke resided at Seattle, Washington, and, of the defendants, McConnell resided at Seattle and Widney and Mackey at Portland, Oregon.[76]

SMITH, J.: It is contended in the reply brief of the relator that the district court has no jurisdiction of the subject-matter of the cause, for the reason that the contracts were in terms to be performed in the state of Oregon, coupled with the fact that the defendants are all nonresidents of Montana. Our statute (Revised Codes, sec. 6504) expressly provides that, if none of the defendants reside in this state, an action may be tried in any county which the plaintiff may designate in his complaint. As to what are styled local actions—such, for example, as those relating to interests in lands—usually the venue or place of trial is the district or the county where the subject-matter lies. But in general, transitory actions may be tried wherever personal service can be made on the defendant. As to the general jurisdiction of the courts of a state, this is coextensive with its sovereignty, which is limited only by the territory of the state and attaches to all the property and persons within the limits thereof. (Wells on Jurisdiction of Courts, secs. 112, 113.)

The Supreme Court of North Carolina in *Miller* v. *Black*, 47 N. Car. 341, said: "The case presents simply the question whether one citizen of the United States can sustain an action against a citizen of another in a state where neither lives. * * * To many purposes the citizens of one state are citizens of every state in the Union. They are not aliens, one to the other. They can purchase and hold, and transmit by inheritance, real estate of every kind in each state. It would be strange indeed if a citizen of Georgia, meeting his debtor, a citizen of Massachusetts, in the state of New York, should not have a right to demand what was due him, nor be able to enforce his demand by resort to the courts of that state. * * * Must a citizen of California to whom one, a citizen of Maine, owes a debt, * * * go to Maine, and bring his suit there, or wait till he catches him in California? We hold not, but that the courts of every state in the Union, where there is no statutory provision to the contrary, are open to him to seek redress." The same court, in *Walters* v. *Breeder*, 48 N. Car. 64, said: "We think it is settled that a citizen of South Carolina may sue another citizen of that state in the courts of our state upon a personal cause of action originating in South Carolina."

In the case of *Johnston* v. *Insurance Co.*, 132 Mass. 432, the Supreme Judicial Court, through Mr. Justice Endicott, said: "It has been decided in this commonwealth that one foreigner may sue another in our courts upon a simple contract debt made without our jurisdiction; if the defendant is found here and process can be legally served upon him." In the case of *Hall* v. *Williams*, 6 Pick (Mass.) 232, 17 Am. Dec. 356, it was held that, if a citizen of one state was in another state and served with process there, he was bound to

[76] The statement of facts is from the opinion of the court, a part only of which is printed. It was held that the court had acquired jurisdiction over the persons of the defendants by virtue of a general appearance by counsel, the discussion of that point is omitted.

appear and make his defense, or submit to the consequences. The Supreme Court of Iowa, in *Darrah* v. *Watson,* 36 Iowa 116, said: "Is it true that the courts of our state can not acquire jurisdiction of the person of a citizen and resident of a sister state by the service of original process upon such citizen within the jurisdiction of the former state? We think it is not." Again, the Supreme Judicial Court of Massachusetts in *Barrell* v. *Benjamin,* 15 Mass. 354, said: "Personal contracts are said to have no situs or locality, but follow the person of the debtor, wherever he may go; and there seems to be no good reason why courts of any country may not lend their aid to enforce such contracts." And it was therefore held that one foreigner might sue another who was transiently within the jurisdiction of the courts of the state upon a contract made between them in a foreign country. (See also, *Gardner* v. *Thomas,* 14 Johns. (N. Y.) 134, 7 Am. Dec. 445; Hawes on Jurisdiction of Courts, sec. 16; *Lisenbee* v. *Holt,* 1 Sneed (33 Tenn.), 42; *Swan* v. *Smith,* 26 Iowa, 87.) In the case of *Peabody* v. *Hamilton,* 106 Mass. 217, it was said: "That both parties are foreigners is no ground for dismissing the writ. It is not necessary that a foreign plaintiff should be personally within the jurisdiction in order to institute an action. * * * Personal actions of a transitory nature may be maintained in any jurisdiction within which the defendant is found, so that process is legally served upon him. This we understand to be the general rule of the common law." In *Dewitt* v. *Buchanan,* 54 Barb. (N. Y.) 31, it was held: "Actions for injuries to the person are transitory and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts for a tort committed in another country, the same as on a contract made in another country."

In our judgment there can be no question that the district court of Jefferson County had jurisdiction of the subject-matter of the action, and, it having acquired jurisdiction over the persons of the defendants by their voluntary general appearance, it follows that the proceedings in this court should be dismissed; and it is so ordered.[77]

Dismissed.

HENWOOD *v.* CHEESEMAN.

SUPREME COURT OF PENNSYLVANIA, 1817.

3 *Serg. & R. (Pa.)* 500.

Cheeseman, the plaintiff below, brought an action of assumpsit against Henwood in the Court of Common Pleas of Philadelphia County for the use and occupation of the plaintiff's land in the

[77] *Roberts* v. *Knight,* 7 Allen (Mass.) 449 (1863); *Educational Society* v. *Varney,* 54 N. H. 376 (1874); *Henderson* v. *Perkins,* 94 Ky. 207, 14 Ky. L. 782, 21 S. W. 1035 (1893); *Kunselman* v. *Stine,* 192 Pa. 462, 43 Atl. 948 (1899).

state of New Jersey. It appeared that the defendant went on the land under an agreement to purchase, but a dispute having occurred and the purchase not having been completed, the vendor brought this action. On error by the defendant below it was urged that the action was local.[78]

TILGHMAN, C. J.: The last exception is, to the jurisdiction of the court of common pleas. The land is in New Jersey, and therefore, the defendant supposes, an action for the rent, can be maintained nowhere out of New Jersey. Were this action, in its nature local, the law would be with the defendant. But the action is transitory, and therefore not confined to New Jersey. The action of assumpsit is founded on privity of contract, not privity of estate. This was decided in the case of *The Corporation of New York* v. *Dawson*, 2 Johns. Cas. 335. With regard to actions for the recovery of rent, I take the law to stand thus: Where the action is brought by the lessor against the lessee, being founded on the mere privity of contract, it is transitory, and may be brought out of the county, or state, in which the land lies. But if the lessor assigns the reversion, and the action is brought by the assignee of the reversion, against the lessee, there is a distinction, founded on the form of the action which may be brought. The assignee may, in such case, maintain an action of debt at common law, which being founded solely on privity of estate (for the privity of contract is destroyed by the assignment of the reversion), is local. Or, he may have an action of covenant by virtue of the statute 32 Hen. 8, ch. 34, which transfers the privity of contract from the assignor to the assignee; and this action not being founded on privity of estate, but of contract, is transitory, and may be brought anywhere. This distinction is taken, in the case of *Thursby* v. *Plant*, 1 Saund. 237, which is cited by the court in *Thrale* v. *Cornwall*, 1 Wils. 165, with this remark, "that it had always been held for good law." We may take the rule then to be, that where the action is founded on privity of estate, it is local, where on privity of contract, it is transitory. I have laid down this rule, when the action is brought by the lessor, or the assignee of the reversion, against the lessee. It is unnecessary to speak now of actions brought against the assignee of the lessee. In 1 Chitty on Pleadings, 274, 275, the cases on this subject are collected, and the result briefly and truly given.

I am of opinion, on the whole, that the present action was well brought, and well supported by the evidence. The judgment should, therefore, be affirmed.

DUNCAN, J.: Assumpsit can not be considered as a local action. It is founded on the contract express or implied, between the parties. No possible case could ever arise, in which the action would be local. But all actions of debt or covenant, between the lessor and lessee, the action being founded on privity of contract, are transitory, whether the lands be abroad, or in the county in which the action is brought. 1 Chitt. Plead. 274. The rule, as I apprehend it,

---

[78] Only so much of the opinion of the judges as relates to the question of venue is included.

is: where the action is founded on privity of estate, it is local; where on privity of contract, transitory. Debt for rent by the assignee, is local. But covenant being founded on privity of contract, is transitory.[79] At common law, covenant did not lie for the assignee of the reversion, but is given by stat. 32 Hen. 8, ch. 34. *Thrale* v. *Cornwall,* 1 Wils. 165, and so is the distinction, 1 Saund. 237. It can be no objection to the action, that it concerns the realty, and, therefore, only can be tried in the county in which the land lies. This is not the law of contracts. For where you proceed against the party for damages, for the nonperformance of such contract, you may bring the action wherever the party is to be found. It follows the person, and in *Penn* v. *Baltimore,* a specific execution of articles respecting lands lying in America, was decreed by the Court of Chancery of England. For where the title is incidental, the court possessing jurisdiction of the contract, which is in its nature transitory, may even inquire into the very title, let the lands lie where they may. Besides, in this case, the defendant would not be allowed to question the plaintiff's title to the land.

Gibson, J., was absent.

Judgment affirmed.[80]

THE CHANCELLOR OF THE STATE OF NEW JERSEY *v.* BENJAMIN P. MORRIS.

SUPREME COURT OF NEW JERSEY, 1911.

82 *N. J. L.* 14.

GARRISON, J.: To the declaration filed in the name of the chancellor in an action on a receiver's bond the defendant demurred and also moved to strike out the assignments of breach. Without passing upon the propriety of this joinder, we have, since no objection was interposed by the plaintiff, considered the several grounds urged against the declaration with the result that judgment is given for the plaintiff on the demurrer and the defendant takes nothing by his motion.

---

[79] Covenant founded on privity of contract is transitory, but when founded on privity of estate is local. *Lienow* v. *Ellis,* 6 Mass. 331 (1810); *Bracket* v. *Alvord,* 5 Cow. (N. Y.) 18 (1825); *Whitaker* v. *Forbes,* L. R. 1875) 10 C. P. 583; *Tillotson* v. *Prichard,* 60 Vt. 94, 14 Atl. 302, 6 Am. St. 95 (1887); *Coleman* v. *Lucksinger,* 224 Mo. 1 (1909); *Burt Lumber Co.* v. *Bailey,* 175 Fed. 131 (1909).

Bulwer's Case, 7 Co. 57 (1584); *Wey* v. *Yally,* 6 Mod. 194 (1704); *Thursby* v. *Plant,* 1 Saund. 237 (1669); *Roche* v. *Marvin,* 92 N. Y. 398 (1883); *State* v. *Dist. Court,* 94 Minn. 370, 102 N. W. 869 (1905); *Clement* v. *Stanger,* 75 N. J. L. 287 (1907); *Sheppard* v. *Coeur D'Alene Lumber Co.,* 62 Wash. 12 (1911).

Courts of equity act *in personam.* *Penn* v. *Lord Baltimore,* 1 Ves. Sr. 444 (1750); *Massie* v. *Watts,* 6 Cranch (U. S.) 148, 3 L. ed. 181 (1810); *Schmaltz* v. *York Mfg. Co.,* 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. 782 (1902).

The defendant also moved that the venue, which was laid in Atlantic County, be changed to Monmouth County where the defendant resides. The venue as laid is sought to be justified upon the ground that the receiver's creditors in whose interest the action is brought are residents of Atlantic County. Such creditors are, however, not parties to the action, hence the place of their residence was not to be considered in laying the venue, which under the two hundred and second section of the practice act,[81] might be either (1) the county in which the plaintiff resides, or (2) in which the defendant resides, or (3) in which the cause of action arose, or (4) in which process was served on a nonresident defendant.

In the present case the venue should have been laid in the county in which the defendant resides since none of the other contingencies existed. Neither the residence of the chancellor as an individual nor the state capital is within the meaning of the statute, moreover no one has moved to have the place of trial in either Morris or Mercer County. The cause of action can not be said to have arisen in any particular county; and the defendant is not a nonresident. There being therefore but one place where the venue could properly be laid under the statute, there was no right of choice in the plaintiff and no room for the discretion of the court under the two hundred and second section. Assuming that the convenience of the persons for whom the action is brought will be considered under the two hundred and third section as if they were plaintiffs, the convenience of the defendant is equally entitled to consideration; and where the conveniences offset each other, the statutory venue should prevail. The venue must be changed to Monmouth County, not for the convenience of the defendant, but because there was no authority to lay it elsewhere, and no sufficient reason has been shown for a change of the venue laid in conformity with the statute.[82]

---

[81] 3 Comp. Stat. N. J. (1910) 4113.

[82] In England the rules of the Supreme Court provide, order 36, rule 1, "There shall be no local venue for the trial of any action, except where otherwise provided by statute, but in every action in every division the place of trial shall be fixed by the court or a judge." The place of trial is ordinarily fixed by the master under the summons for directions. The place is fixed according to the balance of convenience, having regard to all the circumstances. *Jenkins* v. *Bushby*, L. R. (1891) 1, ch. 484. It is within the discretion of the judge to change the venue. *Thorogood* v. *Newman*, 23 Times Rep. 97 (1906).

In the United States the rules as to local venue are to a large extent statutory. Some states adhere to the common law, but in the great majority the subject is fully covered by statute. For example, see New York Code Civ. Pro. §§ 982 to 990; California Code Civ. Proc. §§ 392 to 400; 1 Burns' Ann. Stat. Ind. (1914) §§ 309 to 311. In the various statutes the common-law rules are followed approximately in actions relating to land. In transitory actions proper the general policy is that suit shall be brought in the county where the plaintiff or defendant resides. 40 Cyc. 94 and cases there cited. *Wood* v. *Ins. Co.*, 13 Conn. 202 (1839); *Talmadge* v. *Third Nat. Bank*, 91 N. Y. 531 (1883); *Archibald* v. *Miss. R. Co.*, 66 Miss. 424 (1889); *Jacobson* v. *Hosmer*, 76 Mich. 234, 42 N. W. 1110 (1889); *Hunt* v. *Dean*, 91 Minn. 96, 97 N. W. 574 (1903); *Interstate Cooperage Co.* v. *Eureka Lumber Co.*, 151 N. Car. 455 (1909); *Hislop* v. *Taaffe*, 141 App. Div. (N. Y.) 40 (1910); *Danser* v. *Dorr*, 78 S. E. 367 (W. Va. 1913); *Scott* v. *Miller L. Co.*, 122 Minn.

SECTION 5. COMMENCEMENT OF ACTIONS.

(a) Process.

WEST, *qui tam, v.* RATLEDGE.

SUPREME COURT OF NORTH CAROLINA, 1833.

4 *Devereux's Law* (*N. Car.*) 31.[83]

DANIEL, J.: In England, when a person is about to commence a suit, the usual course of proceeding is in the first place, to execute a warrant to an attorney of the court to have the writ issued, and the pleadings in the cause made up. The attorney then gives instructions for the original; these instructions are contained in a paper called the praecipe, in which he sets forth the cause of action. Formerly, the practice was to take the warrant and the praecipe to the chancery, where the original writ was caused to be made out by the Master of the Rolls; which original recited the action as stated in the praecipe. The original is a mandatory letter in parchment from the King, tested in his name, and sealed with the great seal. It is directed to the sheriff or other returning officer of the county where the plaintiff intends to lay the venue, and is made returnable to the court either of the King's Bench or Common Pleas, at Westminster.[84] If the sheriff return on the original *non est inventus,* the original is then left on file in the court, and a judicial writ or process issues, called a special *capias ad respondendum,* which is grounded upon the original. If the sheriff return on the capias, *non est inventus,* the plaintiff then may issue an alias, and a pluries, and so on into outlawry, to compel an appearance by the defendant. When the defendant appears in court in consequence of the service of the original, or an arrest on any process which issues upon it, the plaintiff then files his declaration, and serves a copy on the defendant, who defends either by demurrer or plea. If he pleads to the action,

---

377 (1913). As in the principal case many statutes provide that nonresidents may be sued where found or served. *Murphy* v. *Winter,* 18 Ga. 690 (1855); *Hawley* v. *State,* 69 Ind. 98 (1879); *Baisley* v. *Baisley,* 113 Mo. 544, 21 S. W. 29, 35 Am. St. 726 (1892); *Steen* v. *Swadley,* 126 Ala. 616, 28 So. 620 (1899); *Smith* v. *Provident Sav. L. A. Soc.,* 159 Mich. 167 (1909).

The New York Code Civ. Pro., § 987, provides: "The court may, by order, change the place of trial in either of the following cases: (1) Where the county designated for that purpose in the complaint is not the proper county. (2) Where there is reason to believe that an impartial trial can not be had in the proper county. (3) Where the convenience of witnesses, and the ends of justice will be promoted by the change." Similar statutes are in force in most states. See *Carpenter* v. *Central Vermont R. Co.,* 84 Vt. 538 (1911); *Murray Cure Inst. Co.* v. *Ward,* 108 Minn. 527 (1909); *State* v. *District Court,* 43 Mont. 571 (1911); *Hemenway* v. *Fitzgerald,* 159 App. Div. (N. Y.) 748 (1913); *Taber* v. *Eyler,* 162 S. W. 490 (Tex. 1913); *Willoughby* v. *Buffalo, etc., R. Co.,* 203 Pa. 243 (1902).

[83] Extract from the opinion of the court.

[84] The day for the defendant's appearance is generally the return day of the writ. 1 Tidd's Practice 106; *Hunsaker* v. *Coffin,* 2 Ore. 107 (1864).

then the whole of the pleadings to the making up of the issue are completed in the Superior Court at Westminster. A nisi prius record is then made out and transmitted to the court of nisi prius, or the assizes of the county where the venue is laid, that the issues may be there tried by a jury. When a trial takes place, and a verdict is rendered, it is entered on the nisi prius roll, or some paper attached to it which is called the postea, and delivered to the party in whose favor the verdict is rendered, who returns it into the Superior Court, at Westminster, where the record belongs; and on notice being given to the adverse party, a motion is then made for judgment; which, if no cause is shown to the contrary, is rendered by the court upon which issues the execution.

In modern times the practice of commencing suit by original purchased out of chancery, has been tacitly waived by the profession. The practice is now, for the attorney to leave the praecipe and a memorandum of his warrant at the filazer's office, and the filazer thereupon issues a *capias ad respondendum,* in the first instance, keeping the praecipe as instructions for the original, if it afterwards becomes necessary, by a writ of error being brought after a judgment by default, on demurrer, or on plea of *nul tiel record;* for the want of an original is aided after verdict, by stat. 18, Eliz. ch. 14. If a writ of error should be brought, for the want of an original, in any of those cases where the defect is not cured by the statute of Elizabeth, the plaintiff may, by a petition to the Master of the Rolls, obtain an original and move the court where the record is, to amend by adding the original, which is always granted. So that the record is complete, when in obedience to the writ of certiorari, it is transmitted into the court of errors. The plaintiff in error will then have nothing in the record upon which he can assign errors, and will fail in his effort to reverse the judgment. (1 Saund. 318, a Archb. P. K. B. 73.) By the rules of the common law, great nicety and exactness were required in the proceedings and pleadings in a suit; small errors and inaccuracies were always sure to be fatal to the party making them; as for instance, in bailable actions, the declaration should always correspond with the writ in the names of the parties, and in the cause of action (*Bingham* v. *Dickie,* 1 Eng. C. L. Rep. 276, Archb. Pra. 68, 69, 124), and if there was a variance in these, or in the sum demanded, between the writ and declaration, it would be fatal. (Archb. 68.)[85]

---

[85] See also 3 Blackstone's Commentaries, 270, chaps. 18 and 19; Archbold's Practice, bk. 1, pt. 1; Tidd's Practice, chaps. 5 to 11; Troubat & Haly's Practice, ch. 6; 32 Cyc. 419.

In modern English practice every action in the high court of justice is commenced either by a writ or by an originating summons. A writ is a formal document by which the king commands the defendant to enter an appearance within so many days (usually eight) if he wishes to dispute plaintiff's claim, otherwise judgment will be signed against him. The writ specifies the name and residence of each plaintiff and defendant and the name and place of business of the plaintiff's solicitor. It also specifies the division of the high court in which the plaintiff intends to sue. Besides the formal statements every writ must be endorsed with a statement of the nature of plaintiff's claim and of the relief or remedy required in the action. Ordinarily the en-

HAIL *v.* SPENCER.

SUPREME COURT OF RHODE ISLAND, 1835.

1 *R. I.* 17.

BY THE COURT: The note declared on is dated October 31, 1828, and signed by Esek Spencer. The writ, dated October 27, 1834, is admitted to have been sent to the officer for service, a day or two before the 31st October, 1834, but it is not admitted that the officer received the writ before the day of service.[86]

Was the action commenced within six years?

Our act of limitations seems to be not materially different from the English statute, adopted as early as the reign of James I. And it seems to be reasonable to conclude that the English construction was perfectly understood by our legislature. If, therefore, the language of both statutes is substantially the same, our legislature must have used the language with a view to the meaning given to it by English courts. In fact the principles of the decisions of those courts have been uniformly recognized in ours, as truly expounding the meaning of the act. If the issuing of the English capias be considered in the common pleas, then, the commencement of the suit (and it in fact is in all cases where an outlawry is not contemplated), there can be no good reason why the issuing of our writ of arrest, or original summons (which takes the place of the arrest), should not, on like principles, be deemed the commencement of the suit. The writ of arrest is nothing more than the English capias, naturalized here, or accommodated to our institutions. Now it is admitted that the writ, in this case, was issued prior to the expiration of the six years, and,

---

dorsement is a general statement of the nature of the claim, but in certain cases the plaintiff is permitted to state the particulars of the case in full detail on the back of the writ, which is then said to be specially endorsed. When the writ is drafted, unless the plaintiff is obliged to apply for special leave, as where the defendant is out of England or it is proposed to unite different causes of action, the writ is taken to the central office of the high court or to a district registry, where a signed copy is stamped and filed and a second copy impressed with a seal and handed back for service. The plaintiff or his solicitor serves this by showing it to the defendant and leaving with him a correct copy. If the action is for the recovery of land and no one is in possession, the writ is served by posting. Odgers on Pleading & Practice, ch. 1; Stephens' Commentaries (15th ed.), vol. 3, p. 523.

In the United States the commencement of an action is generally regulated by statute, and while many of the ancient names are retained, the practice bears little analogy to the common law. The most common name for the writ by which a personal action is commenced is "A Summons." For example see Pennsylvania Act of June 13, 1836, P. L. 568, § 1; P. & L. Dig. (2d ed.) 5770; New York Code of Civ. Proc. §§ 416-418. In some jurisdictions suit is commenced by notice. See *Leas* v. *Merriman,* 132 Fed. 510 (1904); *McKenna* v. *Cooper,* 79 Kans. 847 (1909).

The *praecipe* is a memorandum addressed by the attorney to the clerk of the court containing directions for the preparation of the writ and an order for its issuance. *Potter* v. *Hutchinson M. Co.,* 87 Mich. 59 (1891).

[86] Part of the opinion is omitted. The court at this time consisted of Durfee, C. J., Haile, J., and Staples, J.

unless the actual receipt of the service of it, by the officer, be necessary to constitute the commencement of the action, it was commenced within the six years. In the ordinary acceptation of terms, the action is certainly commenced when the writ is issued, but to answer the intent of the statute, is something more than this required? If more, what is it? Is it the service of the writ? If so, it is the sheriff who commences the suit, and not the plaintiff. And the ability of the sheriff to make the service, may depend on a thousand circumstances, over which neither he nor the plaintiff may have any control; nay, even on the will of the debtor himself, as his absence from the county. We can not suppose that the legislature, in any event, intended to make a man's rights dependent on such contingencies.

Is it the receipt of the writ by the sheriff that is required in order to constitute the commencement of an action? If so, its commencement may still depend on contingencies wholly independent of the plaintiff, as the sheriff's occasional absence, his sickness, or his want of official qualifications. But at any rate, why should the receipt of it by the sheriff be required. As long as the defendant is untouched by the precept, of what consequence is it to him, whether it be in the hands of the plaintiff or the sheriff How can his liability be affected by this or that event? The truth is, that in contemplation of law, the writ is issued on the application of the creditor, by the sovereign power of the state, through the instrumentality of its officers. It is the state's precept or command, and is issued and the action commenced, whenever it is in the hands of the plaintiff, or his attorney, ready to fulfill its purpose. In this view the commencement of the action depends wholly on the will, or the diligence of the plaintiff. If he loses his right, it is wholly the result of his neglect. It should, however, be followed up by such acts as show that it is a real and not a pretended commencement of a suit. For if there be an unusual lapse of time between the day of the date of the writ, and that of its delivery to the sheriff, and wholly unexplained, it might raise a presumption against the correctness of the date, which would force on the plaintiff the necessity of proving its correctness.[87]

We have been unable to ascertain, that in any state with the exception of Connecticut, the service of the writ is considered the commencement of the action. It is believed, that all other states consider the issuing of the writ as the commencement of the suit. And, in fact, in the case cited from 4 Conn. R. 151, the court seems to build its decision rather on the received opinion, or established practice of that state, than on any judicial decisions, English or American.[88] It indeed considers a decision in Massachusetts, that a

[87] As to what is reasonable diligence in endeavoring to obtain service, compare *Marble* v. *Hinds*, 67 Maine 203 (1877), with *Tracy* v. *Grand Trunk R. Co.*, 76 Vt. 313 (1904).

[88] *Jencks* v. *Phelps*, 4 Conn. 149 (1822). Accord: *Sanford* v. *Dick*, 17 Conn. 213 (1845); *Bonnet* v. *Ramsay*, 6 Martin (La.) N. S. 129 (1827); *Searle* v. *Adams*, 3 Kans. 515 (1866); *Detroit Free Press* v. *Bagg*, 78 Mich. 650 (1889); *Hayton* v. *Beason*, 31 Wash. 317 (1903).

writ may be altered at any time before its service, as recognizing the service as the commencement of the suit. Nobody can doubt the right of the plaintiff to alter his writ, or, in other words, to make a new one of it, at any time before service; but the true date of the writ would then be the day of its alteration, which, if necessary, might be proved. But at any rate, the inference in this case was wrong. The service of the writ is not considered in Massachusetts the commencement of the action. Dane takes it for granted that the suit is commenced when the writ is issued. (Digest, v. 1; ch. 29, art. 7, sec. 3.) And in *Ford* v. *Phillips* (1 Pick. 202), the making and not the service of the writ, is considered the commencement of the suit.[89]

Since, therefore, the writ in this case was issued within the six years, and since the issuing of the writ appears to me to have been the commencement of this suit, I do not see the propriety of going into a very wide estimate of the plaintiff's further diligence. The law bars his action after the six years, and it seems to me to give him the benefit of the whole of that time, without imposing upon him the necessity of making calculations as to contingencies arising from circumstances over which he has no control.

"The statute did not intend to bar," says Lord Mansfield, "unless the party had acquiesced six years, but he who sued out a *latitat* to bring the defendant into custody, did not acquiesce, within the true meaning of the act." *Johnson* v. *Smith* (2 Burr. 961).

Let judgment be entered for the plaintiff, for the principal and interest of the note, together with the amount of the account and costs.[90]

---

[89] So, also, *Gardner* v. *Webber*, 34 Mass. 407 (1835), but the writ must be "made with the intention to have the same seasonably served." *Bunker* v. *Shed*, 49 Mass. 150 (1844).

[90] The general rule is that a suit is commenced when a writ is sued out with the bona fide intention of being served. *Society* v. *Whitcomb*, 2 N. H. 227 (1820); *Burdick* v. *Green*, 18 Johns. (N. Y.) 14 (1820); *Johnson* v. *Farwell*, 7 Maine 370 (1831); *McClure* v. *McClure*, 1 Grant Ca. 222 (Pa. 1855); *Chapman* v. *Goodrich*, 55 Vt. 354 (1883). For the purpose of stopping the running of the statute of limitations, however, it is also generally held that the writ must be delivered or put in the course of delivery to the proper officer for service. *Ross* v. *Luther*, 4 Cow. (N. Y.) 158 (1825); *Mason* v. *Cheny*, 47 N. H. 24 (1866), particularly instructive; *Lesure L. Co.* v. *Mutual F. I. Co.*, 101 Iowa 514 (1897); *Huysman* v. *Evening Star N. Co.*, 12 App. Ca. D. C. 586 (1898); *Nichols* v. *British American I. Co.*, 109 Ga. 621 (1900); *County* v. *Pacific Coast Borax Co.*, 67 N. J. L. 48 (1901); *Dedenbach* v. *Detroit*, 146 Mich. 710 (1906). Contra: *Williams* v. *Roberts*, 1 Cromp. M. & R. 676 (1835); *Schroeder* v. *Merchants' & M. T. Co.*, 104 Ill. 71 (1882), holding that the writ need not be delivered for service.

By the New York Code of Civil Procedure, §§ 398, 399, an action is commenced when the summons is served on the defendant. But an attempt to commence an action is equivalent where the summons is delivered to the sheriff with the intent that it shall be actually served, followed by actual service, or service by publication, within sixty days after the expiration of the time limited for the commencement of the action. See *Riley* v. *Riley*, 141 N. Y. 409 (1894).

In equity see *Miller* v. *Rich*, 204 Ill. 444 (1903); *United States* v. *Miller*, 163 Fed. 444 (1908).

In England under the rules of the Supreme Court, order VIII, rule 1,

JESSE ROMAIN *v.* BOARD OF COMMISSIONERS OF MUSCATINE COUNTY.

SUPREME COURT OF IOWA, 1844.

Morris's (Iowa) 357.

This was an action of trespass brought by the board of commissioners of the county of Muscatine, trustees of a school section, against Jesse Romaine. Upon the summons issued and returned in this case, there was the following:

"I hereby authorize George Hunt to serve the within summons according to law, for and at my risk.

"James Davis, Sheriff, M.

"September 28, 1840."

"As per authority of James Davis, sheriff of Muscatine county, I served the within, on the 26th day of September, by informing him, the defendant, that I had a writ for him; he, the defendant, immediately fled from my presence, I then left a copy of the within in the care of Benjamin Brooks, he being a man person over the age of fifteen years, and said Brook's house being defendant's usual place of residence.

"G. W. Hunt.

"Returned October 14, 1840."

The defendant moved to quash the summons:

(1.) Because it was not served upon the defendant according to law. (2.) That there had been no service upon the defendant by an officer of that court or any other person legally authorized. Which motion was overruled. Thereupon came a jury to inquire into and assess the damages, and a verdict and judgment was rendered for the plaintiff for sixty-eight dollars and ninety cents.

To reverse this judgment the defendants below sued out their writ of error.

MASON, C. J.: The service of the summons in this case was clearly defective, and there was no appearance to cure that defect. The return is dated October 14, 1840. We can not find that at that date there was any other than a personal service provided for. On the 31st of December, following, a law was passed authorizing a service by copy where the defendant can not be found, but the return in this case was wholly irregular under that law.

In the first place the certificate of a person, not a sworn officer, is not a sufficient return; secondly, it does not appear to have been left at the place of residence of the defendant, but merely with Benjamin Brooks; and, thirdly, the contents of the writ do not appear to have been stated to said Brooks. In the absence of any

---

a writ not served may be renewed on application to the court, but the practice is not to renew where the plaintiff's claim would, but for such renewal, be barred. *Hewett* v. *Barr*, L. R. (1891), 1 Q. B. Div. 98.

statute on the subject, service must be personal. Where the statute provides a substitute, the terms and conditions of that substitute must be complied with.[91]

Reversed.

CASSIDY *v.* LEITCH.

NEW YORK COMMON PLEAS, 1877.

2 Abbott's New Cases 315.[92]

Trial by the court.

VAN HOESEN, J.: This action is founded upon a judgment recovered in the state of Louisiana. The Louisiana suit was begun and judgment rendered therein in the year 1869. At the commencement of the suit, and for some time prior as well as subsequent thereto, the defendant was domiciled at the corner of Rampart and Terpsichore streets in the city of New Orleans. He was absent from home when the suit was begun, and the citation and the petition (papers which correspond to the summons and the complaint of our New York practice) were served upon him by the sheriff leaving a copy of them at the domicile of the defendant with his (the defendant's) wife, who was a white person above the age of 14 years, and who dwelt in the same domicile with said defendant.

The return of the sheriff is in strict conformity with the law of Louisiana as expounded by the courts of that state (Code of Practice, secs. 189, 190, 201; *Kendrick* v. *Kendrick*, 19 La. 38).

The defendant, as has been said, was domiciled in Louisiana, and owed allegiance to that state, and submission to its laws.

The manner of serving process must necessarily be regulated by every country for itself; and if a state permits process to be served upon one of its own citizens by the leaving of it in his absence at his domicile with an adult member of his household, that method of service is not so repugnant to the principles of natural justice that

---

[91] "In making service of the summons, and in the return of such service, the provisions of the statute must be and must appear to have been substantially observed and followed by the officer, otherwise the proceedings can not be supported." *People* v. *Bernal*, 43 Cal. 385 (1872); *Bennet* v. *Howard*, 2 Day (Conn.) 416 (1807); *Fulcher* v. *Lyon*, 4 Ark. 449 (1842); *Wilson* v. *Hayes*, 18 Pa. 354 (1852); *Hynek* v. *Louis and Clara Englest*, 11 Iowa 210 (1860); *Water Lot Co.* v. *Bank of Brunswick*, 30 Ga. 685 (1860); *Maher* v. *Bull*, 26 Ill. 348 (1861); *Coffee* v. *Gates*, 28 Ark. 43 (1872); *Hiller* v. *Burlington & M. R. Co.*, 70 N. Y. 223 (1877); *People* v. *Judge of Superior Court*, 38 Mich. 310 (1878); *Blake* v. *Smith*, 67 N. H. 182, 38 Atl. 16 (1892); *Law* v. *Grommes*, 158 Ill. 492, 41 N. E. 1080 (1895); *Savings Bank* v. *Anthier*, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498 (1892); *Eisenhofer* v. *New Yorker Z. P. Co.*, 91 App. Div. (N. Y.) 94, 86 N. Y. S. 438 (1904); *Warrick* v. *McCormick*, 150 Ky. 800 (1912). The statutory provisions for personal service and substitutes therefor in the various states differ greatly in their requirements and must be consulted for local details. See the various local works on practice and Elliott's General Practice, ch. 10.

[92] The arguments of counsel and part of the opinion are omitted.

a foreign tribunal should refuse to recognize it and treat a sentence founded on it as a nullity (3 Burge Foreign and Colonial Laws, 1056).

A foreign judgment rendered against a citizen of the state in which it was pronounced, stands on a very different footing from a foreign judgment against one who owed no allegiance to and was not subject to the jurisdiction of the state in which it was rendered.

In order to make the answer in this case sufficient, there should be added to it allegations showing that the defendant was not domiciled in Louisiana or subject to the laws of that state, or that the judgment is not binding there, or that it is contrary to natural justice. As a plea in bar the answer is fatally defective.

After reading the testimony of the defendant, no surprise will be felt at his omission to contest the plaintiff's claim. I think judgment should be rendered in favor of the plaintiff for the sum claimed in the complaint.[93]

Verdict for plaintiff for $9,107.85.

WALLACE *v.* UNITED ELECTRIC COMPANY.

SUPREME COURT OF PENNSYLVANIA, 1905.

211 *Pa.* 473.

Appeal by plaintiff from a decree of Court of Common Pleas No. 1, Philadelphia, setting aside service of a bill in equity for discovery and an accounting in the case of *Albert E. Wallace* v. *United Electric Company of New Jersey* and *United Gas Improvement Company.*[94]

BROWN, J.: A decree for discovery is a personal one to be enforced against the person decreed to make it; and, if the appellee was properly brought within the jurisdiction of the court below personally, a decree that it make discovery could be enforced against it personally by the appellant as his first move to obtain the ultimate

---

[93] Substituted service in actions *in personam* is a departure from the common-law rule requiring personal service and the statute authorizing such service must be followed strictly. But when the statute is complied with, the general rule is that substituted service on a resident defendant is equivalent to personal service and warrants a personal judgment. 19 Ency. Pl. & Pr. 624; 32 Cyc. 461; *Bujac* v. *Morgan,* 3 Yeates (Pa.) 258 (1801); *Conwell* v. *Atwood,* 2 Ind. 289 (1850); *Hope* v. *Hope,* 4 DeG. M. & G. 328 (1854); *Sturgis* v. *Fay,* 16 Ind. 429, 79 Am. Dec. 440 (1861); *Beard* v. *Beard,* 21 Ind. 321 (1863); *Knox* v. *Miller,* 18 Wis. 397 (1864); *Castleton* v. *Weybridge,* 46 Vt. 474 (1874); *Duflos* v. *Burlingham,* 34 L. T. (N. S.) 688 (1876); *Betancourt* v. *Eberlin,* 71 Ala. 461 (1882); *DuVal* v. *Johnson,* 39 Ark. 182 (1882); *Giles* v. *Hicks,* 45 Ark. 271 (1885); *People* v. *House,* 4 Utah 382, 10 Pac. 843 (1886); *Hurlbut* v. *Thomas,* 55 Conn. 181, 10 Atl. 556, 3 Am. St. 43; *Missouri, K. & T. R. Co.* v. *Norris,* 61 Minn. 256 (1895); *Jay* v. *Budd,* L. R. (1898), 1 Q. B. 12; *Nelson* v. *Chicago, B. & Q. R. Co.,* 225 Ill. 197 (1907); *Atchison Co.* v. *Challiss,* 65 Kans. 179 (1902); *Park Land Imp. Co.* v. *Lane,* 106 Va. 304 (1906); *Abbott* v. *Abbott,* 101 Maine 343 (1906).

[94] A part of the opinion of the court is omitted.

relief asked for. In view of this, the proceeding must, as was held by the learned judge below, be regarded as *in personam* as to the appellee; and the question whether the Act of April 6, 1859, P. L. 387, even if it does authorize extra-territorial service of process from a court of this state, is effectual to acquire jurisdiction over the person of a defendant residing and served in another state, is not an open one.

Before the passage of that act, Chief Justice Gibson, in discussing the attempt to acquire jurisdiction over the person of the defendant by the extra-territorial service of process, said in *Steel* v. *Smith*, 7 W. & S. 447: "Jurisdiction of the person or property of an alien is founded on its presence or situs within the territory. Without this presence or situs, an exercise of jurisdiction is an act of usurpation. An owner of property who sends it abroad subjects it to the regulations in force at the place as he would subject his person by going there. The jurisdiction of either springs from the voluntary performance of an act, of whose consequence he is bound to take notice. But a foreigner may choose to subject his property, reserving his person; and it is clear that jurisdiction of property does not draw after it jurisdiction of the owner's person; consequently, there can be no rightful action by the tribunal on the foundation of jurisdiction acquired by the attachment of property, which reaches beyond the property itself. What, then, is the right of a state to exercise authority over the persons of those who belong to another jurisdiction, and who have, perhaps, not been out of the boundaries of it? 'The sovereignty united to domain,' says Vattel, 'establishes the jurisdiction of the nation over its territories or the countries which belong to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, or the county which belongs to it; to take cognizance of the crimes committed and the differences that arise in the country.' 'On the other hand,' adds Mr. Justice Story (Confl. ch. 14, sec. 539), no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions."

The first section of the Act of 6th April, 1859, authorizes any court of this commonwealth having equity jurisdiction, in any suit in equity instituted therein concerning property within the jurisdiction of the said court, to order and direct that any subpoena or other process to be had in such suit be served on any defendant therein 'then residing or being out of the jurisdiction of said court wherever he, she or they may reside or be found.' It further provides for the proof of service both within and without the limits of the United States. It was held in Coleman's Appeal, 75 Pa. 41, that process thus issued in this state and served in another state on a resident thereof could not give jurisdiction of the person thus served." In the federal courts the same view is entertained. By a statute of the state of Oregon provision was made for service upon a nonresident by publication. In *Pennoyer* v. *Neff*, 95 U. S. 714, it appeared that judgment had been entered against Neff on process which the plain-

tiff undertook to have served upon him extra-territorially, by publication, in conformity to the statute. Judgment was entered in the proceeding against him, and, in holding that he was not bound by it, through Mr. Justice Field, it was said: "Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state can not run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them." In the Circuit Court of the United States, for the western district of this state, in the case of *McHenry* v. *New York P. & O. R. R. Co.,* 25 Fed. Repr. 65, the Court of Common Pleas of Westmoreland County had made an order of service on aliens in pursuance of the act of 1859, but it was said by the circuit court: "It is, indeed, true that pursuant to an order of the court of common pleas, claimed to be authorized by the Pennsylvania Act of April 6, 1859, P. L. 387, process has been served on those defendants in England, where they reside, but, clearly, such extra-territorial service was ineffectual to bring them within the jurisdiction of the court or make them parties to the suit."

The service upon the appellee was ineffectual to bring it into this jurisdiction, and the order of the court below setting it aside was properly made. That order is now affirmed and this appeal dismissed at the costs of appellant.[95]

---

[95] *Buchanan* v. *Rucker,* 9 East 192 (1808); *Bissell* v. *Briggs,* 9 Mass. 462, 6 Am. Dec. 88 (1813); *Borden* v. *Fitch,* 15 Johns. (N. Y.) 121, 8 Am. Dec. 225 (1818); *Skinner* v. *McDaniel,* 4 Vt. 418 (1832); *Gifford* v. *Thorn,* 7 N. J. Eq. 90 (1848); *Litchfield* v. *Burwell,* 5 How. Pr. (N. Y.) 341 (1850); *Harris* v. *Hardeman,* 14 How. (U. S.) 334, 14 L. ed. 444 (1852); *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. ed. 931 (1870); *Thompson* v. *Whitman,* 18 Wall. (U. S.) 457 (1873); *Isett* v. *Stuart,* 80 Ill. 404, 22 Am. Rep. 194 (1875); *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565 (1877) the leading case; *Harkness* v. *Hyde,* 98 U. S. 476, 25 L. ed. 237 (1878); *Quarl* v. *Abbett,* 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662 (1885); *Hewitson* v. *Fabre,* L. R. (1888), 21 Q. B. 6; *Rand* v. *Hanson,* 154 Mass. 87, 28 N. E. 6, 12 L. R. A. 574, 26 Am. St. 210 (1891); *Anheuser-Busch Brew. Assn.* v. *Peterson,* 41 Nebr. 897 (1894); *Cabanne* v. *Graf,* 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735, 94 Am. St. 722 (1902); *First Nat. Bk.* v. *Eastman,* 144 Cal. 487, 77 Pac. 1043, 103 Am. St. 95 (1904); *Hildreth* v. *Thibodeau,* 186 Mass. 83, 71 N. E. 111, 104 Am. St. 560 (1904); *Haddock* v. *Haddock,* 201 U. S. 562, 50 L. ed. 867 (1905); *Martin* v. *Martin,* 214 Pa. 389 (1906); *Wetmore* v. *Karrick,* 205 U. S. 141 (1906); *Brown* v. *Fletcher,* 210 U. S. 82 (1907); *Emanuel* v. *Symon,* L. R. (1908), 1 K. B. 302; *Lowrie* v. *Castle,* 198 Mass. 82 (1908).

An appearance in the case, or its equivalent, is a waiver of the defective service. *Keeler* v. *Keeler,* 24 Wis. 622 (1869); *Pearce* v. *Bogert,* 10 Daly (N. Y.) 277 (1881); *Allured* v. *Voller,* 107 Mich. 476, 65 N. W. 285 (1895); *Stamey* v. *Barkley,* 211 Pa. 313, 60 Atl. 991 (1905). As to whether the acknowledgment alone of service outside the jurisdiction will afford a basis for a personal judgment, compare *Richardson* v. *Smith,* 11 Allen (Mass.) 134 (1865); *Johnson* v. *Monell,* 13 Iowa 300 (1862); *Clark* v. *Tull,* 113 Iowa 143, 84 N. W. 1030 (1901) with *Litchfield* v. *Burwell,* 5 How. Pr. (N. Y.) 341 (1850); *Weatherbee* v. *Weatherbee,* 20 Wis. 499 (1866); *Scott* v. *Noble,* 72 Pa. 115, 13 Am. Rep. 663 (1872); *Smith* v. *Chilton,* 77 Va. 535 (1883);

GOLDEY *v.* MORNING NEWS.

SUPREME COURT OF THE UNITED STATES, 1895.

156 *U. S.* 518.

This was an action for a libel, claiming damages in the sum of $100,000, brought in the Supreme Court of the state of New York for the county of Kings, by Catherine Goldey, a citizen of the state of New York, against The Morning News of New Haven, a corporation organized and existing under the laws of the state of Connecticut, and carrying on business in that state only, and having no place of business, officer, agent or property in the state of New York.

The action was commenced January 4, 1890, by personal service of the summons in the city and state of New York upon the president of the corporation, temporarily there, but a citizen and resident of the state of Connecticut; and on January 24, 1890, upon the petition of the defendant, appearing by its attorney specially and for the sole and single purpose of presenting the petition for removal, was removed into the Circuit Court of the United States for the Eastern District of New York, because the parties were citizens of different states, and the time within which the defendant was required by the laws of the state of New York to answer or plead to the complaint had not expired.

In the Circuit Court of the United States the defendant, on February 5, 1890, appearing by its attorney specially for the purpose of applying for an order setting aside the summons and the service thereof, filed a motion, supported by affidavits of its president and of its attorney to the facts above stated, to set aside the summons and the service thereof, upon the ground "that the said defendant, being a corporation organized under the laws of the state of Connecticut, where it solely carries on its business, and transacting no business within the state of New York, nor having any agent clothed with authority to represent it in the state of New York, can not legally be made a defendant in an action by a service upon one of its officers while temporarily in said state of New York." Thereupon, that court, after hearing the parties on a rule to show cause why the motion should not be granted, "ordered that the service of the summons herein be, and the same is hereby, set aside and the same declared to be null and void and of no effect, and the defendant is hereby relieved from appearing to plead in answer to the complaint or otherwise herein." 42 Fed. Rep. 112. The plaintiff sued out this writ of error.[96]

GRAY, J.: This writ of error presents the question whether, in a personal action against a corporation which neither is incorporated

---

Riker v. *Vaughan*, 23 S. Car. 187 (1885); *Godwin* v. *Monds*, 106 N. Car. 448, 10 S. E. 1044 (1890); *White* v. *White*, 66 W. Va. 79 (1909).

As to proceedings *in rem*, see the chapter on Judgments, sec. 7 (b) *infra*.

[96] Only so much of the opinion as relates to the service of process is printed.

nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation.

Upon the question of the validity of such a service as was made in this case, there has been a difference of opinion between the courts of the state of New York and the Circuit Courts of the United States. Such a service has been held valid by the Court of Appeals of New York. *Hiller* v. *Burlington & Missouri Railroad,* 70 N. Y. 223; *Pope* v. *Terre Haute Co.,* 87 N. Y. 137. It has been held invalid by the Circuit Courts of the United States, held within the state of New York; *Good Hope Co.* v. *Railway Barb Fencing Co.,* 23 Blatchford 43; *Goldey* v. *Morning News,* 42 Fed. Rep. 112; *Clews* v. *Woodstock Co.,* 44 Fed. Rep. 31; *Bentlif* v. *London & Colonial Corporation,* 44 Fed. Rep. 667; *American Wooden Ware Co.* v. *Stem,* 63 Fed. Rep. 676; as well as in other circuits. *Elgin Co.* v. *Atchison, etc., Railway,* 24 Fed. Rep. 866; *United States* v. *American Bell Tel. Co.,* 29 Fed. Rep. 17; *Carpenter* v. *Westinghouse Co.,* 32 Fed. Rep. 434; *St. Louis Co.* v. *Consolidated Barb Wire Co.,* 32 Fed. Rep. 802; *Reifsnider* v. *American Publishing Co.,* 45 Fed. Rep. 433; *Fidelity Co.* v. *Mobile Railway,* 53 Fed. Rep. 850. It becomes necessary, therefore, to consider the question upon principle, and in the light of the previous decisions of this court.

It is an elementary principle of jurisprudence, that a court of justice can not acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it can not be recognized as valid by the courts of any other government. *D'Arcy* v. *Ketchum,* 11 How. 165; *Knowles* v. *Gaslight Co.,* 19 Wall. 58; *Hall* v. *Lanning,* 91 U. S. 160; *Pennoyer* v. *Neff,* 95 U. S. 714; *York* v. *Texas,* 137 U. S. 15; *Wilson* v. *Seligman,* 144 U. S. 41.

For example, under the provisions of the Constitution of the United States and of the acts of congress, by which judgment of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. Constitution, art. 4, sec. 1; Acts of May 26, 1790, ch. 11, 1 Stat. 122, and March 27, 1804, ch. 56, 2 Stat. 299; Rev. Stat. sec. 905; *Knowles* v. *Gaslight Co.* and *Pennoyer* v. *Neff,* above cited.

If a judgment is rendered in one state against two partners jointly, after serving notice upon one of them only, under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another state, or in a court of the United States, against the partner who was not served with process. *D'Arcy* v. *Ketchum,* and *Hall* v. *Lanning,* above cited.

So a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there.[97]

Judgment affirmed.

DUNLAP *v.* CODY.

SUPREME COURT OF IOWA, 1871.

31 *Iowa* 260.[98]

Suit upon a judgment rendered by the Circuit Court of Hancock County, Illinois, for the sum of $1,145.31. The defendant in answer denies any indebtedness, and alleges that the note upon which judgment was obtained was executed in Ohio on the 5th day of March, 1855, and at the time suit was instituted thereon was barred by the statute of limitations; that plaintiffs and their attorneys, in order to avoid the statute of limitations of the state of Iowa, and obtain jurisdiction of the person of defendant in the state of Illinois, fraud-

---

[97] *Lafayette Ins. Co.* v. *French*, 18 How. (U. S.) 404, 15 L. ed. 451 (1855); *St. Clair* v. *Cox*, 106 U. S. 350, 27 L. ed. 222 (1882); *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98, 34 L. ed. 608 (1890); *Mexican Central R. Co.* v. *Pinkney*, 149 U. S. 194, 37 L. ed. 699 (1893); *In re. Hohorst*, 150 U. S. 653 (1893); *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406 (1903); *Remington* v. *Central Pacific R. Co.*, 198 U. S. 95, 49 L. ed. 959 (1905); *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364 (1906); *Herndon-Carter Co.* v. *Norris*, 224 U. S. 496 (1912); *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218 (1913); *Dobson* v. *Farbenfabriken Co.*, 206 Fed. 125 (1913); *Ostrander* v. *Deerfield L. Co.*, 206 Fed. 540 (1913). In *International H. Co.* v. *Commonwealth*, 234 U. S. 579 (1914) it is said per Day, J.: "For some purposes a corporation is deemed to be a resident of the state of its creation, but when a corporation of one state goes into another in order to be regarded as within the latter, it must be there by its agents authorized to transact its business in that state. The mere presence of an agent upon personal affairs does not carry the corporation into the foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be doing business within the state. * * * Each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the state." See further *Phillips* v. *Library Co.*, 141 Pa. 462, 21 Atl. 640, 23 Am. St. 304 (1891); *Foster* v. *Charles Betcher Lumber Co.*, 5 S. Dak. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. 859 (1894); *Doctor* v. *Desmond*, 80 N. J. Eq. 77 (1912); *Kendall* v. *Orange Judd Co.*, 118 Minn. 1. (1912); *Watkins Land Mtg. Co.* v. *Elliott*, 62 Kans. 291 (1900); *Payne* v. *East Union Lumber Co.*, 109 La. 706 (1903); *Grant* v. *Cananea C. Co.*, 189 N. Y. 241 (1907); *Whitehurst* v. *Kerr*, 153 N. Car. 76 (1910); *Eldred* v. *Palace Car Co.*, 105 Fed. 455, 45 C. C. A. 1 (1900) and note. As to service of process on corporations, generally, see Thompson on Corporations §§ 2990, 3050, and the local statutes.

[98] Part of the statement of facts and opinion of the court are omitted.

ulently represented to defendant that one Hiatt, with others, was about to erect an elevator at Carthage, in Hancock County, Illinois, to cost between $30,000 and $40,000, and induced defendant, who is a carpenter, to go to Hancock County for the purpose of looking at the site of said elevator. That they had the sheriff of Hancock County in waiting, and that, as soon as defendant stepped from the cars at Carthage, the said sheriff served him with a summons in said cause. That the proposal of building the elevator was a pretense made for the purpose of inducing defendant to go to Illinois where plaintiff could see him, and avoid the bar of the statute of limitations of the state of Iowa. To this answer the plaintiff demurred.

The demurrer was overruled and judgment entered for defendant with costs. Plaintiffs appeal.

DAY, C. J.: Do the means used to obtain jurisdiction of the person of defendant, in the courts of Illinois, amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists in the suggestio falsi or the suppressio veri. Both exist here. The false statement was made to defendant by plaintiff's attorney that Hiatt and others were about to erect an elevator in Hancock County, Illinois, to cost between $30,000 and $40,000; and the defendant, being a carpenter, was induced to go to Illinois to look at the site of the proposed structure. The truth, that the object in getting defendant into the state of Illinois, was to obtain jurisdiction of his person in an action against him, and avoid the bar of the statute of limitations of the state of Iowa, was suppressed. It can not be supposed that if the real facts and purpose had been made known to defendant he would voluntarily have gone to Illinois, and subjected himself to an action upon this demand, long since barred by the statute of limitations of the state in which he resides. Counsel representing plaintiff in this court, and who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position, that the mode of obtaining jurisdiction was fraudulent. They concede that it "smells somewhat of fraud." The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a "pious fraud" in which "the end justifies the means."

We do not think that it is entitled even to that small measure of charity.

An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced.[99]

Affirmed.

---

[99] Accord: *Stein* v. *Valkenhuysen*, 1 El., B. & El. 65 (1858); *Wauzer* v. *Bright*, 52 Ill. 35 (1869); *Williams* v. *Reed*, 29 N. J. L. 385 (1862); *Metcalf* v. *Clark*, 41 Barb. (N. Y.) 45 (1864); *Townsend* v. *Smith*, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793 (1879); *Columbia Placer Co.* v. *Bucyrus Co.*, 60 Minn. 142, 62 N. W. 115 (1895); *Olean St. R. Co.* v. *Construction Co.*, 55 App. Div. (N. Y.) 292 (1900); *Harbison-Walker Ref. Co.* v. *Fredericks*, 12 Pa. Dis. R. 419 (1903); *Cavanagh* v. *Manhattan Transit Co.*, 133 Fed. 818 (1905). Com-

MORROW *v.* DUDLEY & CO.

UNITED STATES DISTRICT COURT, MIDDLE DIST. PA., 1906.

144 *Fed.* 441.

ARCHBALD, J.: Service of the summons in this case was made on W. D. Breaker, one of the defendants, a resident of New York, on January 20, 1906, while he was at Scranton, Pa., for the purpose of attending a hearing in bankruptcy before W. L. Hill, referee, in support of a claim of the defendant firm against the La Plume Condensed Milk Company, of which the plaintiff is trustee. The hearing was fixed for January 19th, and after the parties had met, and proceeded a certain distance, it was adjourned to the next day. Service was made after the completion of the adjourned hearing, as the defendant was on his way to the train to return home. The summons were returnable the fourth Monday of February (February 26th), the first day of the next term; and, on February 10th, the present rule to set aside the service was taken.

Of the right of a party to attend a judicial hearing away from the place of his residence, without being subjected to the service of process, there is, of course, no question. 1 Tr. & Haly Prac., sec. 236.[2] And hearings before a referee in bankruptcy are within the rule. *Arding* v. *Flower,* 8 Term Rep. 534; *Selby* v. *Hills,* 8 Bing. 166; *Ex parte King,* 7 Ves. 312; *Ex parte List,* 2 Ves. & B. 373; *Matthews* v. *Tufts,* 87 N. Y. 568. The privilege is personal, however, and may be waived; and will be taken to be so, unless insisted upon promptly. *Matthews* v. *Puffer* (C. C.) 10 Fed. 606; *Hendrick* v. *Gates,* 3 C. P. Rep. (Pa.) 160. There was a delay of three weeks in the present instance, and it is contended that this operated as a waiver. But I am not so persuaded. Ordinarily, it is sufficient if application to set aside the service is made on or before the return day (*Lederer* v. *Adams,* 19 Civ. Proc. R. [N. Y] 294, 11 N. Y. Supp. 481; *McPherson* v. *Nesmith,* 3 Grat. [Va.] 237), provided no other step has been taken in the case (1 Tr. & Haly Prac. sec. 240), and the situation of the parties has not changed meanwhile (*Webb* v. *Taylor,* 9 Jur. 39; *Massey* v. *Dantum,* 12 Wkly. Notes Cas. [Pa.] 436; *Young* v. *Armstrong,* 13 Wkly. Notes Cas. [Pa.] 313). It was held in *Souder* v. *Burling,* 1 Tr. & Haly Prac. sec. 236, note, that it must be made before the defendant leaves the jurisdiction. But the circumstances which led to this observation are not stated,

---

pare *Union Sugar Refinery* v. *Mathiesson,* 2 Cliff (U. S.) 304 (1864); *Commercial Nat. Bank* v. *Davidson,* 18 Ore. 57 (1889); *Kennedy* v. *Merritt,* 55 Pitts. L. J. 261 (1908); *McLain* v. *Parker,* 88 Kans. 717 (1913).

[2]Accord: *Hayes* v. *Shields,* 2 Yeates (Pa.) 222 (1797); *Huddeson* v. *Prizer,* 9 Phila. 65 (1872); *Person* v. *Grier,* 66 N. Y. 124, 23 Am. Rep. 35 (1876); Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370 (1877); *Murray* v. *Wilcox,* 122 Iowa 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. 263 (1904); *Richardson* v. *Smith,* 74 N. J. L. 111 (1906); *Skinner* v. *Waite,* 155 Fed. 828 (1907); *Barber* v. *Knowles,* 77 Ohio 81 (1907). The privilege does not extend to mere volunteers. *Michaels* v. *Hain,* 78 Hun (N. Y.) [illegible] (1894).

and there is nothing to determine, therefore, how far it may be properly extended to other cases. It is probable that there the defendant did not depart immediately, for it is said that if he had insisted on his privilege at once, the plaintiff might have had the process served upon him legally, afterwards, before he left. In this respect, it is like the case where the defendant returns into the jurisdiction, putting himself again within reach of process, before he moves; which is held to be a waiver. *Massey* v. *Dantum*, 12 Wkly. Notes Cas. (Pa.) 436; *Hendrick* v. *Gates*, 3 C. P. Rep. (Pa.) 160.[3] But it certainly does not apply where, as here, the defendant was served on his way to the train.

The rule is made absolute, and the service is set aside.[4]

GEORGE GRAVES *v.* J. D. MACFARLAND.

SUPREME COURT OF NEBRASKA, 1899.

58 *Nebr.* 802.

SULLIVAN, J.: This is an appeal by George Graves from a judgment of the District Court of Antelope County. The facts essential to an understanding of the questions presented for decision are these: The appellant, who was plaintiff below, purchased of Lyman Seiler, in August, 1890, a lot in the city of Lincoln subject, according to the recital of the deed, to an incumbrance of $1,600. In January, 1892, the mortgagee, J. D. Macfarland, brought an action in the District Court of Lancaster County to foreclose his mortgage, making Seiler and Graves and wife parties defendant. Mr. and Mrs. Graves resided in the city of Neligh, in Antelope County, and process was sent to the sheriff of that county for service upon them. The writ was issued on January 10 and was made returnable January 18. It was not in fact returned and filed in the office of the clerk of the district court until January 23. The sheriff's certificate, which is dated January 16, recites that on January 15 the summons

---

[3] What is a reasonable time for departure is a question of fact to be determined from the evidence. *Linton* v. *Cooper*, 54 Nebr. 438 (1898); *Cake* v. *Haight*, 30 Misc. (N. Y.) 386 (1900); *Finncane* v. *Warner*, 194 N. Y. 160 (1909).

[4] Nonresident parties and witnesses are exempt from service of process while attending and departing from court. *Miles* v. *McCullough*, 1 Binney (Pa.) 77 (1803); *Grove* v. *Campbell*, 9 Yerg. (Tenn.) 7 (1836); *Massey* v. *Colville*, 45 N. J. L. 119 (1883); *Wilson* v. *Donaldson*, 117 Ind. 356 (1888). Contra (as to suitors) in *Capwell* v. *Sipe*, 17 R. I. 475 (1891); *Baisley* v. *Baisley*, 113 Mo. 544 (1892). See generally 25 Lawyer's Reports Annotated 721. As to attorneys see *Greenleaf* v. *People*, 133 N. Car. 292 (1903). As to the exemption from arrest in civil cases enjoyed by ambassadors, members of legislative bodies while in the discharge of their duties, electors and persons actually engaged in military service see 1 Troubat & Haly's Practice (Fish's ed.), 246, 32 Cyc. 490; *Merrick* v. *Gidding*, 28 Fed. 387 (1886), members of congress; *Corlies* v. *Holmes*, 20 Wend. (N. Y.) 681 (1839), elector; *Davidson* v. *Barclay*, 63 Pa. 406 (1869), military service; *Cameron* v. *Roberts*, 87 Wis. 291 (1894), justice of the peace; *Dupont* v. *Pichon*, 4 Dall. (Pa.) 321 (1805); *In re Anfrye*, 3 W. N. C. (Pa.) 188 (1876), diplomats.

was personally served upon Mrs. Graves and a copy left at the usual place of residence of George Graves.[5]

It is contended that the summons not having been returned within the time limited by the statute, the court acquired no jurisdiction over the person of the appellant, and that the judgment rendered against him was therefore void. We think counsel is right in asserting that the file-mark of the clerk is the proper and primary evidence of the time when the summons was returned by the sheriff. And it must, under the authorities, be conceded that the return contemplated by the law includes not only the officer's certificate of service, but also the delivery of the writ to the office from which it issued. (Alderson, Judicial Writs & Process, sec. 184; *Nelson* v. *Cook,* 19 Ill. 440; *Cariker* v. *Anderson,* 27 Ill. 358). It does not follow, however, that a service which is valid when made becomes a nullity because the officer fails to make due return of the writ. When the summons is served the action is pending; the court has jurisdiction of the parties and can not be divested of the authority over them by any fault or omission of the sheriff. It is not the officer's return that gives the court power to hear and determine the cause, but the fact of service during the life of the writ. The return is, of course, the appropriate evidence of the jurisdictional fact, but it is not conclusive. There is no good reason why a defendant who has been duly served should complain because the court was not possessed of the proof of service within the time fixed by the statute.[6] (*Smith* v. *Payton,* 13 Kans. 362; *Clough* v. *McDonald,* 18 Kans. 114; *Miller* v. *Forbes,* 49 Pac. Rep. [Kans.] 705.)

[5] Only so much of the opinion as relates to the sheriff's return is printed. Judgment for the plaintiff below was reversed on other grounds.

[6] In *Nelson* v. *Cook,* 19 Ill. 440 (1858) it is said: "The indorsement of the officer is one thing, and the return another. The action of the officer upon the writ is not the return strictly speaking. It does not become a return, or bear that character, until as the word imports, it be actually returned to the office out of which it issued. Being indorsed, and remaining in the hands of the officer, it is under his control, and he can erase the endorsement and substitute another at his pleasure. He is not concluded by anything he may have written upon it, until it has left his possession, and has been returned to the proper office. Nor is he then concluded, for, by a proper application to the court, and which courts rarely refuse, he can alter and amend his return; the courts holding him to his first responsibility in an action for false return." See, also, *Beall* v. *Shattuck,* 53 Miss. 358 (1876).

Process must be returned by the officer charged with executing it, certifying in a brief statement what he did in furtherance of the command of the writ. *Jenkins* v. *McGill,* 4 How. Pr. (N. Y.) 205 (1849); *Jones* v. *Bibb Brick Co.,* 120 Ga. 321, 48 S. E. 25 (1904). See, also, *Metcalf* v. *Gillet,* 5 Conn. 400 (1824); *Wilson* v. *Greathouse,* 2 Ill. 174 (1835); *Moore* v. *Miller,* 16 N. J. L. 233 (1837); *Sheldon* v. *Comstock,* 3 R. I. 84 (1854); *Hutton* v. *Campbell,* 10 Lea. (Tenn.) 170 (1882); *State v. Reed,* 50 La. 170, 23 So. 333 (1898); *Albright-Pryor Co.* v. *Pacific S. Co.,* 126 Ga. 498 (1906); *Hemmelberger-Harrison L. Co.* v. *Jones,* 220 Mo. 190 (1909); *McGowin* v. *Dickson,* 182 Ala. 161 (1913); New York Code Civ. Proc., § 434; California Code Civ. Pro. § 415.

It is proper to permit a return of service to be amended according to the fact. *Spencer* v. *Rickard,* 69 W. Va. 322 (1911). Accord: *First Nat. Bk.* v. *Ellis,* 27 Okla. 699 (1911); *Speare* v. *Stone,* 193 Fed. 375 (1912); *Furr* v. *Bank of Fairmount,* 139 Ga. 815 (1913); *Fountain* v. *Detroit M. & C. R. Co.,* 210 Fed. 982 (1913); *Ripley* v. *Harmony,* 111 Maine 91 (1913).

TILLMAN *v.* DAVIS.

SUPREME COURT OF GEORGIA, 1859.

28 *Ga.* 494.

Certiorari. Decision by Judge Allen, in Lee Superior Court, March term, 1859.

William J. Tillman brought suit to the January term, 1858, of Lee Inferior Court, against John A. Dannard and Jonathan Davis, on a promissory note given for rent. Davis lived in the county of Lee, and Dennard in the county of Dougherty. Both parties appear, from the entries on the original and second original declarations, to have been regularly served.

At the July term, 1858, of said court, a verdict was rendered in favor of the plaintiff, judgment duly entered up, and *fi. fa.* issued.

Davis afterwards moved to set aside said judgment, on the following grounds, to wit:

1st. That defendant Davis was, in fact, only security to the contract on which said judgment was founded, and signed the same as such.

2d. That he gave plaintiff notice to sue the principal on said note on or about the first day of January, 1858. That the suit on which said judgment is founded was brought against himself and said principal within three months after the notice aforesaid, but that said principal was never duly served with said writ; that said principal was not served until after the court passed to which the writ was sued. And that, therefore, the court had no jurisdiction on said suit. That Dennard was insolvent. These facts Davis offered to prove to the court.

The court refused the motion, and Davis excepted; whereupon the court also overruled the exceptions, and Davis sued out a writ of certiorari. Upon the hearing of the certiorari at the March term, 1859, of Lee Superior Court, it was admitted that, since the hearing in the inferior court, the interrogatories of C. M. Boynton, the sheriff of Dougherty County, had been taken, and that the sheriff admitted he had not served Dennard within the proper time; that the service was, however, made before the January term, 1858, of Lee Inferior Court, and by the consent of Dennard, was dated back to the proper time. The court refused to act upon any matter not disclosed by the record from the court below, but sustained the certiorari and overruled the decision of the inferior court.

To this decision counsel for Tillman excepted, and now assigns the same for error.[6a]

LUMPKIN, J.: Of course, the testimony of Boynton, the Sheriff of Dougherty County—taken after the case was decided in the inferior court—was properly disregarded upon the hearing of the certiorari.

[6a] Part of the opinion of the court and the dissenting opinion are omitted. By statute in Georgia a defendant can now traverse the sheriff's return. *Parker* v. *Medlock*, 117 Ga. 813, 45 S. E. 61 (1903).

Had that evidence been in, it would have sustained the return of Boynton, the sheriff; and we should have been saved the necessity of inquiring whether the return of that officer, as it stands, can be controverted. The case depends upon the decision of that question. If Dennard was regularly served, as he appears to have been by the return of the sheriff, Davis was concluded by the judgment.

Upon examination, it will be found that the conclusiveness of the sheriff's return, both upon mesne and final process, is assumed as one of the axiomatic truths of the law, and the principle is found scattered broadcast throughout the whole of the text books and reports, both in England and in this country, except in the state of Connecticut, where a contrary doctrine has obtained.

"The return of the sheriff," says Baron Comyn, "is of such high regard, that generally no averment shall be admitted against it. As if A be returned to be outlawed, he can not say that he was only *quarto* or *quinto exactus*. Kit., 280. If the sheriff return issues upon B, it can not be averred by A to save the issues, that his name is not B. 2 Rol. 462, 1, 5. If the sheriff in *redisseisin* returns *accessi ad terras*, etc., it can not be assigned for error, *quod non accessit*. Leon., 183. If *coronors* make a return, it can not be said that only *one* made the return. R. Raymond, 485. If a sheriff returns *scire feci* A. *tenen' un' mess'*, A can not plead *non tenet*. R. Cro. Eliz., 872; R. Mod. 10. (Com. Dig. Title Return G. 6 vol., 242-243.) Sheriffs' return not traversable; but you may have an action for a false return. Loft., 631; *Rex* v. *Elkins*, 4 Burr. 2127; *Barr* v. *Satchwell*, 2 Str. 813.

But I will not multiply citations upon this point. I have investigated carefully in Brooke and Viner's Abridgements, and traced the question to its fountain head, and find it well settled that by the common law no averment will lie against the sheriff's return, and one reason assigned amongst others, is that he is a sworn officer, to whom the law gives credit. Jenk. 143, pl. 98. There are some exceptions to the general rule in favor of life and liberty, and some modifications made by several ancient statutes. But they are slight and restricted to returns upon particular subjects, and do not affect the present case. It is also true, that while the return of the sheriff, in certain cases, will not be allowed to be controverted in the same action, an averment may be made contrary to the same return in another action.

I lay down another proposition, which seems to be uniform and incontrovertible: that a return of the sheriff which is definitive to the trial of the thing returned, as the return of the sheriff upon his writs, can not be traversed. Brooke's Abr. Title Averment; Viner's Abr. Title Return, vol. XIX.

All the American authorities are collected in note (d.) appendix to vol. 2 Cowen & Hill's notes to Phillips on Ev., p. 794, and, as I stated in the beginning of this opinion, with a solitary exception, there is an unbroken array of American cases in favor of the well-established English rule, that as between the parties to the process

or their privies,[7] the return of the sheriff is usually conclusive, and not liable to collateral impeachment, except for fraud or collusion; a rule so necessary to secure the rights of the parties, and to give validity and effect to the acts of ministerial officers, leaving the persons injured to their redress by an action for a false return; and that this rule concluding the parties, applied to mesne process, by which the parties are brought into court.

I will not consume time in reviewing the Connecticut cases. Suffice it to say that in *Watson and others* v. *Watson* (6 Conn. Rep. 334). Ch. J. Hosmer, who delivered the meagre opinion of the court, says, distinctly, that it is a general rule of the English common law, that the return of the sheriff is conclusive, both as it respects mesne and final process, there being no distinction made between the two in Westminster Hall. But that in Connecticut a contrary doctrine had prevailed; and that he was unable to assign the precise reason for this departure from the English common law.

This concession is sufficient to satisfy a judge in Georgia what his duty is.

It may be supposed that to make the returns of an officer, prima facie evidence of their truth would be a sufficient security for the rights of the people; and to prevent the perpetration of irreparable wrong. But that is a matter for the legislature and not for the courts.

By the act of 1840 (Pamphlet, p. 4; Hotchkiss, 527), returns made under oath, by virtue of any rule or order of the court, are traversable.[8] But the legislature has not seen fit to extend the right to the ordinary returns made by a sheriff on process in his hands. Where they stop, we must stop.[9]

Stephens, J., concurred. Benning, J., dissents.

---

[7] Strangers are not concluded by the return. *United States* v. *McHie*, 194 Fed. 894 (1912); *Hearsley* v. *Bradbury*, 9 Mass. 95 (1812); *Brown* v. *Davis*, 9 N. H. 76 (1837); *Phillips* v. *Elwell*, 14 Ohio St. 240, 84 Am. Dec. 373 (1863); *Hutton* v. *Campbell*, 10 Lea. (Tenn.) 170 (1882).

[8] A return of personal service made by a private person is open to contradiction. *O'Connor* v. *Felix*, 147 N. Y. 614, 42 N. E. 269 (1895); *Campbell* v. *Wayne Circuit Judge*, 111 Mich. 247, 69 N. W. 511 (1896); *Peck* v. *Chambers*, 44 W. Va. 270, 28 S. E. 706 (1897); *Marsh* v. *Potter*, 15 N. Dak. 284, 107 N. W. 970 (1906).

[9] Accord: *Slayton* v. *Inhabitants of Chester*, 4 Mass. 478 (1808); *Bean* v. *Parker*, 17 Mass. 591 (1822); *Case* v. *Redfield*, 7 Wend. (N. Y.) 398 (1831); *Goubot* v. *DeCrony*, 2 Dowl. P. C. 86 (1833); *Zion Church* v. *St. Peter's Church*, 5 W. & S. 215 (1843); *Barrett* v. *Copeland*, 18 Vt. 67, 44 Am. Dec. 362 (1844); *Castner* v. *Styer*, 23 N. J. L. 236 (1852); *Nichols* v. *Nichols*, 96 Ind. 433 (1884); *Insurance Co.* v. *Webb*, 106 Tenn. 191 (1900); *Newcomb* v. *New York Central, etc., R. Co.*, 182 Mo. 687, 81 S. W. 1069 (1904); *Mayerson* v. *Cohen*, 123 App. Div. (N. Y.) 646 (1908); *Strobel* v. *Clark*, 128 Mo. App. 48 (1907); *Miedreich* v. *Lauenstein*, 172 Ind. 140 (1908), affirmed: 232 U. S. 236; *Higham* v. *Iowa S. T. Assn.*, 183 Fed. 845 (1911); *Fraternal Bankers* v. *Wire*, 150 Mo. App. 189 (1910); *Sutherland* v. *People's Bank*, 111 Va. 515 (1910); *Kimsey* v. *Macon Lumber Co.*, 136 Ga. 369 (1911); *Hotovitsky* v. *Little Russian, etc., Church*, 78 N. J. Eq. 576 (1911); *Flaccus Oak L. Co.* v. *Heasley*, 50 Pa. Super. Ct. 127 (1912): The modern tendency, however, is to permit the return to be attacked by affidavit, motion or other proceeding to set it aside, hence there is great confusion in the cases.

TOWNER *v.* PHELPS.

SUPREME COURT OF CONNECTICUT, 1791.

1 *Root's (Conn.)* 250.

Upon a writ of error, adjudged—That a writ which has been served and returned can not have an existence as a writ, for another purpose, by being taken out of the files and served again.[10]

(b) Appearance.

CARRIE M. CHILDERS *v.* ADOLPH J. LAHANN.

SUPREME COURT OF NEW MEXICO, 1914.

18 *N. Mex.* 487.

Motion to dismiss appeal.[11]

ROBERTS, C. J.: Appellant admits that no citation was issued or served upon appellee; that the return day was October 25, 1913. But she resists the motion to dismiss the appeal, on the ground that appellee has entered a general appearance in the case in this court. The issuance and service of citation is waived by the voluntary appearance of the appellee or defendant in error. *Daily* v. *Foster,* 128 Pac. 71. The claim of appellant is not based upon any formal entry, plea, motion, or act of the appellee shown by the records of

---

See 32 Cyc. 516; 18 Enc. Pl. & Pr. 969; *Butts* v. *Francis,* 4 Conn. 424 (1822); *Owens* v. *Ranstead, 22* Ill. 161 (1869); *Barbour* v. *Newkirk,* 83 Ky. 529 (1886); *Crosby* v. *Farmer,* 39 Minn. 305 (1888); *Park Bros. & Co.* v. *Oil City B. W.,* 204 Pa. 453, 54 Atl. 334 (1903); *Nicholas Allegrette* v. *Stubbert,* 126 Ill. App. 171 (1906); *Westman* v. *Carlson,* 86 Nebr. 847 (1910); *Pinnacle Gold Min. Co.* v. *Popst,* 54 Colo. 451 (1913).

[10] A writ when returned served is *functus officio. Gorman* v. *Steed,* 1 W. Va. 1 (1864); *Carrigan* v. *Washburn,* 9 N. Y. Supp. 541 (1889); *Mansur* v. *Insurance Co.,* 136 Mo. App. 726 (1909). Contra: *Ridenburg* v. *Sandlin,* 14 Idaho 472 (1908), where it is said: "The contention that a summons once returned and filed is *functus officio* and can not be given life and effect by an order of court is not well founded. As soon as it becomes a file of the court, it is beyond the power of any party to the action to withdraw it without an order of court to that effect; but the court itself has control over the records and files in a case as well as over its own process, and it might order a summons already issued and on file to be withdrawn for service, or order an entirely new summons as justice and the exigencies of the case demand."

In most jurisdictions that follow the common law, when a summons is returned not served, an *alias* writ may issue, and if that be similarly returned, it may be followed by *pluries* writs until service is made upon the defendants. *Danville & W. R. Co.* v. *Brown,* 90 Va. 340 (1893); *Oil & Gas R. Co.* v. *Gartland,* 58 W. Va. 267 (1905); *Berkman* v. *Weisinger,* 50 Misc. (N. Y.) 515 (1906); *Bovaird* v. *Ferguson,* 215 Pa. 235 (1906). California otherwise, *Dupuy* v. *Shear,* 29 Cal. 238 (1865), see *Coffin* v. *Bell,* 22 Nev. 169 (1894).

[11] Part of the opinion is omitted.

this court, but is founded solely upon a letter received by her attorney from one of appellee's attorneys, and the reply of her said attorney thereto. The letters are as follows:

"El Paso, Texas, Nov. 2, 1913.

"E. W. Dobson,
"Albuquerque, N. M.

"Dear Mr. Dobson:

"Your letter of the 28th ult. was forwarded to me here, and I wish to thank you for the offer to extend courtesies in case of *Childers* v. *Lahann.*

"If it is not asking too much, I would like to have the case continued to the January term, when I hope to be able to attend to it. I am here under treatment and improving slowly, but am unfit for work. By extending the time for hearing of the case as indicated, you will greatly oblige. Mr. Hudspeth will sign a stipulation if one is necessary.

"Yours truly,
"John Y. Hewitt."

To which appellant's attorney replied as follows:

"John Y. Hewitt,
"El Paso, Texas.

"My Dear Judge:

"Yours of the 2d inst. received. I told Mr. Hudspeth that I would grant any reasonable time for you to file briefs in the case of *Childers* v. *Lahann,* and so far as I am concerned the case can be taken up at the January term. After your reply brief is filed it may be that I will want to answer the same, although at the present time I think I have covered all points that I could.

"I will sign any stipulation that you or Mr. Hudspeth may desire, although this letter is sufficient and I assure you no advantage will be taken and you will be granted the time that you desire.

"Yours truly,
"E. W. Dobson."

No application for a continuance was made to the court by appellee, and no entry of any kind was made by the court in the case in this regard. On November 26, the motion to dismiss was filed.

The solution of the question depends upon the effect of the letters quoted, for, if they constituted an appearance by appellee in this court, the motion to dismiss is not well taken.

Bouvier's Law Dictionary defines appearance, in practice, as follows: "A coming into court as a party to a suit, whether as plaintiff or defendant. The formal proceeding by which a defendant submits himself to the jurisdiction of the court."

It could hardly be contended that the letters which passed between the attorneys would constitute an appearance, within the defi-

nition of the term above quoted. There was no "coming into court," for no action by the court was asked by appellee. No paper, motion or pleading of any kind was filed by appellee, nor was any relief asked of the court. Had appellee applied to the court for a continuance, such act would have constituted an appearance and the court would have jurisdiction over his person. And the question, as to whether a party had appeared and submitted himself voluntarily to the jurisdiction of the court, should be tried by the record and not by other evidence. Were this not true the door might be opened to fraud and imposition. As to the acts necessary to constitute an appearance and how established, the Supreme Court of Indiana say: "To constitute an appearance so as to give jurisdiction over the person of a defendant in this state, there must be some formal entry, plea, motion, or act, or word spoken in said cause in court which should be shown by the record." *Kirkpatrick, etc., Co.* v. *Central Electric Co.*, 159 Ind. 639.

In the case of *Scott et al.* v. *Hull et al.*, 14 Ind. 136, the defendants sought to remove the cause to the Federal Court, and the question arose as to whether they had not voluntarily appeared in the case in the state court, by appearing before an officer upon the taking of depositions by plaintiffs, and also by defendants taking depositions, to be used upon the trial of said cause. The court say: "There should be some formal entry, or plea, or motion, or official act (3 Blackf. 266) to constitute an appearance; and this should be of record, and tried by the record. 6 Com. Dig. 8; *Kanouse* v. *Martin*, 15 How. (U. S.) 198."

The Supreme Court of West Virginia, in the case of *Groves* v. *County Court*, 42 W. Va. 587, say: "Appearance is the first act of the defendant in court (1 Tidd, Prac. 262; 6 Com. Dig. tit. 'Pleader', B. 1, p. 6) and the appearance of the defendant is triable by the record which is a verity (1 Co. Litt. 260; 1 Chit. Pl. 512)." See also *Colby* v. *Knapp*, 13 N. H. 175.

In vol. 2, Standard Encyc. Proc. 491, the rule is stated as follows: "There should be some formal entry of record, 'or plea, motion, or official act, to constitute an appearance', and this should be tried by the record and not by other evidence."

In this case, the fact that the court would be required to resort to evidence outside of the record, in order to ascertain that appellee had appeared, renders appellant's contention untenable.

The court has jurisdiction of the cause, but not of the appellee, because of the failure of serve citation. All that remains to give the court jurisdiction over both the cause and the parties, is the issuance and service of citation. We are of the opinion that the above facts, all of which are admitted, furnish good cause for a denial of the motion to dismiss the appeal, and warrant the court in permitting appellant to sue out and serve citation on appellee. The court is always reluctant to dispose of any cause except upon the merits of the question involved, unless required to do so by plain and explicit provisions of the statute, rule of court, or established procedure.

For the reasons stated, the motion to dismiss the appeal will be denied, at this time, and appellant will be given the right to sue out and serve citation, and it is so ordered.[12]

HARRY E. HENRY *v.* WALTER L. SPITLER.

SUPREME COURT OF FLORIDA, 1914.

67 *Fla.* 146.[*]

SHACKLEFORD, C. J.: Walter L. Spitler instituted an action of replevin against Harry E. Henry to recover the possession of certain described mules. The property was redelivered to the defendant upon the filing of a forthcoming bond in accordance with the statutory provisions. On the 7th day of April, 1913, the return day of the writ, the defendant entered his special appearance "for the purpose of moving to quash the return to the writ of replevin" and filed the following motion:

---

[12] See, further, *Humphreys* v. *Humphreys*, Morr. (Iowa) 359 (1844); *Scott* v. *Hull*, 14 Ind. 136 (1860); *Byrne* v. *Jeffries*, 38 Miss. 533 (1860); *Crary* v. *Barber*, 1 Colo. 172 (1869); *Rhoades* v. *Delaney*, 50 Ind. 468 (1875); *Douglas* v. *Haberstro*, 8 Abb. N. C. (N. Y.) 230, 50 How. Pr. 276 (1880); *Ridgway* v. *Horner*, 55 N. J. L. 84, 25 Atl. 386 (1892); *Harrison* v. *Morton*, 87 Md. 671 (40 Atl. 897) (1898); *Bank* v. *Prescott*, 60 Kans. 490 (1899); *Kirkpatrick C. Co.* v. *Central E. Co.*, 159 Ind. 639, 65 N. E. 913 (1902).

A general appearance is an unqualified submission to the jurisdiction of the court and does not necessarily involve the physical presence of either the party or his attorney. It may be in writing. *Russell* v. *Craig*, 10 Colo. App. 428, 51 Pac. 1017 (1897); *Thornhill* v. *Hargreaves*, 76 Nebr. 582 (1906), or by acts showing unequivocal recognition that the case is before the court. *Long* v. *Newhouse*, 57 Ohio 348, 49 N. E. 79 (1897); *People* v. *Cowan*, 146 N. Y. 348, 41 N. E. 26 (1895).

A special appearance is one made for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant. *Nye* v. *Liscombe*, 21 Pick. (Mass.) 263 (1838); *Turner* v. *Larkin*, 12 Pa. Super, Ct. 284 (1899); *Hilton* v. *Consumers Co.*, 103 Va. 255 (1904); *Allen F. Co.* v. *Southern R. Co.*, 145 N. Car. 37 (1907); *Dixon* v. *Wells*, L. R. (1890) 25 Q. B. 249; *State* v. *Tolan*, 33 N. J. L. 195 (1868); *Seacoast L. Co.* v. *R. J. & B. F. Camp L. Co.*, 63 Fla. 604 (1912). It has been held that if a defendant relies on want of personal jurisdiction his objection must be confined to a denial of jurisdiction over his person and must not include a denial of jurisdiction of the subject-matter of the action. *Smith* v. *Hoover*, 39 Ohio 249 (1883); *Fitzgerald & Mallory Con. Co.* v. *Fitzgerald*, 137 U. S. 98, 34 L. ed. 608 (1890); *Nicholes* v. *People*, 165 Ill. 502, 46 N. E. 237 (1897); *Perrine* v. *Knights Templar's L. I. Co.*, 71 Nebr. 267, 98 N. W. 841, 101 N. W. 1017 (1904); *Lillie* v. *Modern Woodmen*, 89 Nebr. 1 (1914); *Western L. Co.* v. *Butte, etc., Mining Co.*, 210 U. S. 368 (1907). Contra: *Kelley* v. *Smith*, 196 Fed. 466 (1912); *Spencer* v. *Court of Honor*, 120 Minn. 422 (1913).

Where an attorney appears, he is presumed to act by authority of the party he represents; but if his authority is questioned, the court will require proof of his employment. *Bayley* v. *Buckland*, 1 Exch. 1 (1847); *Kepley* v. *Irwin*, 14 Nebr. 300, 15 N. W. 719 (1883); *Ferris* v. *Commercial Nat. Bank*, 158 Ill. 237 (1895); *Bonnifield* v. *Thorp*, 71 Fed. 924 (1896); *Danville, etc., R. Co.* v. *Rhodes*, 180 Pa. 157, 36 Atl. 648 (1897); 2 Enc. Pl. & Pr. 681; 23 Cyc. 1077.

[*] Part only of the opinion is printed.

"The defendant, Harry E. Henry, by his attorneys for the purpose hereinabove stated, and under his special appearance herein filed, respectfully moves the court to quash the return of the sheriff to the writ of replevin issued in the above-stated cause, upon the following grounds and for the following reasons:

(1) It affirmatively appears from said return to the writ of replevin that no effectual and valid service of the same has been made.

(2) It affirmatively appears from said return that this defendant has not been summoned to appear in said cause by proper and effectual service of process in the manner required by law.

(3) It affirmatively appears from said return that this court has never acquired jurisdiction of the person of this defendant.

(4) And for other good and sufficient reasons apparent upon the face of the return to the said writ of replevin.

Wherefore the defendant prays that the said return may be quashed."

This motion was denied and the defendant allowed until the August rule day in which to plead, on which day he filed his plea of not guilty. A trial was had before a jury, which resulted in a verdict in favor of the plaintiff. Upon this verdict a judgment was rendered and entered against the defendant and the sureties upon his forthcoming bond, which judgment the defendant has brought here for review.

The first and second assignments are based upon the denial of the motion "to quash and set aside the sheriff's return to the writ and summons in replevin issued in said cause." It is contended by the plaintiff that these assignments have been waived by the defendant both by the filing of his forthcoming bond and by subsequently pleading and going to trial upon the merits, so that they are not open to consideration by us. While there is much conflict in the authorities upon this point, we are of the opinion that this contention must be sustained. In fact, we are committed to the doctrine that after the denial of a motion to set aside the service of the process by which the suit was commenced because there was no legal service upon the defendant, the defendant waives this point by pleading issuably to the declarations and going to trial upon the merits. *Florida Railroad Co.* v. *Gensler,* 14 Fla. 122. It is true that subsequent to this decision the point was again before this court and was left undetermined because only two members thereof participated therein. Mr. Chief Justice Maxwell held, as is set forth in the first headnote in *Stephens* v. *Bradley,* 24 Fla. 201, 3 South Rep. 415: "If after special appearance to set aside service of summons, the court refusing to set it aside, the defendant appears to defend the action, he will be considered to have waived the defect of service." Mr. Justice Raney refused to concur therein for the reasons stated in his opinion. We think that Mr. Chief Justice Maxwell was right, and hereby copy with approval the following excerpt from his opinion:

"The first error assigned is against the action of the court in overruling the motion 'to quash the writ and in sustaining the serv-

ice.' We find in the record no motion to quash the writ, but only to 'quash the service of the writ', and as to that it is needless to specify the grounds of the motion, as the error, if there was one, was cured under the rule adopted in this state, by the conduct of the defendants in afterwards appearing to demur and file pleas. *Florida Railroad Company* v. *Gensler et al.*, 14 Fla. 123. The statute which authorizes a party to plead over after his demurrer has been overruled, without being deemed to have waived the benefit of his demurrer on appeal to this court, has no application to a case where a party, notwithstanding defective process or defective service, of process, waives his objections, whether overruled by the court or not, by appearing generally to defend the suit."

We are strengthened in the correctness of this conclusion by the vigorous and well reasoned opinion rendered by Mr. Justice Marshall in *Corbett* v. *Physicians' Casualty Association*, 135 Wis. 505, 115 N. W. Rep. 365, 16 L. R. A. (N. S.) 177. The authorities upon each side of the question will be found collected in the case note to this opinion on page 155 of 16 L. R. A. (N. S.). One of the latest and most strongly reasoned opinions on the other side of the question is that of Mr. Justice Poffenbarger in *Fisher* v. *Crowley*, 57 W. Va. 312, 50 S. E. Rep. 422, 4 Ann. Cas. 282, the effect of which is weakened, however, by the forcible dissenting opinion rendered by Mr. Justice Sanders. A valuable case note will also be found on page 290 of 4 Ann. Cas. Even if we should hold that the court erred in the denial of the motion, as to which we express no opinion, and should for that reason reverse the judgment, the defendant would then be in court. See *Busard* v. *Houston*, 65 Fla. 479, 62 South. Rep. 483, following prior decisions in holding that "A writ of error from what purports to be a final judgment of a circuit court operates as a general appearance in the case of parties taking the writ." Having reached this conclusion, it becomes unnecessary to determine whether or not the filing of a forthcoming bond by the defendant in an action of replevin constitutes a general appearance. Upon this point also the authorities are in conflict. See *Fowler* v. *Fowler*, 15 Okla. 529, 82 Pac. Rep. 923; *Cheatham* v. *Morrison*, 37 S. C. 187, 15 S. E. Rep. 924; *Morrow* v. *Nowell-Shapleigh Hardware Co.*, 165 Ala. 331, 51 South. Rep. 766.

Affirmed.[14]

---

[14] Accord: *Lampley* v. *Beavers*, 25 Ala. 534 (1854); *Pry* v. *Hannibal R. Co.*, 73 Mo. 123 (1880); *Lycoming F. S. Co.* v. *Storrs*, 97 Pa. 354 (1881); *Dailey* v. *Kennedy*, 64 Mich. 208, 31 N. W. 125 (1887); *Sealy* v. *Cal. Lum. Co.*, 19 Ore. 94, 24 Pac. 197 (1890); *Ruby C. M. Co.* v. *Gurley*, 17 Colo. 199, 29 Pac. 668 (1892); *Thompson* v. *Greer*, 62 Kans. 522, 64 Pac. 48 (1901); *Franklin L. I. Co.* v. *Hickson*, 197 Ill. 117, 64 N. E. 248 (1902); *Corbett* v. *Casualty Assn.*, 135 Wis. 505 (1908); *McCullough* v. *Railway Mail Assn.*, 225 Pa. 118 (1909); *Farmers L. & T. Co.* v. *Joseph*, 86 Nebr. 256 (1910); *Neff* v. *Alvin*, 181 Ill. App. 41 (1913); *Woodhouse* v. *Nelson Land Co.*, 91 Kans. 823 (1914). Contra: *Kent* v. *West*, 50 Cal. 185 (1875); *Walling* v. *Beers*, 120 Mass. 548 (1876); *Harkness* v. *Hyde*, 98 U. S. 476, 25 L. ed. 237 (1878); *Southern P. R. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 942 (1892); *Baird* v. *Helfer*, 12 App. Div. (N. Y.) 23, 42 N. Y. S. 484 (1896); *Chandler* v. *Citizens Nat. Bk.*, 149 Ind. 601, 49 N. E. 579 (1897); *Graham* v. *O'Bryan*, 120

CHARLES C. WETZEL *v.* COUNTY OF HANCOCK.

APPELLATE COURT OF ILLINOIS, 1908.

143 *Ill. App.* 178.

RAMSAY, J.: Plaintiff in error brought suit against defendant in error before a justice of the peace in Hancock County to recover for services alleged to have been performed by plaintiff in error for the defendant in error. Summons was served upon the county board and on return day George V. Helfrich, the state's attorney for said county appeared on behalf of the county. Upon a trial of the cause before the justice of the peace and after all the evidence upon the part of plaintiff in error had been heard, the defendant in error, by its attorney, entered a motion to dismiss the case for want of jurisdiction upon the part of the justice of the peace. This motion the court overruled and rendered judgment in favor of plaintiff in error in the sum of $141 and costs. An appeal was prayed by defendant in error to the circuit court of said county, which was allowed without bond.

In the circuit court plaintiff in error made a motion to dismiss the appeal for want of an appeal bond, and defendant in error renewed its motion made before the justice of the peace to dismiss the suit for want of jurisdiction. The trial court denied the former motion and allowed the latter and dismissed the suit for want of jurisdiction of subject-matter. Exception was taken of the action of the court and the case brought to this court upon a writ of error.[15]

Plaintiff in error next contends that the justice of the peace had jurisdiction of the subject-matter involved and that the trial court erred in dismissing the suit. Section 31 of chapter 34 of the Revised Statutes provides that: "All actions, local or transitory, against any county may be commenced and prosecuted to final judgment in the circuit court or any court of general jurisdiction in the county against which the action is brought." The word "may" in this section has been held by our Supreme Court to mean "must." *Randolph County* v. *Ralls,* 18 Ill. 29.

Since, under said section 31 above quoted, all suits against counties must be brought in the circuit court or a court of general jurisdiction in the county, it follows as a matter of course that a justice of the peace has no jurisdiction of the subject-matter in a suit in

---

N. Car. 463, 27 S. E. 122 (1897); *Fisher* v. *Crowley,* 57 Ind. 312, 50 S. E. 422 (1905). See also, *Gahm* v. *Wallace,* 206 Mass. 39 (1910); *Meyers* v. *American L. Co.,* 201 N. Y. 163 (1911); *Franklyn* v. *Taylor H. Co.,* 68 N. J. L. 113 (1902); *Big Vein Coal Co.* v. *Read,* 229 U. S. 31 (1913). For England see *Keymer* v. *Reddy,* L. R. (1912) 1 K. B. 215.

A special appearance without more does not, as a rule, give jurisdiction of the person. 3 Cyc. 527 and the cases there cited. In Iowa, Kentucky and Texas by statute a special appearance is an appearance for all purposes. See *York* v. *Texas,* 137 U. S. 15, 34 L. ed. 604 (1890); *Maysville R. Co.* v. *Ball,* 108, 241, 21 Ky. L. 1693, 56 S. W. 188 (1900); *Teller* v. *Equitable M. Assn.,* 108 Iowa 17, 78 N. W. 674 (1899).

[15] Part of the opinion dealing with another point is omitted.

which a county is a defendant, and as the justice of the peace in the case at bar had no jurisdiction of the subject-matter it could not be given him by an appearance of the defendant, nor even by its consent. *Leigh* v. *Mason*, 1 Scam. 249; *Beesman* v. *City of Peoria*, 16 Ill. 488; *Williams* v. *Blankenship*, 12 Ill. 121; *Highway Commissioners* v. *Smith*, 217 Ill. 260.

In *Peak* v. *The People*, 71 Ill. 278, the court say that "consent of the parties can not confer jurisdiction upon a court in which the law has not vested it."

The justice of the peace had no jurisdiction of the subject-matter and the circuit court could, upon an appeal, acquire no jurisdiction to try the case. *Dodge* v. *The People*, 113 Ill. 496; *Nigh* v. *Dovel*, 84 Ill. App. 228.

Plaintiff in error cites many cases in support of his contention that an appearance by appellee can be held to give the court jurisdiction, but an examination of those cases shows that the jurisdiction there discussed was a jurisdiction of the person and not a jurisdiction of the subject-matter.

Where a court has jurisdiction of the subject-matter a party may confer jurisdiction of his person by an entry of appearance, but when the court has no power to hear and determine the subject-matter involved, the question of jurisdiction is not waived by an appearance, but may be suggested at any time and in any manner that properly calls the attention of the court to that fact. *Nigh* v. *Dovel*, 84 Ill. App. 228; *Town of Audubon* v. *Hand*, 223 Ill. 367.

The action of the trial court in dismissing the suit was proper and the judgment is accordingly affirmed.[16]

---

[16] "Appearance never confers jurisdiction, where the subject-matter is not within the jurisdiction of the court." Per Adams, C. J., in *Hynds* v. *Fay*, 70 Iowa 433, 30 N. W. 683 (1886). Accord: *Low* v. *Rice*, 8 Johns. (N. Y.) 409 (1811); *Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120 (1829); *Rhode Island* v. *Massachusetts*, 12 Pet. (N. S.) 657, 9 L. ed. 1233 (1838); *Osgood* v. *Thurston*, 23 Pick. (Mass.) 110 (1839); *Brown* v. *Webber*, 60 Mass. 560 (1850); *Brown Bros. & Co.* v. *Bank of Mississippi*, 31 Miss. 454 (1856); *Ind. & C. R. Co.* v. *Renner*, 17 Ind. 135 (1861); *White* v. *Hampton*, 14 Iowa 66 (1862); *Rahilly* v. *Lane*, 15 Minn. 447 (1870); *Wheelock* v. *Lee*, 74 N. Y. 495 (1878); *Pine Saw Logs* v. *Sias*, 43 Mich. 356, 5 N. W. 414 (1880); *Ervin* v. *Oregon R. Co.*, 62 How. Pr. (N. Y.) 490 (1882); *The Monte A*, 12 Fed. 331 (1882); *Sunier* v. *Miller*, 105 Ind. 393, 4 N. E. 867 (1885); *The Norma*, 32 Fed. 411 (1887); *The Berkeley*, 58 Fed. 920 (1893); *State* v. *Manitowoc*, 92 Wis. 546, 66 N. W. 702 (1896); *Butterick* v. *Richardson*, 39 Ore. 246, 64 Pac. 390 (1901); *English* v. *English*, 19 Pa. Super. Ct. 586 (1902); *Nixon* v. *Piedmont Mut. Ins. Co.*, 74 S. Car. 438 (1906); *Murphy* v. *People*, 221 Ill. 127 (1906); *Riley* v. *Southern R. Co.*, 81 S. Car. 387 (1908); *West Cove G. Co.* v. *Bartley*, 105 Maine 293 (1909); *Reid* v. *Reid*, 72 Misc. (N. Y.) 214 (1911); *Lewisburg Bridge Co.* v. *Union County, etc.*, 232 Pa. 255 (1911); *Wolf* v. *McGaugh*, 175 Ala. 299 (1912); *St. Louis* v. *Glasgow*, 254 Mo. 262 (1913).

(c) Statement of Plaintiff's Claim.

KING *v.* WILMINGTON AND NEW CASTLE ELECTRIC RAILWAY COMPANY.

SUPERIOR COURT OF DELAWARE, 1898.

1 *Pennew.* (*Del.*) 452.

Superior Court, New Castle County, November Term, 1898.

LORE, C. J.: The plaintiff's declaration contains four counts for injuries, alleged to have been received by him, by having been thrown from one of the defendant's electric railroad cars, through the carelessness and negligence of the defendant.

The defendant demurs specially to each of the four counts of the plaintiff's declaration.[17]

The substance of the demurrer is, that the plaintiff has not set forth in his declaration the facts of his claim with sufficient certainty to apprise the defendant of what is intended to be proved.

The rule of pleading in cases of this character is quite clear. The plaintiff must set forth in his declaration the facts of his claim, with such certainty as reasonably to inform the defendant what is proposed to be proved in the case; so that the defendant may have a fair opportunity to meet such facts in preparing his defence.

It is the purpose of pleading to reasonably and fairly disclose the facts of the case and not to conceal them. Pleadings should not be used as the means of concealing the facts by vague and general terms. Time, place and circumstances, so far as relied on and within the knowledge of the party, must be specified; and that, too, with reasonable fullness and fairness. Any other rule would make pleading the medium of concealing the facts of the case, except so far as might be necessary to bring it within the least possible legal certainty.

Chitty epitomizes the rule in this definition: "A declaration is the specification in methodical and legal form of the circumstances which constitute plaintiff's cause of action." 2 Chitty's Pleading 240.

It is not sufficient to state a mere conclusion of law.

It is not sufficient to state the result or conclusion of fact, arising from circumstances of the case not set forth in the declaration.

While some Western states have adopted a different rule, yet by the best considered cases, it is not sufficient merely to allege generally the negligence and carelessness of the defendant, without giving any particulars of such negligence, even in the case of passengers.[18]

---

[17] Part of the opinion is omitted.

[18] *Bolin* v. *Southern R. Co.*, 65 S. Car. 222 (1902); *Wilkins* v. *Standard Oil Co.*, 70 N. J. L. 449 (1904); *Norfolk & W. R. Co.* v. *Stegall*, 105 Va. 538 (1906); *Cumberland T. & T. Co.* v. *Pierson*, 170 Ind. 543 (1908). Compare: *Greinke* v. *Chicago C. R. Co.*, 234 Ill. 564 (1908); *Gresh* v. *Wanamaker*, 221 Pa. 28 (1908). A general averment of negligence is good against a general demurrer. *Chicago* v. *Schwab*, 202 Ill. 545 (1903), but not against a special demurrer, *Palmer Brick Co.* v. *Chenall*, 119 Ga. 837 (1904).

In the statement of facts in pleadings, Chitty announces a rule which practically solves this case. "A general statement of facts, which admits of almost any proof to sustain it is objectionable." 2 Chitty's Pleading 231.

Applying these rules to the declaration in this case, we find that the second, third and fourth counts are sufficient.

The second count charges the defendant with "so negligently and carelessly omitting and neglecting to use proper care and caution in running one of its cars wherein the said plaintiff was then and there a passenger for hire, that said car ran from the rail with great force and violence," whereby the plaintiff was thrown out and injured.

The third charges the defendant with "negligently and carelessly running two cars, upon one of which the said plaintiff was then riding as a passenger for hire, upon a certain track, which was then and there through the negligence and carelessness of the said defendant improper and unsafe," whereby the car was thrown from the track and the plaintiff thereby thrown to the ground and injured.

The fourth count charges the defendant with "so negligently and carelessly running a certain car in which the plaintiff was then and there a passenger for hire and was then riding, that the said car jumped from the track," thereby causing the injury.

While the facts set forth in these three counts are meagre, yet they are sufficient in law, inasmuch as they specify circumstances relied on; such as the car ran from the rail from the negligent running of the defendant; the car was thrown from the track by reason of an improper and unsafe track; that the car jumped from the track; by reason of the defendant's careless running. These specifications direct the defendant to the peculiar circumstances which are alleged to have caused the injury.

Applying the same test, the first count in the declaration is manifestly insufficient. It charges the defendant with "so negligently and carelessly operating a certain electric car which it was then and there running for the carriage of persons for hire, that thereby the said plaintiff, who was then and there a passenger on said car, was, through the negligence and carelessness of the said defendant as aforesaid," thrown from the car and injured.

This averment is simply the bald statement, that the defendant so negligently and carelessly operated a car that the plaintiff was thrown from the car and injured. Negligently operating a car, is a very general statement, involving a multitude of possible circumstances of negligence, with not one single fact or circumstance stated; which comes within Chitty's rule of admitting almost any proof to sustain it. It is more in the nature of a statement of a conclusion of fact, and contains none of the elements of good pleading. It gives the defendant no specific fact to meet or defend, but turns him loose among a multitude of possible causes of negligence coming within the term negligently operating a car.

The plaintiff justifies in part that the allegation of negligence is that contained in the form given in 2 Chitty 650. Examination shows

that this count is in marked contrast with the specific statement of fact contained in that form.

We do not mean to say that the plaintiff is always bound to set forth facts or circumstances, the knowledge of which is more properly or peculiarly in the opposite party, or to detail the circumstances minutely; but that such circumstances, as he does know and must have contemplated and relied on when he framed his declaration, and are reasonably necessary for the defendant's information, should be specified with reasonable certainty. To this he is unquestionably held by all the rules of good pleading.

The demurrer therefore to the first count is sustained. The demurrers to the second, third and fourth counts are overruled.[19]

MOORE *v.* HOBBS.

SUPREME COURT OF NORTH CAROLINA, 1878.

79 N. Car. 535.

Civil action tried at Spring Term, 1878, of Chowan Superior Court, before Furches, J.

The plaintiff complains:

1. That the defendants are indebted to him in the sum of $488.70 at eight per cent. interest per annum from the 1st day of December, 1875.

2. That no part of said debt has been paid.

3. Therefore the plaintiff demands judgment against the defendant (for said sum) and costs.

The defendants demur:

Because the facts stated in said complaint are insufficient to constitute a cause of action, in that, it does not contain a plain and concise statement of the facts constituting the plaintiff's cause of action.

The court overruled the demurrer and offered to allow the defendants to answer, which they refuse to do. Thereupon judgment was rendered upon the complaint in favor of the plaintiff for the sum demanded, and the defendants appealed.

READE, J.: "A declaration is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's cause of action." 1 Chitty, Pl. 240. Observe, that it is not to state that there is a cause of action, but the "circumstances" which constitute the cause of action. "The general requisites or qualities of a declara-

[19] "The purpose of a declaration is to inform the defendant of the nature of the demand made upon him. The facts must be stated with sufficient certainty to be understood by the defendant, who has to answer them; by the jury, who have to inquire into their truth; and by the court, which has to render the judgment." *Lane* v. *Seakford*, 106 Va. 93 (1906). See also, *Beardsley* v. *Southmayd*, 14 N. J. L. 534 (1834); *Read* v. *Smith*, 83 Mass. 519 (1861); *Gere* v. *Unger*, 125 Pa. 644, 17 Atl. 511 (1889); *Barr* v. *McGary*, 131 Pa. 401, 19 Atl. 45 (1890); *Bill Posting S. Co* v. *Jerome*, 27 Pa. Super. Ct. 171 (1905); *Cassidy* v. *Richardson*, 74 N. H. 221 (1907); *Stone* v. *Pendleton*, 21 R. I. 332 (1899); *Haines* v. *Rogers*, 73 N. J. L. 51 (1905); *Royal Phosphate Co.* v. *Van Ness*, 53 Fla. 135 (1907).

tion are, * * *; second, that it contain a statement of all the facts necessary in point of law to sustain the action, and no more; third that these circumstances be set forth with certainty and truth." 1 Chitty, Pl. 244. Observe again, that "all the facts are to be set forth. If a declaration in debt be upon simple contract, the consideration must be set forth with the other facts. If it be upon a specialy, the specialty must be set forth, and that imports a consideration. Chitty, Pl. 362, 363. The form of a declaration on simple contract is as follows: A B, the plaintiff in this suit * * * complains of C D, the defendant, in this suit * * * for that, whereas the defendant on — was indebted to the plaintiff in $— for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, etc., or for the price and value of work then done, etc., or for money lent, etc. Arch, N. P. 297. The form of a declaration on specialty is as follows: A B, the plaintiff, etc., complains, etc. Whereas, the defendant, etc., by his certain writing obligatory sealed with his seal, and now shown to the court, etc., acknowledged himself to be held and firmly bound unto the plaintiff in the sum of $—, etc., Arch, N. P. 304. A defect in the declaration appearing on the face of it could be taken advantage of by demurrer.

It is plain therefore that under the former mode of pleading, the declaration in this case is fatally defective. It states a cause of action, viz., indebtedness; but it states not one single "circumstance" or "fact" constituting the cause. But then it is said, "that all the forms of pleading heretofore existing are abolished." C. C. P., sec. 91. True, but still, all form is not abolished, for the same C. C. P., secs. 91, 92, prescribes, "that the complaint shall contain a plain and concise statement of the facts constituting the cause of action without unnecessary repetition, and each material allegation shall be distinctly numbered."

Observe, that in the new, as in the old form, the facts constituting the cause of action must be stated, with this addition in the new over the old, that each material fact shall be separately numbered. The object of the declaration in the old forms was to inform the defendant fully as to the facts, so that he might make his defense both by the proper pleas and by proofs, and that the jury and the court might see what they had to try and to decide. This was not a matter of mere form, but of substance. And there has been no relaxation of the requisite in the new form, and no alteration from the old, except to require the greater particularity of separately numbering every material fact. Why require them to be numbered if they are not required to be stated?

There is not in this case a single fact stated to show whether the complainant is on a simple contract for goods sold and delivered, or for work and labor, or for money lent, or for any like matter, or whether it is upon a bond or other specialty, or whether it be not for some alleged tort.

Reversed and remanded.[20]

[20] Pomeroy's Civil Remedies (4th ed.), § 411, *et seq.; People* v. *Ryder*, 12 N. Y. 433 (1855); *Green* v. *Palmer*, 15 Cal. 411 (1860); *Rogers* v. *Milwaukee*, 13 Wis. 610 (1861); *Cline* v. *Cline*, 3 Ore. 355 (1871); *Wills* v. *Wills*,

PEOPLES NATIONAL BANK *v.* NICKERSON.

SUPREME JUDICIAL COURT OF MAINE, 1910.

106 *Maine* 502.

Real action to recover several tracts of land in Pittsfield, Somerset county. At the return term of the writ, the defendant filed a special demurrer to the declaration. The presiding justice pro forma overruled the demurrer and the defendant excepted.

The declaration in the plaintiff's writ is as follows:

"In a plea of land wherein the plaintiff demands of the defendant a lot of land situated in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Also another lot situated in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Also another lot situated in said Pittsfield and bounded as follows, to wit: (Description omitted in this report.)

"Also another lot of land situate in said Pittsfield and bounded and described as follows, to wit: (Description omitted in this report.)

"Whereof the defendant was seized in fee simple within twenty years last past and whereof the defendant within said time unjustly and without judgment of law disseized the demandant and still unjustly withholds said premises from it and the demandant further avers that the defendant has been in possession of said premises since the 11th day of May, 1908, receiving the rents and profits thereof during all that time which the demandant avers are reasonably worth fifteen dollars ($15.00) per month which it claims to recover in this action."

KING, J.: The sole question presented in this case is whether a declaration in a writ of entry containing in one count several distinct tracts of land is bad for duplicity.

"Duplicity in a declaration consists in joining in one and the same count, different grounds of action, of different natures, or of the same nature, to enforce only a single right of recovery." Gould on Pleading (5th ed.), page 205, sec. 99.[21]

---

34 Ind. 106 (1870); *Louisville & P. C. Co.* v. *Murphy*, 9 Bush (Ky.) 522 (1872); *Yorn* v. *Bracken*, 153 Ind. 492 (1899); *Phelan* v. *Vestner*, 125 Ga. 825 (1906); *Kiblinger Co.* v. *Sauk Bank*, 131 Wis. 595 (1907); *Pennington* v. *Gillaspie*, 63 W. Va. 541 (1908); *Levering* v. *Webb P. Co.*, 106 Minn. 62 (1908); *Smythe* v. *Cleary*, 127 App. Div. (N. Y.) 555 (1908); *Rushin* v. *Central Georgia R. Co.*, 128 Ga. 726 (1907).

The New York Code of Civ. Pro., § 481, provides: "The complaint must contain: (1) the title of the action, specifying the name of the court in which the action is brought; if it is brought in the Supreme Court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant. (2) A plain and concise statement of the facts constituting each cause of action without unnecessary repetition. (3) A demand of the judgment to which the plaintiff supposes himself entitled.

[21] For example, where several causes of action on different contracts are stated in one count. *Blome* v. *Wahl-Henues Institute*, 150 Ill. App. 164 (1909). So, where a declaration for injury to an employe charged (1) dul-

In Chitty on Pleading (16th ed.), vol. 1, star page 249, it is said: "The plaintiff can not, by the common-law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect to such demand."

Mr. Stephen in his work on Pleading says, page 242, "that the declaration must not, in support of a single demand, allege several matters, by any one of which that demand is sufficiently supported."

The distinction between the combining in one count of several distinct causes of action and duplicity must be kept clearly in mind. That distinction was aptly stated in *Higson* v. *Thompson*, 8 U. C. B. 561, 562, where the court said: "Duplicity in a count consists in supporting the same claim on several distinct grounds, not in laying several injuries in one count."

A declaration, therefore, is not bad for duplicity because more than one cause of action is set forth in one count, provided not more than one independent and sufficient ground or matter is therein alleged in support of a single demand or right of recovery.

In *Platt* v. *Jones*, 59 Maine, page 242, it is said: "It is not quite accurate to say that two causes of action in one count render it double. Several items of account may be very properly embraced in one count, and yet each one of those items might be a good cause of action. So in the case of several trespasses upon the same lot of land."

It will be seen upon examination of the declaration before us that it does not violate the rule against duplicity. The pleader has set forth as his demand, or right of recovery, the right to the possession of four distinct tracts of land; the ground or matter alleged in support of his demand, or right of recovery, is that the defendant has disseized him of those tracts. If the declaration is to be construed as setting forth in one count a separate demand for each of those tracts, rather than a demand for them all combined, there is no duplicity, because there is no allegation of more than one ground relied upon in support of each single demand. In other words, if there is but one demand, or right of recovery, set forth—that is, the demand of the combined tracts then there is but one ground relied upon in support of that demand—the defendant's disseizin; on the other hand, if there is set forth a distinct demand, or right of recovery, for each tract, still there is but one ground relied upon in support of any of those distinct demands—the defendant's disseizin. In neither case would the declaration be bad for duplicity.[22]

Exceptions overruled.[23]

---

ness of circular saw teeth; (2) irregularity in the set of the teeth; (3) failure to instruct plaintiff how to operate the saw. *Ferguson* v. *National Shoemakers*, 108 Maine 189 (1911).

[22] Part of the opinion is omitted.

[23] Accord: *Burgess* v. *Freelove*, 2 Bos. & Pul. 425 (1801); *Den* v. *Snowhill*, 13 N. J. L. 23 (1831); *Main* v. *School District*, 18 Conn. 214 (1846); *Hotchkiss* v. *Butler*, 18 Conn. 287 (1847); *Wilder* v. *McCormick*, 2 Blatch. C. C. 31 (1846); *Fisk* v. *Tank*, 12 Wis. 276 (1860); *Cracraft* v. *Cochran*, 16 Iowa 301 (1864); *Earl* v. *Tupper*, 45 Vt. 275 (1873); *Rice* v. *Coolidge*, 121

GAINESVILLE AND DAHLONEGA ELECTRIC RAILWAY COMPANY *v.* AUSTIN.

SUPREME COURT OF GEORGIA, 1905.

122 *Ga.* 823.

The petition contained three counts. In the first count it was alleged, that the plaintiff was a passenger in one of the electric cars of the defendant, in which no seats were provided, and that he was therefore compelled to stand; that in the center of the car was a post, upon the top of which rested the trolley-pole; that while the car was in motion the conductor negligently caused and allowed the trolley-wheel to get off the wire, and the trolley-pole shot upward; that the trolley-wire began to sag, and the trolley-pole began to strip the guy-wires off the trolley-wire; that the trolley-wire, with its deadly electric current, was thus caused to fall down and among the unprotected passengers on the car; that there was no roof on the car to keep the wire off, and it came in contact with the passengers, shocking them and causing lurid flashes of fire; that the car was running 20 to 30 miles per hour, and the employes in charge of the car took no steps to stop it, or to prevent the electric current from striking the passengers; that the plaintiff was considerably shocked, and the emergency was great, and, being dazed and shocked and in dire extremity, jumped from the car to the ground, and in so doing was seriously injured. Various acts of negligence were charged against the defendants. The third count contained allegations similar to those of the first count, except that it was averred that by the falling of the wire the plaintiff was "thrown and hurled" from the car. The defendant demurred to each count on various grounds, to the petition generally on the ground that it is contradictory and uncertain, and to the third count on the ground that it contradicts the first and second counts. The court struck the second count, and overruled the demurrer as to the remainder of the petition. The defendant excepted.

COBB, J.: The special demurrer was designed to raise objection that the first and third counts contained contradictory allegations as to the manner in which the injury complained of occurred; and the question is presented whether this practice is allowable in this state. The rules of the common-law pleading permitted the bringing of one suit founded upon several causes of action of a similar nature,

---

Mass. 393 (1876); *Fulmer* v. *Comm.*, 97 Pa. 503 (1881); *Devino* v. *Central Vt. R. Co.*, 63 Vt. 98 (1890); *Oliver* v. *Perkins*, 92 Mich. 304 (1892); *State* v. *Warren*, 77 Md. 121 (1893); *Waterman Co.* v. *Waterman*, 40 App. Div. (N. Y.) 530 (1899). Otherwise where two or more distinct primary rights are sought to be enforced or two or more distinct wrongs redressed. *English* v. *Purser*, 6 East 395 (1805); *Handy* v. *Chatfield*, 23 Wend. (N. Y.) 35 (1840); *Swinney* v. *Nave*, 22 Ind. 178 (1864); *Overbagh* v. *Oathout*, 90 Hun (N. Y.) 506 (1895); *Alabama G. S. R. Co.* v. *Shahan*, 116 Ala. 302 (1896); *Gore* v. *Condon*, 87 Md. 368 (1898); *Southern R. Co.* v. *Hanby*, 166 Ala. 641 (1910). See also *Secor* v. *Sturgis*, 16 N. Y. 548 (1858) at p. 558.

provided such causes of action were set forth in separate and distinct counts. A declaration which contained one count and set forth two or more causes of action therein was bad for duplicity, but a declaration which contained two or more distinct counts upon separate causes did not violate the rule against duplicity. If the declaration contained more than one count, and the transaction set forth was exactly the same in each, the pleading was bad, and the surplus counts would be stricken therefrom, and in some cases the cost would be placed upon the attorney responsible for the surplusage. But if the counts differed in any substantial particular from each other, each was allowed to stand, upon a fiction that each was a different cause of action. The rule permitting various counts setting forth different causes of action of a similar nature gave rise to the practice of the pleaders in setting forth one cause of action in various ways in different counts, in order to meet the probable variations in proof that might occur at the trial. While as matter of fact there may have been only one transaction, a declaration containing several counts would be allowed to stand where there was any material difference in the way in which the details of the transaction was set forth; the declaration on its face thus appearing to be upon several causes of action, and therefore within the rule above referred to. See Gould on Pleading, 164, 208; Stephen on Pleading (Heard), 266; 1 Chitty on Pleading, 424; Phillips on Code Pl., secs. 124, 206; 5 Encyc., P. & P. 319 (11).[24] The common-law practice of allowing two or more causes of action of a similar nature to be joined in the same declaration has been incorporated into the code of this state. The rule allowing several counts was substantially and materially changed by the rules of practice adopted in England in 1833, under which two or more counts were generally not permissible where it was apparent that they were based upon the same transaction. See 1 Chitty, Pl. 749; Stephen, Pl. (Heard) 277. The reason given for the abolition of several counts by the English rules of practice of 1833 was that the right to amend had been greatly enlarged, and there was therefore no longer any necessity for stating the cause of action in various ways.[25] Under the present law of this state the right of amendment is even more liberal than it was in England in 1833, but this does not entirely dispense with the desirable results reached by the use of several counts; for while the plaintiff may amend to adjust his pleading to the evidence, the amendment may be of such a character as to cause surprise to the opposite party and work a postponement of the case, and several counts can be well

[24] *Nelson v. Griffiths*, 2 Bingh. 412 (1824); *Frazer* v. *Shaw*, 7 Dowl. & R. 383 (1825); *Little* v. *Blunt*, 30 Mass. 473 (1833); *Cole* v. *Sprowl*, 35 Maine 161 (1852); *Blauregard* v. *Webb Granite Co.*, 160 Mass. 201 (1893); *Winters* v. *Mowrer*, 1 Pa. Super. Ct. 47 (1895); *Rawlinson* v. *Shaw*, 117 Mich. 5 (1898); *Farquhar* v. *Farquhar*, 194 Mass. 400 (1907).

[25] In England the rules of the Supreme Court, order 19, rule 4, now provide: "Every pleading shall contain and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively."

used to avoid the probability of delay which would result from the use of one when the evidence varies from the allegations and makes an amendment necessary. The changes made by the English rules of practice of 1833 have never been adopted by the General Assembly or by the judges as rules of practice in this state; and a plaintiff may in different counts set forth the same cause of action in various ways.

When the first and third counts in the petition are tested by the prevailing rules of practice in this state, it will appear that there is at least one substantial difference between the two. In the first count it is alleged that the plaintiff "jumped" from the car, and in the third count that he was "thrown and hurled" from the car. While each count sets forth a cause of action having for its basis apparently the same transaction, the causes of action in the two counts are not the same, and in determining liability different proof would be required and different rules of law would be applicable. In *Pitts* v. *Smith*, 108 Ga. 37, and *Seifret* v. *Sheppard*, 111 Ga. 814, the petitions were held bad for duplicity, for the reason that one count dealt apparently with two separate and distinct causes of action. See, in this connection, *Orr* v. *Cooledge*, 117 Ga. 206. The first and third counts set forth a cause of action, and there was no error in overruling the demurrer to these counts. See *Mannon* v. *Ry. Co.* (W. Va.), 49 S. E. 450.

Judgment affirmed.[26]

HITCHCOCK *v.* MUNGER.

SUPREME COURT OF NEW HAMPSHIRE, 1844.

15 *N. H.* 97.

Debt, qui tam, under the statute against usury.

The first count alleged that on the 26th day of February, 1839, one Samuel Richardson made his promissory note to the defendant, for the sum of three hundred dollars, upon which note there were three indorsements, the dates of which were specified in the count, and that afterwards, on the 8th day of April, 1841, Richardson and the defendant made a corrupt agreement, by virtue of which Richardson paid the defendant the sum of fifteen dollars, for forbear-

---

[26] Pomeroy's Civil Remedies (4th ed.), § 467. Under the codes it is generally held that where a plaintiff has two or more grounds upon which he may have a single cause of action, and there is some uncertainty as to which he would be able to establish at the trial, he may set forth his claim in different counts so as to include each and every ground he may have for recovery. *Whitney* v. *Railway Co.*, 27 Wis. 327 (1870); *Pearson* v. *Milwaukee & St. P. R. Co.*, 45 Iowa 497 (1877); *Wilson* v. *Smith*, 61 Cal. 209 (1882); *Oberndorfer* v. *Moyer*, 30 Utah 325 (1906). Compare: *Ferguson* v. *Gilbert*, 16 Ohio St. 88 (1865); *Penn M. L. T. Co.* v. *Conoughy*, 54 Nebr. 123 (1898); *Craft R. M. Co.* v. *Quinnipiac B. Co.*, 63 Conn. 551 (1893).

But where the complaint sets out two or more distinct causes of action, the statement of the facts constituting each cause must be separate and numbered. N. Y. Code of Civ. Pro., § 483; *Powers* v. *Sherin*, 89 App. Div. (N.

ance and giving day of payment of the sum due on the note, over and above the rate of six per cent., contrary to the form of the statute, etc., by reason whereof the defendant forfeited the sum of forty-five dollars, being three times the amount of the usury; one-half to the use of the county, and one-half to the use of the plaintiff.

The second count alleged that on the said 26th day of February, 1839, said Richardson gave his other promissory note to the defendant, of like date and amount, and payable in the same manner, at the rate before mentioned, upon which note were payments made by the said Richardson similar to those upon the note first described. The corrupt agreement, etc., was then stated, as in the first count.

After verdict for the plaintiff the defendant moved in arrest of judgment, on account of the insufficiency of the second count in the declaration.[27]

GILCHRIST, J.: Where there are several counts in a declaration, whether the subjects of them be really distinct, or identical, they must always purport to be founded on distinct causes of action, and not to refer to the same matter. Stephen on Pleading (2d ed.), 318, 319. This is rendered necessary by the rule against duplicity, the object of which is to ensure the production of a single issue upon the same subject-matter in dispute. 1 Ch. Pl. 259. This rule, though evaded as to the declaration, by the use of several counts, is not permitted to be directly violated. Where there are several counts, they are for all purposes as distinct as if they were in different declarations, and they must severally contain all necessary allegations. But a party has a common law right to introduce several counts into his declaration, in fact for the same subject-matter of complaint, and varying from the first count only in statement, description, or circumstances. 1 Ch. Pl. 451.[27a]

In *Barnes* v. *May*, *Cro. Eliz.* 240, a demand in assumpsit for wool sold, was alleged to have been made "at such a day and place." The second count contained an averment, *licet similiter requisitus*,

---

Y.) 37 (1903); *Paul* v. *Ford*, 117 App. Div. (N. Y.) 151 (1907); *New* v. *Smith*, 73 Kans. 174 (1906); *Yazoo & M. V. R. Co.* v. *Wallace*, 90 Miss. 609 (1907); *Casey* v. *St. Louis Transit Co.*, 205 Mo. 721 (1907).

Where a complaint shows double statements of the same cause of action or different grounds of recovery for the same right in one count the plaintiff has, in some cases, been required to elect upon which ground he will proceed. *Harvey* v. *Southern Pacific Co.*, 46 Ore. 505 (1905); *McHugh* v. *St. Louis Transit Co.*, 190 Mo. 85 (1905).

[27] The statement of facts is abridged and the arguments of counsel and part of the opinion are omitted.

[27a] When separate counts are used either in a common-law declaration or a code complaint, each is a complete cause of action, as distinct from the others as if it stood alone. *Leabo* v. *Detrick*, 18 Ind. 414 (1862); *Simmons* v. *Fairchild*, 42 Barb. (N. Y.) 404 (1854); *Clark* v. *Whittaker Iron Co.*, 9 Mo. App. 446 (1881); *Bailey* v. *Mosher*, 63 Fed. 488 (1894); *McLellan* v. *Assiniboia*, 5 Manitoba 127 (1888); *Hopkins* v. *Contra C. Co.*, 106 Cal. 566 (1895); *Cooper* v. *Portner B. Co.*, 112 Ga. 894 (1900); *Gilmore* v. *Christ Hospital*, 68 N. J. L. 47 (1902). Matters of *inducement* and not of the *gravamen* of the action stated in the first count of the complaint, need not and should not be repeated, but merely referred to in the subsequent counts. *Abendroth* v. *Boardley*, 27 Wis. 555 (1871); *Aull Savings Bank* v. *Lexington*, 74 Mo. 404 (1881).

without alleging day and place, and it was adjudged good. In assumpsit for the defendant's board for 120 weeks, the count alleged the price to be 7s. per week. The second count was upon *quantum meruit;* and after verdict for the plaintiff, it was moved in arrest of the judgment, because the weeks in the *quantum meruit* were not laid to be *alia* than those in the special promise, *sed non allocatur;* for they do not appear necessarily to be the same, and without necessity the court will not intend them so. Bac. Abr., Pleas and Pleadings, B, 1. In *Tindall* v. *Moore,* 2 Wis. 114, the action was slander upon several sets of words spoken by the defendant of the plaintiff. The first set charged the plaintiff with setting a certain house on fire. In the fifth set he said that the plaintiff "set the house on fire," (meaning the same house). After verdict for the plaintiff, it was moved in arrest, that the latter set of words were not actionable, and the innuendo could not relate to the house mentioned in the first set of words. But it was held that though the latter set of words were not in themselves actionable, they should have relation to the former set. In *Phillips* v. *Fielding,* 2 H. Bl. 123, which was assumpsit for the nonperformance of a special agreement, the first count set forth certain conditions of sale, and it was held that the other counts might have referred generally to those conditions without repeating them. Gould, J., said that he remembered an indictment for forgery, in which there were three counts for the forgery, and three for the utterance. In the first count, the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised that the remaining counts described him as "the said A B," by reference to the first; but all the judges held that the description was good, and that the latter counts might refer to the former. In *Stiles* v. *Nokes,* 7 East 493, Mr. Justice Lawrence says that a general reference to former parts of the record may be sufficient in pleading, without repeating the whole of such parts, where it is a reference to something certain. In a second count upon a deed or agreement, it is proper to aver that a certain other deed or agreement was made between the parties containing the like terms and stipulations as are contained in the deed set forth in the first count. 1 Ch. Pl. 450, note, (h).

The second count in the declaration before us refers to the first count with as much particularity as the law and authorities require. We are of opinion that it is sufficient, and that the motion in arrest of judgment should be overruled.

Judgment on the verdict.[28]

---

[28] Accord: *Dorr* v. *McKinney,* 91 Mass. 359 (1864); *Haskell* v. *Haskell,* 54 Cal. 262 (1880); *Bricker* v. *Missouri P. R. Co.,* 83 Mo. 391 (1884); *St. Louis G. L. Co.* v. *St. Louis,* 86 Mo. 495 (1885); *Treweek* v. *Howard,* 105 Cal. 434 (1895); *Fellows* v. *Chipman,* 26 R. I. 196 (1904); *Wolf* v. *Smith,* 149 Ala. 457 (1906); *Marietta* v. *Cleveland, C. C. & St. L. R. Co.,* 52 Misc. (N. Y.) 16 (1906); *Realty Co.* v. *Farm Stock & H. R. Co.,* 79 Minn. 465 (1900). Contra: *Potter* v. *Earnest,* 45 Ind. 416 (1873). And a reference to be deemed sufficient must be clear and explicit. *Opdycke* v. *Easton & Amboy R. R. Co.,* 68 N. J. L. 12 (1902); *Taylor* v. *New Jersey T. G. & T. Co.,* 70 N. J. L. 24 (1903).

BULL *v.* MATHEWS.

SUPREME COURT OF RHODE ISLAND, 1897.

20 *R. I.* 100.

Trespass on the case for trover and conversion, joining counts in assumpsit. Heard on defendant's motion in arrest of judgment.

TILLINGHAST, J.: This is a motion in arrest of judgment on the ground of a misjoinder of causes of action. The action is trespass on the case for trover and conversion, and the declaration contains a count in trover and conversion, and also the ordinary counts in assumpsit. At the trial of the case in the district court a decision was rendered in favor of the plaintiff for $19.10 and costs; but there is nothing in the record to show whether the judgment was based on the count in trover and conversion, or on those in assumpsit. No plea was filed in the case, but as the defendant entered an appearance the general issue is deemed to be filed. Gen. Laws R. I., ch. 237, sec. 3. But whether, in this case, the general issue as to the count in trover, which would be not guilty, or as to the counts in assumpsit, which would be non assumpsit, is in, we have no means of determining. Within five days after the rendition of said decision the defendant filed his motion in arrest of judgment in the district court, whereupon the case was certified to this court.

It is a familiar rule of common-law pleading that counts sounding in tort can not properly be joined with counts sounding in contract, and also that such misjoinder is fatal, not only on demurrer, but also on motion in arrest of judgment. Encyc. Pl. & Pr., vol. 2, p. 803, and cases cited; *Haskell* v. *Bowen,* 44 Vt. 579. The effect of such misjoinder is clearly expressed in Chit. Pl. 9 Am. ed. 206, as follows: "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for in case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on demurrer or in arrest of judgment, or upon error." See also Gould's Pl., ch. 4, sec. 87, and cases cited.

The ordinary test for determining whether different causes of action may be joined is to inquire whether the same plea may be pleaded and the same judgment given on all the counts of the declaration; and unless this question can be answered in the affirmative the counts can not be joined. See *Drury* v. *Merrill,* 20 R. I. 2. See also *Court of Probate* v. *Sprague,* 3 R. I. 205.

Applying this test to the case at bar, it will at once be seen that there is a fatal misjoinder. If the pleader in this case had simply omitted to strike out the money counts which are printed in the writ, perhaps we might disregard them; but as he has filled them out in the ordinary way where the case is assumpsit, we feel bound to presume that he intended to rely thereon, as well as on the count in trover.

It is true that, since the case was certified to this court, the plaintiff's counsel has filed an affidavit setting forth that by reason of mistake and oversight he neglected to strike out the money counts,

and also that at the trial in the district court the evidence introduced was confined to the count in trover, which was the only count relied on. But as a motion in arrest of judgment raises only those objections which are apparent upon the record; (*State* v. *Paul,* 5 R. I. 189; Black on Judgments, vol. 1, sec. 96-8;) and as the affidavit forms no part of the record, we are not at liberty to consider it.

Judgment arrested.[29]

NEW YORK CODE OF CIVIL PROCEDURE, SEC. 484.

The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for withholding thereof. (See sec. 1496.)
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof. (See sec. 1689.)
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section. (See sec. 1815.)
10. For penalties incurred under the forest, fish and game law.
11. For penalties incurred under the agricultural law.
12. For penalties incurred under the public health law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.[30]

[29] At the common law, a cause of action arising *ex contractu* can not be joined with a cause of action arising *ex delicto. Brown* v. *Dixon,* 1 Term Rep. 274 (1786); *Corbett* v. *Packington,* 6 Barn. & C. 268 (1827); *Howe* v. *Cook,* 21 Wend. (N. Y.) 29 (1839); *McNair* v. *Compton,* 35 Pa. 23 (1859); *McDermott* v. *Morris Canal & B. Co.,* 38 N. J. L. 53 (1875); *N. & W. R. Co.* v. *Wysor,* 82 Va. 250 (1886); *Wilkins* v. *Standard Oil Co.,* 71 N. J. L. 399 (1904).

Where the plaintiff waives the tort, there is no misjoinder of counts where one count alleges failure of consideration in a contract and the other alleges a right to rescind the contract by reason of false representations which induced it. *Whitney* v. *Haskell,* 216 Pa. 622 (1907). Accord: *Logan* v. *Wallis,* 76 N. Car. 416 (1876); *Campbell* v. *Wright,* 21 How. Pr. (N. Y.) 9 (1860).

[30] See Pomeroy's Code Remedies (4th ed.), § 437 et seq.; California Code Civil Procedure, § 427.

GEORGE DERBY WHITE *v.* IMPROVED PROPERTY HOLDING COMPANY.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1910.

140 *App. Div.* (*N. Y.*) 529.

Appeal by the defendant, the Improved Property Holding Company of New York, a corporation, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of June, 1910, upon the decision of the court, rendered after a trial at the New York special term, overruling the defendant's demurrer to the amended complaint.

LAUGHLIN, J.: The first ground of demurrer is that an action for breach of contract is joined with an action for the conversion of personal property, and that such causes of action are not consistent with each other, and do not fall within any of the subdivisions of section 484 of the Code of Civil Procedure.

I am of the opinion that the demurrer was well taken. It is evident that the plaintiff has attempted to set forth two causes of action separately numbered and stated to recover the same amount of damages on two different theories; but it does not necessarily follow that the causes of action may be joined in one complaint. In the first cause of action it is alleged that defendant leased to the plaintiff certain rooms in the 320-322 Fifth avenue building; and that between the 5th day of March and the 1st day of April, 1909, the defendant "unlawfully and wrongfully took and converted" certain personal property of the plaintiff lawfully on the leasehold premises "and disposed of the same to its own use"; whereby the plaintiff sustained damages in the sum of $3,843. In the second cause of action it is alleged that it was provided in the lease that the defendant should cause the premises to be cleaned and cared for and should be responsible for the loss of property "in or from said leased premises caused by the gross negligence" of the janitor or his assistants; that the premises were part of an office building containing freight and passenger elevators which were in charge of the servants of the defendant who had access to the premises; that the defendant, not regarding its duty, "so negligently conducted itself in caring for said premises and property that through the gross negligence and misconduct of the defendant, its servants and agents, and without negligence on the part of the plaintiff, said property was removed from said premises in the absence of the plaintiff, his servants and agents, by some person or persons unknown to the plaintiff, and thereby said property was wholly lost to the plaintiff, to his damage," in said sum of $3,843.

In an action for conversion an order of arrest might be obtained and a body execution issued on the judgment. (Code Civ. Proc. secs. 549, 556, 557.) But no such relief can be had in an action for breach of contract by which personal property has been lost as al-

leged in this complaint. Although this may not be a controlling consideration it is important in determining the legislative intent in construing the provisions of section 484 of the Code of Civil Procedure which specifies the causes of action that may be joined in the same complaint. It is not contended that authority for joining these two causes of action is found in any of the subdivisions of section 484 excepting the 9th. That subdivision in connection with the first sentence of the section provides that the plaintiff may unite in the same complaint two or more causes of action brought to recover, "upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section." By the last paragraph of that section it is further provided that it must appear upon the face of the complaint that all the causes of action, "so united, belong to one of the foregoing subdivisions of this section," and "that they are consistent with each other."

It is quite clear, I think, that the cause of action for the wrongful conversion of personal property by the defendant is not consistent with a cause of action for the breach of an agreement on its part to safeguard the property against loss, whereby through its neglect to perfrom its contract duty the property was removed and appropriated by a third party. If the property was converted by the defendant it surely was not taken by a third party through its neglect to care for it. Conversion implies a wrongful and wilful act on the part of the defendant.

Moreover, I am of the opinion that the claim for conversion and the claim for breach of contract do not arise out of the same transaction or transactions connected with the same subject of action within the scope and meaning of subdivision 9 of section 484 of the Code of Civil Procedure. The "transaction" upon which the cause of action for conversion is based was the conversion. (See *People* v. *Dennison*, 84 N. Y. 272; *Storey* v. *Richardson*, 91 App. Div. 381; affd., 181 N. Y. 584; *Van* v. *Madden*, 132 App. Div. 535; *Deagan* v. *Weeks*, 67 App. Div. 410, and *Heigle* v. *Willis*, 50 Hun 588.) On the other hand the subject of the action for the breach of contract and the transaction upon which it was based are the contract and the facts constituting the breach. (See *Lehmair* v. *Griswold*, 40 N. Y. Super. Ct. 100; *Carpenter* v. *Manhattan Life Ins. Co.*, 93 N. Y. 552, and *Rothschild* v. *Whitman*, 132 N. Y. 472.)

It follows, therefore, I think, that the interlocutory judgment should be reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to serve an amended complaint upon payment of costs in this court and in the court below.[81]

Ingraham, P. J., Scott, Miller and Dowling, JJ., concurred.

---

[81] Accord: *Nichols* v. *Drew*, 94 N. Y. 22 (1883); *Southworth Co.* v. *Lamb*, 82 Mo. 242 (1884); *Henderson* v. *Boyd*, 85 Tenn. 21, 1 S. W. 498 (1886); *Stark* v. *Wellman*, 96 Cal. 400, 31 Pac. 259 (1892); *Commercial Union A. Co.* v. *Shoemaker*, 63 Nebr. 173 (1901); *Kruger* v. *St. Joe Lumbering Co.*, 11 Idaho 504, 83 Pac. 695 (1905); *Drexel* v. *Hollander*, 112 App. Div. (N. Y.) 25 (1906); *Montgomery* v. *Alexander Lumber Co.*, 140 Ga. 51 (1913); *Pridemore* v. *Fife*, 178 Mo. App. 332 (1914). Compare *Devin* v. *Walsh*,

MARTER *v.* HENRY SANCHEZ COMPANY.

SUPREME COURT OF NEW JERSEY, 1908.

77 N. J. L. 95.[82]

TRENCHARD, J.: The plaintiff in this action sues the Henry Sanchez Company, Henry Sanchez and Gumersindo Sanchez.

The action is brought upon a promissory note for $1,000, made by one of the defendants, the Henry Sanchez Company, a corporation of this state, to the plaintiff.

The first count of the declaration charges the company alone with liability.

The second count avers that the company was dissolved under the corporation act of this state; that the two individual defendants were directors of the company, and became trustees for the creditors under the statute; that they have corporate assets of the company in their hands sufficient to pay all outstanding liabilities of the company. On these facts the second count seeks to recover against these two directors alone.

The declaration also contains common counts, under which the plaintiff seeks to hold all three defendants.

The defendant Gumersindo Sanchez demurs upon the ground, among others, that the three counts or causes of action are improperly joined.

We think the demurrer should be sustained.

The plaintiff can not, in one action, assert an independent liability of the corporation in one count, an independent liability of the individual directors of the corporation in another, and the liability of both the corporation and the individual directors in a third count. *Dunn* v. *Pennsylvania Railroad Co.*, 38 Vroom 377.

Such misjoinder of counts affords cause for a general demurrer to the declaration. 1 Chitt. Pl. 202, 205, 665; 2 Saund. 117b; *Drummond* v. *Dorant*, 4 T. R. 360; *Dunn* v. *Pennsylvania Railroad Co.*, *supra*.

The demurrer will be sustained.[83]

---

108 Iowa 428, 79 N. W. 133 (1899); *Maisenbacker* v. *Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. 213 (1899); *Minton* v. *Piano Co.*, 33 App. D. C. 137 (1911); *Hooper* v. *Herring*, 9 Ala. App. 292 (1914); *Birmingham R. L. & P. Co.* v. *Jackson*, 9 Ala. App. 588 (1914). See also *Bowman* v. *Wohlke*, 166 Cal. 121 (1913).

[82] Part of the opinion is omitted.

[83] *Strohecker* v. *Grant*, 16 S. & R. (Pa.) 237 (1827); *Sebring* v. *Keith*, 2 Bailey's S. Car. 192 (1831); *Preston* v. *Davis*, 8 Ark. 167 (1847); *Burns* v. *Williams*, 88 N. Car. 159 (1883); *Sleeper* v. *World's F. B. H. Co.*, 166 Ill. 57 (1897); *Wedgewood Co.* v. *Parr*, 112 Iowa 514 (1900); *Gilmore* v. *Christ Hospital*, 68 N. J. L. 47 (1902); *Cole* v. *Lippit*, 25 R. I. 104 (1903); *Weil* v. *Townsend*, 25 Pa. Super. Ct. 638 (1904).

A demand due plaintiff as surviving partner may be joined in the same action with a demand due him in his own right. *Stafford* v. *Gold*, 9 Pick. (Mass.) 533 (1830); *Adams* v. *Hackett*, 27 N. H. 289 (1853); *Davis* v. *Church*, 1 W. & S. 240 (1841), compare *Mosgrove* v. *Golden*, 101 Pa. 605

COPLESTON *v.* PIPER.

COURT OF COMMON PLEAS, 1697.

1 *Lord Raymond* 191.

Trespass quare clausum necnon mesuagium et tenementum fregit et quandam parcellam hordei asportavit, etc. Upon not guilty pleaded, verdict for the plaintiff, and entire damages given. And last Easter term Gould King's serjeant moved in arrest of judgment; 1. That the word tenementum is too general and uncertain, for it signifies anything that can be holden. But the Powells justices said, that ejectment de uno tenemento is ill for the uncertainty, because in that action the thing itself must be recovered, and tenementum may signify a thing for which ejectment will not lie, as an advowson, etc., but in trespass where damages only are recoverable, the word will serve well enough. But in this case, it being after verdict, they will intend that it signifies the same with mesuagium, and so surplusage, and no damages given for it. To which Treby chief justice agreed. 2. Gould argued, that the declaration was too uncertain, for the jury could not know, for what quantity of barley the plaintiff declared, for the word parcel is very uncertain. And therefore 1 Cro. 865 b. trover for parcella piscium Anglice ling, judgment was arrested for the uncertainty. 5 Co. 34. Playter's case. Besides that, it does not appear, whether this parcel was severed from the ground, or growing upon it; in which cases the defendant must have different pleas, for in the first case he might justify by distress, in the last he must make title to the land. And therefore the plaintiff ought to have declared for so many loads of barley, etc. But as to this the court said, that after verdict they will intend that it was severed from the land. But as to the other exception they said, that this differs from Playter's case; for in that case there was neither quantity nor quality, but here there is quality. And Treby chief justice said, that in the term before, trespass pro tribus struibus foeni, Anglice ricks of hay, was adjudged good after verdict. And Powell junior justice said, that trover pro una parcella fili had been adjudged good in the King's bench; and yet there seems that there was uncertainty in the quantity and quality also, for there are several sorts of thread. See 1 Mod. 295; 1 Ventr. 105. So that they seemed to be of opinion that the principal case was well enough;

(1882); *Richards* v. *Heather*, 1 B. & Ald. 29 (1817). So, a demand against one as a surviving partner may be joined with a demand against him as an individual. *Golding* v. *Vaughan*, 2 Chitty Rep. 436 (1782), S. Car. 18 E. C. L. R. 724. But a count against a firm on a joint demand can not be joined with a count against one of the partners on an individual demand. *Lynch* v. *Thompson*, 61 Miss. 354 (1883); *United States* v. *McCoy*, 54 Fed. 107 (1893).

In England, under the rules of the Supreme Court, order XVIII, rule 1, the plaintiff may unite several causes of action in one action except in actions for the recovery of land and actions by a trustee in bankruptcy, but if it appear to the court that any such causes of action can not be conveniently tried together, separate trials may be ordered. See also New Jersey Practice Act of 1912, § 14.

but upon the importunity of the defendant's counsel it was stayed till the plaintiff should move for his judgment. And now this term Darnall serjeant moved for judgment; and said that it was good, after verdict at least. And he cited Style 199, 75, 224, 353; 2 Cro. 664; Pasch. 1694, *B. R. Etherick* v. *Calendar.* Trover de tribus peciis vini branditati, Anglice brandy wine; the defendant demurred generally; and exception there was taken, that pecia was a very uncertain word; but it was adjudged well enough after verdict. And in the case Holt cited, a case between Brasey and Roe, trover pro quatuor peciis tracti grafetti, Anglice drawn grasett, which was adjudged good after demurrer. But Treby chief justice said, that a piece of stuff was a quantity known to consist of so many yards; but a parcel of barley is no quantity known. And therefore last Michaelmas term in a case between Smith and Theobald, trover de quandum parcella culmi, after verdict judgment was arrested, etc. And in Trin. 22 Car.; 2 B. R.; Rot. 373 trover de quandam parcella fili, it was adjudged ill after verdict. And therefore he thought, that judgment ought to be arrested, and it was arrested, nisi, etc.[84]

[84] While some of the objections on the ground of uncertainty in the older cases may seem fantastically technical, nevertheless, in modern pleading, "the declaration must allege all the circumstances necessary for the support of the action, and contain a full regular and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; and that the jury may be able to give a complete verdict upon the issue, and the court, consistently with rules of law, may give a certain and distinct judgment upon the premises." Per Chapman, J., in *Read* v. *Smith,* 83 Mass. 519 (1861); *Luhrig Coal Co.* v. *Ludlum,* 69 Ohio 311 (1903). See also, *Cutler* v. *Southern,* 1 Saund. 116 (1667); *Camphill* v. *St. John,* 1 Ld. Raym. 20 (1694); *Hartfort* v. *Jones,* 1 Ld. Raym. 588 (1700), Salk. 654; *Martin* v. *Hendrickson,* 2 Ld. Raym. 1007 (1703); *Wyat* v. *Essington,* 2 Ld. Raym. 637 (1725), Str. 637; *Bertie* v. *Pickering,* 4 Burr. 2455 (1769); *King* v. *Pippet,* 1 Term Rep. 235 (1786); *J'Anson* v. *Stuart,* 1 Term Rep. (1786), 1 Sm. L. Ca. 30 and notes; *Drewry* v. *Twiss,* 4 Term Rep. 558 (1792); *Oystead* v. *Shed,* 12 Mass. 505 (1815); *Phillips* v. *Phillips,* L. R. 4 Q. B. Div. 127 (1878); *Gere* v. *Unger,* 125 Pa. 644 (1889); *Giroux A. Co.* v. *White,* 21 Ore. 435 (1891), where the complaint is given in its entirety, not, says the court, "as a pattern to imitate, but as an exemple to deter"; *Chestnut St. N. Bk.* v. *Ellis,* 161 Pa. 241 (1894); *Clark* v. *Lindsay,* 7 Pa. Super. Ct. 43 (1898); *Ferguson* v. *Western U. T. Co.,* 64 N. J. L. 222 (1899); *Busch* v. *Calhoun,* 14 Pa. Super. Ct. 578 (1900); *Logansport* v. *Kihm,* 159 Ind. 68 (1902); *Davis* v. *Smith,* 26 R. I. 129 (1904); *Soule* v. *Weatherby,* 39 Utah 306 (1911). Under the codes uncertainty is usually taken advantage of by motion to make more certain. Gould on pleading (Will's ed.) 367 note; *Hale* v. *Omaha N. Bk.,* 49 N. Y. 626 (1872); *Lockwood* v. *Bridge Co.,* 60 S. Car. 492 (1900); unless so uncertain that the elements of a cause of action are not disclosed, *Phillips* v. *Sonora C. Co.,* 90 App. Div. (N. Y.) 140 (1904); *Chicago & E. R. Co.* v. *Lawrence,* 169 Ind. 319 (1907). At common law indefiniteness and uncertainty are, ordinarily, defects of form and subject to special demurrer, unless the pleading fails to disclose a cause of action. *Race* v. *Easton & A. R. Co.,* 62 N. J. L. 536 (1898); *Emmons* v. *Alvord,* 177 Mass. 466 (1901); *McDonald* v. *Smith,* 139 Mich. 211 (1905).

NEVIL *v.* SOPER.

COURT OF KING'S BENCH, 1698.

Salkeld 213.

In covenant against an apprentice the plaintiff assigned for breach, that the apprentice before the time of his apprenticeship expired, and *durante tempore quo servivit,* departed from his master's service: The defendant demurred, and had judgment, because the declaration was repugnant, for it should have been *durante tempore quo servire debuit.* The case of *Lawly* v. *Arnold,*[35] Hill 8 W. 3 B. R., was not unlike this: That was trespass for taking and carrying away his timber and brick, *super terram suam jacent. ergo confectionem domus de novo aedificat.* And the court held this insensible, for they could not be materials toward the building of a house already built. *Sed Quaere,* if that was not surplusage?[36]

MACURDA *v.* LEWISTON JOURNAL CO.

SUPREME JUDICIAL COURT OF MAINE, 1908.

104 *Maine* 554.

Two actions on the case brought by the plaintiff against the defendant company, to recover damages for alleged libels published by the defendant company, "of and concerning the plaintiff." The defendant company filed a general demurrer to each declaration. The presiding justice, pro forma, overruled the demurrers, and the defendant excepted.

---

[35] *Lodie* v. *Arnold,* Salk. 458 (1696).

[36] Pleadings must not be repugnant. *Vigers* v. *Aldrich,* 4 Burr. 2482 (1769); *Rowan* v. *Lee,* 3 J. J. Marsh (Ky.) 97 (1829); *Leavitt* v. *Coles,* 2 McLean (U. S.) 491 (1841); *Mix* v. *People,* 92 Ill. 549 (1879); *Gulliver* v. *Fowler,* 64 Conn. 556 (1894); *Borland* v. *Prindle,* 144 Fed. 713 (1906); *Anniston E. & G. Co.* v. *Rosen,* 159 Ala. 195 (1909); *Stanley* v. *Sumrel,* 163 S. W. 697 (Tex. 1914). Thus a declaration that alleges the plaintiff's intestate was intoxicated and unable to care for himself and which likewise avers that he was in the exercise of due care, is bad for repugnancy. *Keeshan* v. *Elgin A. & S. T. Co.,* 132 Ill. App. 416 (1907). To vitiate a pleading on the ground of repugnancy, the conflicting statements must be irreconcilable, as well as material. *Coddington* v. *Wilkin,* Cro. Jac. 377 (1615). Compare *Incledon* v. *Burges,* Shower 27 (1688); *Nosworthy* v. *Wyldeman,* 1 Mod. 42 (1669); *Palmer* v. *Stavely,* Salk. 24 (1701); *Wyat* v. *Aland,* Salk. 324 (1703); *Hayman* v. *Rogers,* 1 Strange 232 (1719); *Sabine* v. *Johnson,* 1 Bos. & P. 60 (1797); *Catzenholz* v. *Heller,* 82 Wis. 30 (1892); *Ross* v. *Charlestown Co.,* 42 S. Car. 447 (1894); *Peoples Bank* v. *Geisthart,* 55 Nebr. 232 (1898); *Town of Cameron* v. *Hicks,* 65 W. Va. 484 (1909); *Wahle* v. *Great N. R. Co.,* 41 Mont. 326 (1910). "If the pleading is repugnant, in a material point; it is ill in substance or on general demurrer; but repugnancy in an immaterial point is a fault in form only, and therefore no advantage can be taken of it, except by special demurrer." Gould on Pleading (Will's ed.) 313. See also, Chitty on Pleading (16 Amer. ed.) 573.

KING, J.: Each action is to recover damages for an alleged libel and is before the law court on a general demurrer to the declaration. In the first action the publication of the alleged libelous matter is stated in this form:

"Said defendant did * * * falsely and maliciously compose, print, publish and circulate, or cause to be composed, printed, published and circulated in a certain public newspaper * * * a certain scandalous and malicious libel of and concerning the plaintiff."

In the other action the publication is stated in this form:

"Said defendant did * * * falsely and maliciously compose and publish or cause and prepare to be composed and published * * * in a certain newspaper * * * a certain scandalous and malicious libel of and concerning the plaintiff."

It is a general rule of pleading, too well settled to need the citation of authorities, that the declaration must allege the gravamen—the grievance complained of with such precision, certainty and definiteness that the defendant may know what to answer by his pleading and proof.

A disjunctive allegation as to the essence of the cause of action is as pure an example of uncertainty and indefiniteness in pleading as can well be found, for it completely conceals from the defendant the ground upon which a recovery is claimed.

Such form of allegation has been uniformly regarded as fatally defective.

"A pleading is bad under any system of practice when it states material facts in the alternative, so that it is impossible to determine upon which of several equally substantive averments the pleader relies for the maintenance of his action or defense." 6 Encyc. Pl. & Pr., page 268; Chitty on Pl. 16th Am. ed., star page 260; Stephen on Pl. 340; *State* v. *Singer*, 101 Maine, 299.

In the last case cited this court recently decided that such form of charging, in the disjunctive, in an indictment for libel, violates the rule of certainty in criminal pleading and is fatal on general demurrer. It is there said:

"To be charged with printing and publishing a libel is one thing and to defend against it, evidence of one kind may be required, while to meet the charge of having caused a libel to be printed and published may require evidence of another and entirely different character. This distinction goes to the essence of the charge."

Applying the same rule of certainty to the declaration in the cases before us, with like discriminating reasoning, and they are found defective because of the disjunctive form in which the publication is alleged.

But it is suggested by plaintiff that such effect is not reached by a general demurrer. We think it is. It is not a defect in form, but in substance. The question to be answered by the declaration is:

What act of defendant is relied upon? The answer is uncertain; either that he did an act complained of, or caused it to be done. This uncertainty of allegation goes to the very essence of the cause of action to the act of defendant from which the cause of action springs.

If from the declaration the cause of action does not sufficiently appear the pleading is defective in matter of substance.

Here the plaintiff has alleged in each declaration that the defendant did either one or the other of two substantive acts, but he has not disclosed upon which of those acts he relies as the cause of action.

It is the opinion of the court that the declaration in each case is defective because of the disjunctive form of allegation used, and that the defect is reached by general demurrer.

This conclusion makes it unnecessary to consider the other particulars in which it is claimed the declarations are defective. The entry in each case must be, exceptions sustained.[37]

---

[37] As a general rule, it is bad pleading to state material facts in the alternative. *King* v. *Brereton*, 8 Mod. 328 (1725); *Cook* v. *Cox*, 3 M. & S. 109 (1814); *Stone* v. *Graves*, 8 Mo. 148 (1843); *Tift* v. *Tift*, 4 Den. (N. Y.) 175 (1847); *Corbin* v. *George*, 2 Abb. Pr. (N. Y.) 465 (1856); *Sallers* v. *Genin*, 8 Abb. Pr. (N. Y.) 253 (1859); *Wheeler* v. *Thayer*, 121 Ind. 64 (1889); *Mitchell* v. *Williamson*, 6 Md. 210 (1854); *Pittsburg, &c., R. Co.* v. *Peck*, 165 Ind. 537 (1905); *Sprague* v. *Currie*, 133 App. Div. (N. Y.) 18 (1909); *Pacetti* v. *Cent. G. R. Co.*, 6 Ga. App. 97 (1909); *Sloss-Sheffield Co.* v. *Smith*, 166 Ala. 437 (1910); Chitty on Pleading, *260; Stephen on Pleading (Heard's ed.) 387. When a plaintiff, in a single count shifts his right of action from one ground to another, and states several breaches of duty in the alternative or disjunctively, so that it is impossible to say upon which of several equally material averments he relies, the complaint is bad. *Highland, &c., R. Co.* v. *Dusenberry*, 94 Ala. 413 (1891). Compare *Douglas* v. *Marsh*, 141 Mich. 209 (1905); *Spaulding* v. *Edina*, 122 Mo. App. 65 (1906); *Alabama G. S. R. Co.* v. *Sanders*, 145 Ala. 449 (1906).

It has, however, been held that it is sometimes permissible to plead alternatively, when from the nature of the case the party pleading can not fairly be expected to know with certainty which of two conditions exist either of which would sustain his action or defense. *Mann* v. *Cook*, 24 Abb. N. C. 314 (1890) and note; *Hasbery* v. *Moses*, 81 App. Div. (N. Y.) 815 (1907); *Mutual Life Ins. Co.* v. *McCurdy*, 118 App. Div. (N. Y.) 815 (1907); *Floyd* v. *Patterson*, 72 Tex. 202 (1888); *Bank of Saluda* v. *Feaster*, 87 S. Car. 95 (1910) And in several states, by statute, a party may allege a fact in the alternative upon declaring his belief of one alternative or the other and his ignorance whether it is one, or the other. Revised Laws Massachusetts (1902), ch. 173, § 34; Kentucky Code of Civil Procedure, § 113, subsec. 4; *Louisville & N. R. Co.* v. *Ft. Wayne Co.*, 108 Ky. 113 (1900); *Merschel* v. *L. & N. R. Co.*, 121 Ky. 620 (1905). Missouri Revised Statutes (1909), § 1828; *Fleming* v. *Tatum*, 232 Mo. 678 (1911); *Otrich* v. *St. L., &c., R. Co.*, 154 Mo. App. 420 (1910). Under the modern English rules the averment of inconsistent sets of material facts in the alternative is permitted unless embarrassing. Rules of Supreme Court, order 19, rule 24; Annual Practice (1914) 320; *Smith* v. *Richardson*, L. R. 4, C. P. D. 112 (1878).

The New Jersey Practice Act of 1912, Schedule A, rule 37, provides, "Plaintiff may claim alternative relief based upon an alternative construction or ascertainment of his cause of action."

DOE d. BIRCH *v.* PHILIPS.

COURT OF KING'S BENCH, 1796.

6 *Term Reports*, 597.

This ejectment was brought for a forfeiture in a lease.

Yates on a former day moved that the lessor of the plaintiff should give in a particular of the covenants, of the breaches, of the times when, etc., on which he meant to insist that the defendant had forfeited the lease, and that he should not be permitted to give evidence at the trial of any thing not contained in those particulars.

Scarlet now showed cause against the rule, and consented to give a particular of the covenants on which he meant to rely, such a particular as (he said) would be sufficient if this were an action of covenant instead of ejectment, but objected to the extent of the rule, which required a particular of the breaches and of the times when the forfeitures accrued.

But the court, thinking that the application in its full extent was highly reasonable, made the rule absolute.[88]

---

[88] 1 Tidd's Practitce (9th ed.) 596; 1 Troubat & Haly's Practice (Wharton's ed.) 365; 31 Cyc. 565; 16 P. & L. Dig. of Dec. Pa. 27261.

"A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading." Per Rapallo, J., in *Tilton v. Beecher*, 59 N. Y. 176 (1874). While the granting or refusing of a bill of particulars generally lies in the discretion of the court, it is usual to require particulars only in those cases where the pleadings are permitted to be general. If the pleading is more indefinite than is allowed by law a demurrer should be interposd. *Clarke* v. *Ohio R. Co.*, 39 W. Va. 732 (1894); *Transportation Co.* v. *Standard Oil Co.*, 50 W. Va. 611 (1902). See also, *Le Breton* v. *Braham*, 3 Burr. 1389 (1763); *Collett* v. *Thompson*, 3 B. & Pul. 246 (1802); *Hurst* v. *Watkis*, 1 Camp. 68 (1807); *Mercer* v. *Sayre*, 3 Johns. 248 (1808); *Humphry* v. *Cotteyou*, 4 Cow. (N. Y.) 54 (1825); *Johnson* v. *Birley*, 5 B. & Ald. 540 (1822); *Comm.* v. *Snelling*, 32 Mass. 321 (1834); *Davies* v. *Chapman*, 6 Ad. & El. 767 (1837); *Early* v. *Smith*, 12 Irish C. L. Rep., Appendix 35 (1861); *Norris* v. *Hanson*, 1 W. N. C. (Phila.) 507 (1875); *Livingston* v. *Enochs*, 1 W. N. C. (Phila.) 244 (1875); *Furbush* v. *Phillips*, 2 W. N. C. (Phila.) 198 (1875); *Kelsey* v. *Sargent*, 100 N. Y. 602 (1885); *Dwyer* v. *Slattery*, 118 App. Div. (N. Y.) 345 (1907); *Wells* v. *Caro*, 131 N. Y. S. 573 (1911); *Locker* v. *Tobacco Co.*, 200 Fed. 973 (1912).

CHAPTER IV.

TRIAL.

SECTION 1. MODES OF TRIAL.

"These modes of trial are seven in number: The trial by the record, by certificate, by witnesses, by inspection, by wager of battle, by wager of law, and by jury. The first is the appropriate form of trial when the existence of a record is affirmed on one side and denied on the other, upon an issue of *nul tiel record*. The trial by certificate is of rare occurrence in modern times, being almost entirely confined to the issue of *ne unques accouple en loial matrimonie*. This form of issue can arise only in dower; it is not allowed in personal actions. The trial by witnesses is, at the common law, applicable only to a very few issues; but it is the only form of trial which is known to the civil law. It is the proper form of trial when, to a widow's writ of dower, the tenant pleads that the husband is alive.

"The trial by inspection or examination occurred when the judges, upon the testimony of their own sense, were able to decide the point in dispute. This mode of trial seems to have been incidentally swept away in England in the demolition of real actions. The wager of battle was an appeal to arms, and proceeded upon the theory that heaven would give the victory to him who had the right. It was confined, as far as civil actions are concerned, to issue joined in a writ of right, "the last and most solemn decision of real property." It was abolished by statute. Wager of law was a method of deciding the issue by permitting the defendant to swear to the truth of his defense. He brought eleven compurgators with him into court who swore that they believed that he spoke the truth; and the oaths of the twelve were as conclusive against the plaintiff as a verdict would have been. This method of trial also has been abolished in England by statute. The seventh, and by far the most important mode of trial, is the trial by jury, called also the trial *per pais*, or by the country. It is on account of the peculiar characteristics of the trial by jury that the system of pleading at common law is what it is; and many of the rules which have been criticised as most technical and artificial, prove to be both logical and sound when considered in relation to the tribunal for whose guidance they were framed. Trial by jury is, with the exception of the trial by the record, the only form of trial in use in the United States."[1]

---

[1] Pepper on Pleading, 4; also, 18 A. & E. Encyc. of Law (1 ed.), 470. See also III Blackstone's Commentaries, 330; Stephen on Pleading (9 Am. ed.). 76; Elliott's General Practice, § 504, et seq.; Thompson on Trials, *passim.*; Thayer on Evidence, *passim.* Under modern statutes and rules many cases may be tried by the court without a jury.

MILLE LACS COUNTY COMMISSIONERS *v.* MORRISON.

SUPREME COURT OF MINNESOTA, 1875.

22 Minn. 178

Proceedings to enforce payment of delinquent taxes in the county of Mille Lacs under the Act of March 9, 1874 (Laws, 1874, ch. 1, sec. 113). The defendant objected to a defect in the county auditor's affidavit to the tax list, which was overruled, and to the sufficiency of the affidavit of publication, which was allowed to be corrected. The defendant then demanded a jury trial, which was denied. After rendering judgment against defendant's objections, the district judge certified the case to the supreme court.[2]

GILFILLAN, C. J.: Whether the taxpayer is entitled to a jury trial in these proceedings is an important question, as it affects both the power of the state to collect its revenues by a speedy and convenient mode, and the security of the citizen against oppression and illegal acts. It is claimed that because legal rights are involved and are to be determined, it is a proceeding at law, and that in all proceedings at law the right to a trial by jury is guaranteed by the Constitution, and the case of *Parsons* v. *Bedford*, 3 Pet. (U. S.) 433, is cited. In that case Mr. Justice Story, discussing the provisions of the Federal Constitution in respect to trial by jury, says (p. 447): "By common law they meant what the Constitution in the third article denominated 'law,' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered; or where, as in the admiralty, a mixture of public law and maritime law and equity, were often found in the same suit."

If, by this language, the learned judge meant that in all proceedings to ascertain and determine rights, other than those of equitable or maritime jurisdiction, the Constitution guarantees the right of trial by jury, the language is certainly too broad; for there are many proceedings, involving important rights, of neither equitable nor maritime jurisdiction, in which, as settled by many decisions, the parties are not entitled to a jury trial. We refer to a few of these: Proceedings by the state under its right of eminent domain. *Penn. R. Co.* v. *Lutheran Congregation*, 53 Pa. St. 445; *Buffalo Bayou, etc., R. Co.* v. *Ferris*, 26 Texas 588; *Haverhill Bridge* v. *County Comm'rs*, 103 Mass. 120; *Dronberger* v. *Reed*, 11 Ind. 420; *Livingston* v. *Mayor, etc.*, of N. Y., 8 Wend. (N. Y.) 85.[3]

---

[2] The statement of facts is from the opinion, part of which is omitted.

[3] *Central Branch U. P. R. Co.* v. *Atchison, T. & S. F. R. Co.*, 28 Kans. 453 (1882); *Ingram* v. *Maine W. Co.*, 98 Maine 566 (1904); *Wixom* v. *Bixby*, 127 Mich. 479 (1901); *St. Joseph* v. *Geiwitz*, 148 Mo. 210 (1899); *State* v. *Jones*, 239 N. Car. 613, 52 S. E. 240 (1905); *Gilmer* v. *Hunnicutt*, 57 S. Car. 166, 35 S. E. 521 (1900); *Bauman* v. *Ross*, 167 U. S. 549, 42 L. ed. 274, 17 Sup.

Proceedings to determine the right to office under an election. *Whallon* v. *Bancroft*, 4 Minn. 109; *Ewing* v. *Filley*, 43 Pa. St. 384.[4]

Proceedings to assess, on property benefited, the damages for taking lands for highways. *People* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 419; *McMasters* v. *The Commonwealth*, 3 Watts (Pa.) 292. In mandamus. *Atherton* v. *Sherwood*, 15 Minn. 221.[5] Under statutes for settling estates of insolvents. *Sands* v. *Kimbark*, 27 N. Y. 147.[6]

Proceedings to appoint guardians of insane persons. *Gaston* v. *Babcock*, 6 Wis. 503.

References to assess the value of improvements under occupying claimants' laws, where such mode of assessment existed at the adoption of the constitution. *Ross* v. *Irving*, 14 Ill. 171. In suits uniting the legal cause of action to recover a debt, with the equitable cause of action to foreclose a mortgage given to secure it. *Stillwell* v. *Kellogg*, 14 Wis. 461.[7] To enforce liens given by statute upon vessels for labor and material. *Sheppard* v. *Steele*, 43 N. Y. 52. In summary proceedings to enforce debts, where the party may be presumed, from his entering into the contract, to have consented to such mode of enforcing it. *Bank of Columbia* v. *Okeley*, 4 Wheat. (U. S.) 235.[8] As to enforce recognizances or the bonds of sheriffs. *Gildersleeve* v. *The People*, 10 Barb. (N. Y.) 35; *Murry* v. *Askew*, 6 J. J. Marsh. (Ky.) 27; *Creighton* v. *Johnson*, 6 Litt. (Ky.) 240.

Summary convictions for petty offenses. *Byers* v. *Commonwealth*, 42 Pa. St. 89. To determine the settlement of paupers. *Shirley* v. *Lunenburg*, 11 Mass. 379. Upon judgments of courts martial under military laws. *Rawson* v. *Brown*, 18 Maine 216.[9]

Ct. 966 (1896). Compare *Lake Erie, W. & St. L. R. Co.* v. *Heath*, 9 Ind. 558 (1857); *Juvinall* v. *Jamesburg D. D.*, 204 Ill. 106, 68 N. E. 440 (1903); *Pusey's Appeal*, 83 Pa. St. 67 (1876); *King* v. *Greenwood Cem. Co.*, 67 Ohio St. 240, 65 N. E. 882 (1902).

[4] *Mason* v. *State*, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291 (1898); *State* v. *Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39 (1897); *State* v. *Moores*, 56 Nebr. 1, 76 N. W. 530 (1898); *Wheeler* v. *Caldwell*, 68 Kans. 776, 75 Pac. 1031 (1904); Contra: *State* v. *McDonald*, 108 Wis. 8, 84 N. W. 171, 81 Am. St. 878 (1900).

[5] *Mayer* v. *Wilkinson*, 52 Nebr. 764, 73 N. W. 214 (1897).

[6] *Weil* v. *Jaeger*, 174 Ill. 133, 51 N. E. 196 (1898); *In re Christensen*, 101 Fed. 243 (1900); *Vollkommer* v. *Frank*, 107 App. Div. 594, 95 N. Y. S. 324 (1907), affirmed 205 U. S. 521, 51 L. ed. 911; *O'Neill* v. *Glover*, 71 Mass. 144 (1855); *Kempton* v. *Saunders*, 130 Mass. 236 (1881); *Merrill* v. *Bowler*, 20 R. I. 226, 38 Atl. 114 (1897).

[7] The joinder of an equitable cause of action with one purely legal does not deprive the defendant of the right to a jury trial. *Van Deventer* v. *Van Deventer*, 32 App. Div. 578, 53 N. Y. S. 236 (1898); *Myers* v. *Knabe*, 4 Kans. App. 484, 46 Pac. 472 (1896); *Sherman* v. *Randolph*, 13 Okla. 224, 74 Pac. 102 (1903). But see *Guaranty Trust Co.* v. *Robinson*, 31 Misc. 277, 64 N. Y. S. 366 (1900); *Bank of Spartanburg* v. *Chickasaw Soap Co.*, 70 S. Car. 253 (1904). Federal practice did not permit the joinder of an equitable with a legal cause of action. *Scott* v. *Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. 712 (1891). But see Act of Congress of Mar. 3, 1915, ch. 90, 38 Stat. L. 956.

[8] *Krugh* v. *Lycoming F. Ins. Co.*, 77 Pa. St. 15 (1874). Parties may consent to arbitration, but compulsory arbitration violates the right. *Rhines* v. *Clark*, 51 Pa. St. 96 (1866); *Cutler* v. *Richley*, 151 Pa. St. 195, 25 Atl. 96 (1892).

[9] *People* v. *Daniel*, 50 N. Y. 274 (1872); *State* v. *Wagener*, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749, 73 Am. St. 369 (1898).

In proceedings for the assessment and collection of taxes. *McCarrol's Lessee* v. *Weeks*, 5 Hayw. (Tenn.) 246; *Cowles* v. *Brittain*, 2 Hawks (N. Car.) 204; *Harper* v. *Town of Elberton*, 23 Ga. 566; *New Town Cut* v. *Seabrook*, 2 Strobh. (S. Car.) 560; *Crandall* v. *James*, 6 R. I. 144.[10]

The general principle upon which these cases were decided was that the several constitutions intended only to preserve the right of trial by jury in those cases where it existed at the adoption of the respective constitutions, and that rights of persons or property coming in question in those controversies in which, before that time, the right was not recognized do not come within the meaning of the constitutional guaranties. This court, in *Whallon* v. *Bancroft*, 4 Minn. 109, said (p. 113): "Wherever the right of trial by jury could be had under the territorial laws, it may now be had, and the legislature can not abridge it; and those cases which were triable by the court, without the intervention of a jury, may still be so tried."

It is not, of course, to be understood from this that the right to a jury trial will depend on the form of the action or proceeding, or that the legislature may, by changing the form of proceeding or remedy, take that mode of trial from those rights to which the constitution intended to secure it. The Constitution of Vermont provides: "Trial of issues proper for the cognizance of a jury, in the Supreme or county courts, shall be by jury, except when parties otherwise agree." This, though differently expressed, is substantially the same as the provision in the constitution of this state. The Supreme Court of Vermont, discussing this clause in *Plimpton* v. *Town of Somerset*, 33 Vt. 283, said: "All rights, whether then or thereafter arising, which would properly fall into those classes of rights to which, by the course of the common law, the trial by jury was secured, were intended to be embraced within this article." This is the best definition that we have found of the classes of cases to which the trial by jury is secured, for it makes the right to such a trial depend on the nature and character of the controversy, and not on the form of action or proceeding in which it is to be determined.

The judgment, under the law of 1874, is made conclusive as to everything except the jurisdiction of the court. It has this effect, not only as between the state and the owner of the land, but as to all parties, whenever or however the question may arise. It is evident that if it concludes the owner for all time, as it certainly does, as to rights which, by the law existing when the constitution was adopted, were to be tried by jury, it deprives the owner of that constitutional right unless he may have that trial before judgment.

At the time of the adoption of the constitution the owner, whenever, in an action at law, the question of title under tax laws might arise, had the right to a jury trial of certain issues upon which the title depended. But it was not every matter involved in the tax proceedings which he could have so tried. There will, and always must, be some matters as to which the proceedings themselves are

[10] *Ball* v. *Ridge Copper Co.*, 118 Mich. 7, 76 N. W. 130 (1898); *State* v. *Bley*, 162 Ala. 239, 50 So. 263 (1909).

necessarily final, and as to which no further hearing can be allowed. For instance, at what value the property should be assessed, or what rate of tax should be levied, or for what purposes taxes should be raised, are matters which, of necessity, can not be submitted to a jury. No revenue system ever devised has provided for the intervention of a jury to determine those things, either before or after sale. No such system could stand. In *McCarrol's Lessee* v. *Weeks*, 5 Hayw. (Tenn.) 246, which arose under a law somewhat similar to the law of 1874, and in which the court appear to go further than we are disposed to, the court, speaking of proceedings for assessing taxes, very justly said: "It is certainly true that they have the character of summary proceedings, and it is equally true that they must, of necessity, be so; for, if the government were necessitated to take the cautious and tedious steps of the common law in giving personal notice, making up pleadings, and having a jury trial, it would cease to exist. All governments, to raise their revenue, lay taxes on property, and their proceedings necessarily must be summary and *in rem* as to that."

The only issues which, upon a question of title under a tax sale, any party could in any case have tried by a jury, were those that might be made upon the authority to tax—that is, whether the tax was laid upon property subject to taxation; upon the performance, by the proper officers, of the things made by law essential to the validity of the tax or sale; and upon the nonpayment of the tax. In no case could he have a jury try and determine how much the tax ought to have been.

It is true the act does not expressly provide for a jury trial; but it must be presumed that the legislature did not intend to exclude it where it is necessary to the validity of the proceedings and the conclusive effect of the judgment. Under its general powers the district court may direct a jury trial of any issues in which the parties have a right to that mode of trial, in any proceedings pending before it; and when, in these tax proceedings, either of the two issues we have mentioned is made, and a jury trial demanded, may direct the matter to be tried at a general term.[11]

No such issue is raised in this case. The answer relates only to the acts and omissions of the assessing officers and board of equalization; and if the facts were as pleaded, and by reason thereof the taxes appearing on the list against the property were too high, it was the duty of the court merely to reduce the taxes to what it should deem the proper amounts.

Judgment affirmed.[12]

---

[11] *State* v. *Jackson*, 56 W. Va. 558, 49 S. E. 465 (1904).

[12] "It is the right of trial by jury which exists and is preserved, and what that right is is a purely historical question, a fact to be ascertained like any other social, legal or political fact. As the constitution speaks from the time of its adoption, the fact of the right to jury trial, which is ascertained to have existed at that time, must necessarily determine the meaning of the clause which recognizes and preserves that right." Pomeroy's note to Sedgwick's Construction of Statutory and Constitutional Law (2d ed.), p. 487. See, also, Cooley's Constitutional Limitations (6th ed.), p. 505; *Copp* v.

ROSS *v.* McCALDIN.

COURT OF APPEALS OF NEW YORK, 1909.

195 *N. Y.* 210.[28]

WILLIARD BARTLETT, J.: This is a common-law action to recover an indebtedness of $1,000 alleged to be due to the plaintiff from the defendant. The principal plea was payment. Evidently anticipating this plea the plaintiff in his complaint alleged that he had accepted two promissory notes from the defendant on account of his debt which had never been paid and that he had given to the defendant a receipt for $1,000 in full settlement of all liability, which receipt he asked to have vacated, annulled and rescinded. This prayer for relief was followed by a demand for judgment in the sum of $1,000, with interest and costs.

The allegations of the complaint in regard to this receipt do not suffice to turn the action into a case for the cognizance of a court of equity. The receipt is not a contract. *Ryan* v. *Ward*, 48 N. Y. 204. It is merely a declaration which the defendant might use as evidence in support of his plea of payment. The cases cited by the respondent in which equity has entertained jurisdiction of suits to cancel releases have, therefore, no application here. We are clearly of opinion that this action is a common-law action, in which the defendant was entitled to a jury trial provided he made a seasonable demand therefor

---

Henniker, 55 N. H. 179, 20 Am. Rep. 194 (1875); *Whitehurst* v. *Coleen*, 53 Ill. 247 (1870); *Banning* v. *Taylor*, 24 Pa. St. 289 (1855); *Lawrence* v. *Borm*, 86 Pa. St. 225 (1878); *Capital T. Co.* v. *Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. 580 (1898); *Bucknam* v. *Bucknam*, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735 (1900); *Drady* v. *District Court*, 126 Iowa 345, 102 N. W. 115 (1905); *Gunn* v. *Union R. Co.*, 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362 (1905); *Mead* v. *Cutler*, 194 Mass. 277, 80 N. E. 496 (1907); *Robison* v. *Wayne Circuit Judges*, 151 Mich. 315, 115 N. W. 682 (1908).

A statute providing that in civil actions a party shall not be entitled to a trial by jury unless he files within a prescribed time a demand for such a trial is constitutional. *Foster* v. *Morse*, 132 Mass. 354, 42 Am. Rep. 438 (1882); *Clark* v. *Baker*, 192 Mass. 226, 78 N. E. 455 (1906); *Goodman* v. *Superior Court of Santa Clara County*, 8 Cal. App. 232, 96 Pac. 395 (1908); *Heard* v. *Kennedy*, 116 Ga. 36, 42 S. E. 509 (1902); *Condon* v. *Royce*, 68 N. J. L. 222, 52 Atl. 630 (1902); *People* v. *Judge of Superior Ct.*, 41 Mich. 31, 1 N. W. 985 (1879). In civil cases the right to a jury trial may be waived. *Baird* v. *Mayor* 74 N. Y. 382 (1878); *Palmer* v. *Drew*, 59 N. H. 594 (1879); *Lummis* v. *Big Sandy Land &c. Co.*, 188 Pa. St. 27, 41 Atl. 319 (1898); *Claussenius* v. *Claussenius*, 179 Ill. 545, 53 N. E. 1006 (1899); *Chessman* v. *Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410 (1905); *Brooklyn H. R. Co.* v. *Brooklyn C. R. Co.*, 105 App. Div. 88, 93 N. Y. S. 849 (1905); New York Code of Civil Procedure, § 968, provides: "In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed: 1. An action in which the complaint demands judgment for a sum of money only. 2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel."

As to divorce, see Bishop on Marriage and Divorce, § 256; *Powell* v. *Powell*, 104 Ind. 18, 3 N. E. 639 (1885); *Marchmont* v. *Marchmont*, 1 Sw. & Tr. 228 (1858); *Allison* v. *Allison*, 46 Pa. St. 321 (1863).

[28] The statement of facts and arguments of counsel are omitted. The decision reverses 123 N. Y. App. Div. 13.

and did not waive his right thereto in any of the modes prescribed by the statute relating to that subject.[14]

The action was moved for trial at a special term of the Supreme Court in Kings county. At the outset of the trial the following proceedings took place:

"Defendant's counsel: Your honor will see by reading the complaint that there is no equitable cause of action set out; under the former practice the proper course would have been, if there was no equitable cause of action set up, to ask for a dismissal of the complaint, but under the decisions since and the provisions of the code allowing different causes of action to be united, whether equitable or not, it has been held that the court must determine from the allegations of the complaint, not from the prayer for relief, what the character of the action is. Your honor will see, after looking at this complaint, that the relief demanded is a judgment for a sum of money, and I think, if your honor will read the complaint, you will see that there is no equitable cause of action set forth.

"The Court: I think I will hear the proofs and decide the question afterwards.

"Motion denied. Defendant excepts."

The motion thus made by the counsel for the defendant, to the denial of which he duly excepted, was a demand that the case be sent to a trial term to be tried by a jury. This clearly appears subsequently in the record by what occurred after the plaintiff had introduced his testimony and rested.

"Defendant's counsel renewed motion on the grounds already stated to dismiss the complaint or to send the same to trial term to be tried by a jury. Motion was denied. Defendant excepted." This statement plainly shows that the learned judge at special term must distinctly have understood the defendant's counsel to have demanded a jury trial unless the court was willing to dismiss the complaint on the ground that it did not state a cause of action cognizable by a court of equity. The course pursued by counsel for the defendant was that approved by this court in *Hand* v. *Kennedy*, 83 N. Y. 149, 155, and an exception was duly taken to the denial of the motion in each instance. These exceptions raise a question of law for the consideration of this court. We think that they were well taken and entitled the defendant to a reversal of the judgment on the ground that he had a right to have the case tried by a jury. He asserted that right in due time and did nothing which could fairly be construed into a waiver thereof.

The judgment should be reversed and a new trial granted, costs to abide the event.

---

[14] New York Code of Civil Precodure, § 1009. *Herb* v. *Metropolitan Hospital & Dispensary*, 80 App. Div. 145, 80 N. Y. S. 552 (1903).

"A party can not be held to have waived his constitutional right to a jury trial unless an intention to do so appears affirmatively or by necessary inference from unequivocal acts or conduct." *Harsey* v. *McMullen*, 109 Minn. 332, 123 N. W. 1078 (1909). Compare *Goble* v. *Swobe*, 64 Nebr. 838, 90 N. W. 919 (1902), with *Chessman* v. *Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410 (1904).

Cullen, Ch. J., Gray, Edward T. Bartlett and Hiscock, JJ., concur; Werner, J., dissents; Chase, J., absent.

Judgment reversed.[16]

---

[16]The constitutional provision that the right of trial by jury shall remain inviolate does not concern issues of fact in equity. *Meriden Sav. Bank* v. *M'Cormack*, 79 Conn. 260, 64 Atl. 338 (1906); *Bemis* v. *Armour Packing Co.*, 105 Ga. 293, 31 S. E. 173 (1899); *Canavan* v. *Paye*, 34 Pa. Super. Ct. 91 (1907); *Davis* v. *Settle*, 43 W. Va. 17, 26 S. E. 557 (1898); *Ely* v. *Coonts*, 167 Mo. 371, 67 S. W. 299 (1902); *Noble* v. *Learned*, 153 Cal. 245, 94 Pac. 1047 (1908); *Lacelles* v. *Clark*, 204 Mass. 362, 90 N. E. 875 (1910). In jurisdictions where legal and equitable causes of action are joined in the same complaint a party is not deprived thereby of his right to have a trial by jury of the legal cause of action. *Davis* v. *Morris*, 36 N. Y. 569 (1867); *Hudson* v. *Caryl*, 44 N. Y. 553 (1871); *Sternberger* v. *McGovern*, 56 N. Y. 12 (1874); *Reams* v. *Spann*, 28 S. Car. 530, 6 S. E. 325 (1887); *Hughes* v. *Dunlap*, 91 Cal. 385, 27 Pac. 642 (1891); *Abernathy* v. *Allen*, 132 Ind. 84, 31 N. E. 534 (1892): Where, however, the cause of action is equitable, but legal relief is sought as an incident to the equitable cause merely, then neither party is entitled to a jury trial as a matter of right. *Koeper* v. *Louisville*, 109 Minn. 519, 124 N. W. 218 (1910). In bringing an action of a distinctly equitable character the plaintiff may be held to waive his right to a jury trial. *Davison* v. *Associates*, 71 N. Y. 333 (1877); *Cogswell* v. *N. Y., N. H. & H. R. Co.*, 105 N. Y. 319, 11 N. E. 518 (1887); *Loeb* v. *Royal Arcanum*, 198 N. Y. 180, 91 N. E. 547 (1910). But such proceeding by the plaintiff will not deprive the defendant of his right to a jury trial if otherwise entitled thereto. *Wheelock* v. *Lee*, 74 N. Y. 495 (1878); *Sommer* v. *N. Y. El. R.*, 60 Hun 148, 14 N. Y. S. 619, 38 N. Y. St. 419 (1891).

In England, under the rules of the supreme court, the mode of trial is regulated by order XXXVI, rules 2 to 8. In slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, either party may have a trial by jury on giving notice. In all other cases the trial will be by the judge alone unless an order be made for a jury trial. Such an order will be made if either party applies in proper time, unless the action is one which could, without the consent of the parties, have been tried without a jury before the Judicature Act of 1873, or unless it appears that the case involves a prolonged examination of documents or accounts or a scientific or local investigation which can not conveniently be made by a jury. *Timson* v. *Wilson*, L. R. 38 Ch. Div. 72 (1888); *Jenkins* v. *Bushby*, L. R. 1891, 1 Ch. Div. 484.

In equity the chancellor may award an issue to be tried at law before a jury, for the purpose of informing the conscience of the court upon doubtful questions of fact, but the granting of such an issue lies within the sound discretion of the court. *Raymond* v. *Flavel*, 27 Ore. 219, 40 Pac. 158 (1895); *Canavan* v. *Paye*, 34 Pa. Super. Ct. 91 (1907); *Biggerstaff* v. *Biggerstaff*, 180 Ill. 407, 54 N. E. 333 (1899); *Nashville R. & L. Co.*, v. *Bunn*, 168 Fed. 862 (1909); *Clark* v. *Roberts*, 206 Mass. 235, 92 N. E. 461 (1910). An issue, except where it is directed by statute, is merely advisory. If the chancellor is not satisfied with the verdict he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the case without the intervention of a jury. *Carter* v. *Jeffries*, 110 Va. 735, 67 S. E. 284 (1910).

FIRST NATIONAL BANK OF ROCK SPRINGS *v.* FOSTER.

SUPREME COURT OF WYOMING, 1900.

9 *Wyo.* 157.[16]

CORN, J.: Defendant in error brought suit against plaintiff in error upon a lost certificate of deposit. Under the instruction of the court that three-fourths of the jury might concur in and return a verdict, a verdict for the plaintiff was returned, signed by ten of the jurors, the other two refusing to concur.

The defendant below objected to the verdict being received for the reason that it was not unanimous, and therefore not a lawful verdict. The objection was overruled and the verdict entered, and the defendant took its exception. Our Declaration of Rights, art. 1, sec. 9 of the constitution provides: "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate, or abolish the grand jury system."

Section 3651, Rev. Stat. 1899, provides that: "In all civil cases in any of the courts in the state of Wyoming, which shall be tried by a jury, three-fourths of the number of the jurors sitting in any such case may concur in and return a verdict in said case, and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in said case; but whenever such verdict is found and returned by a less number than twelve, said verdict shall be signed by each juror concurring therein." The plaintiff in error insists that the statute is in violation of the section of the constitution above quoted, and this is the only imporant question presented.

No other of the state constitutions, so far as we are advised, contains precisely the same provision as ours, except that of Colorado. But the general question here involved has repeatedly been before the courts of this country for consideration, and certain propositions which lie at the threshold of the discussion are well settled. It is conceded that, in almost all of the states, the legislature may lawfully exercise not only such powers as are specifically enumerated, but that it is invested with the entire legislative power of the state except as restrained by the provisions of the constitution. And our constitution, in line with most of others, art. 3, sec. 1, provides that "the legislative power shall be vested in a senate and house of representatives, which shall be designated 'The legislature of the state of Wyoming.'" It is also so well settled as to require no reference to authorities that, when the constitution secures to litigants the right of trial by jury, the legislature has no power to deny or impair such right. The courts have uniformly held also that the

[16]The statement of facts, arguments of counsel and part of the opinion are omitted, as well as the opinion denying a rehearing.

word "jury" as used in our constitutions, when not otherwise modified, means a common-law jury composed of twelve men, whose verdict shall be unanimous. As stated by the Supreme Court of Minnesota: "The expression 'trial by jury' is as old as Magna Charta, and has obtained a definite historical meaning which is well understood by all English-speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are and always have been number, impartiality and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous." *Lommen* v. *Minneapolis Gaslight Co.*, 65 Minn. 196. An extended list of the cases is given in the note to *State* v. *Bates*, 14 Utah 293, 43 L. R. A. 48.[17]

It is unquestioned also that at the adoption of the constitution the right existed in Wyoming as at common law; that is, in felonies and in all common law cases in the district court, our court of general common-law jurisdiction, the right was to an impartial jury of twelve men and a unanimous verdict. It is also conceded that the people of the state had the power by their constitution to preserve or abrogate the right, or make such modifications of it and establish such modes of trial as might be deemed expedient. These general propositions being settled, the question before us is to ascertain to what extent the right of trial by jury as above defined, is preserved by the section of the Declaration of Rights above quoted.

As to the right in criminal cases, there is no room for construction. The language is express that it shall remain inviolate; that is, that a person charged with crime has the right as heretofore to demand a trial by twelve impartial men whose verdict must be unanimous in order to support a judgment. In civil cases the language is also express as to the matter of number, one of the three essentials of a jury trial at common law, and the legislature is empowered to provide by law for juries consisting of less than twelve. There is no room for construction. But there is no specific mention in the section or anywhere in the constitution of the third essential of unanimity. Is it then to be deemed a matter unprovided

---

[17] Y. B. 41 Edw. I., 31; Y. B. 41 Ass. 11; *Tredymmock* v. *Perryman*, Cro. Car. 259 (1632); *Work* v. *State*, 2 Ohio St. 296, 59 Am. Dec. 671 (1853); Opinion of Justices, 41 N. H. 550 (1860); *Plimpton* v. *Sommerset*, 33 Vt. 283 (1860); *Whallon* v. *Bancroft*, 4 Minn. 109 (1860); *Vaughn* v. *Scade*, 30 Mo. 600 (1860); *Reece* v. *Knott*, 3 Utah 452, 24 Pac. 757 (1861); *Campau* v. *Detroit*, 14 Mich. 276 (1866); *Whitehurst* v. Coleen, 53 Ill. 247 (1870); *Lovings* v. *Norfolk & W. R. Co.*, 47 W. Va. 582, 35 S. E. 962 (1900). And see *In re Pennsylvania Hall*, 5 Pa. St. 204 (1874); *Stillwell* v. *Kellog*, 14 Wis. 461 (1861); *Berry* v. *Chamberlain*, 53 N. J. L. 463, 23 Atl. 115 (1891); *Skinner* v. *Allison*, 127 App. Div. 15, 111 N. Y. S. 264 (1908). A verdict rendered by thirteen jurors unless by consent is erroneous. *Whitehurst* v. *Davis*, 2 Hayw. (N. Car.) 113 (1800); *Wolfe* v. *Martin*, 1 How. (Miss.) 30 (1834); *McCormick* v. *Brookfield*, 4 N. J. L. 69 (1818); *Muirhead* v. *Evans*, 6 Exch. 447 (1851) semble.; *State* v. *Hudkins*, 35 W. Va. 247, 13 S. E. 367 (1891); Contra, *Tillman* v. *Ailles*, 5 S. & M. (Miss.) 373 (1845). And see *Ross* v. *Neal*, 7 T. B. Mon. (Ky.), 407 (1828).

for, a right not preserved, leaving the legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the constitution? We do not think so.

The whole section must be construed together. The subject of it is the right of trial by jury, and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the legislature, wherein the common law might be invaded by statute in civil cases. It is as if the constitution had said: "With reference to the right of trial by jury, it is provided that in criminal cases it shall remain in all respects as heretofore. In civil cases it shall remain as heretofore, except that the legislature may provide for a number less than twelve to constitute a jury." There is no other reasonable construction, for if a rule is to be applied that the legislature have power to enact any laws upon the subject unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing. Yet, there appears nowhere in the constitution any intention to abrogate the right or to substitute any other mode of trial. But the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right. The provision in regard to number is by way of permission, indicating clearly that, in the judgment of the framers of the constitution, permission was necessary. It is also stated as an exception, the word "but" being used in its very customary meaning of "except." That it is stated as an exception is also shown by the use of the word "jury" itself. It can not be supposed that the convention were ignorant of the legal meaning of the word, but they must be presumed to have used it in its correct legal sense of a body of twelve impartial men whose verdict must be unanimous. And it is evident they did so use it. It is so used in the first clause securing the right inviolate in criminal cases. The provision that the number may be less than twelve is clear evidence that the word as used referred to the body universally known to be composed of twelve men. It is permission to the legislature to make a designated change in the common law jury, to reduce the common-law number, twelve. It is not essential that a prohibition upon the legislature should be in express terms. It may be by implication. *Page* v. *Allen,* 58 Pa. St. 345. It will scarcely be contended that an act would be valid providing for the trial of causes by a jury chosen by the plaintiff, or by the party by whom the jury was first demanded, thus disregarding the element of impartiality. Yet by the argument of counsel there is no prohibition upon such legislation. And it is indeed no more prohibited than a disregard of the element of unanimity is prohibited. Neither is prohibited except by the use of the word "jury," the plainly implied provision for "trial by jury," which, as matter of definition, necessarily involve and include both impartiality and unanimity of verdict. * * *

In order to sustain the constitutionality of this section of the statute, it is necessary for this court to say that there is no right of trial by jury in civil cases under the constitution in this state, but

that each succeeding session of the legislature may invent and establish any mode of trial that the whim of the hour or any supposed exigencies of convenience or economy might dictate. Under such a ruling it would be competent for the legislature to provide that the judge of the district should call into court the partisan board of county commissioners and submit to them for decision by a majority vote all civil causes pending in any county. It is perfectly clear that no such revolutionary destruction of ancient landmarks was ever contemplated. The whole tenor of the instrument makes it plain that the ancient method of trial by jury was not to be abandoned, but was to be retained and preserved except as designated in the constitution itself, and what the essentials of that method are, is not a matter of construction or conjecture. We think the statute is clearly unconstitutional.

Reversed.[18]

SECTION 2. THE JURY.

(a) Jury Process.

3 Blackstone's Commentaries 352.

When an issue is joined, by these words, "and this the said A prays may be inquired of by the country," or, "and of this he puts himself upon the country—and the said B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come here, on such a day, twelve free and lawful men, *liberos et legales homines,* of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties." And such writ was accordingly issued to the sheriff.

Thus the cause stands ready for a trial at the bar of the court itself; for all trials were there anciently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence, all trifling suits being ended in the court-

---

[18]Accord: *Denver* v. *Hyatt,* 28 Colo. 129, 63 Pac. 403 (1900). Unanimity is an essential feature of a jury trial at common law. A statute which destroys this feature abridges the right to a jury trial. *American Pub. Co.* v. *Fisher,* 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. 618 (1896); *Kleinschmidt* v. *Dunphy,* 1 Mont. 118 (1869); *Cloud* v. *Morgan,* 7 Kans. App. 213, 52 Pac. 896 (1898); *May* v. *M. & M. R. Co.,* 3 Wis. 197 (1854). In civil cases the right to a trial by a jury of twelve may be waived by consent. *Roach* v. *Blakey,* 89 Va. 767, 17 S. E. 228 (1893); *Gillespie* v. *Benson,* 18 Cal. 409 (1861); *Raleigh & G. R. Co.* v. *Bradshaw,* 113 Ga. 862, 39 S. E. 555 (1901); *Krugh* v. *Lycoming F. Ins. Co.,* 77 Pa. St. 15 (1874); *Miller* v. *Cambria Co.,* 25 Pa. Super. Ct. 591 (1904); *Kanorowski* v. *People,* 113 Ill App. 468 (1904); *United States* v. *Ramsey,* 158 Fed. 488 (1907). Under the constitution of Missouri as amended, a law authorizing a verdict by nine or more of a jury of twelve is valid. *Gabbert* v. *Chicago R. I. & P. R. Co.,* 171 Mo. 84, 70 S. W. 891 (1902); *Taussig* v. *St. Louis & K. R. Co.,* 186 Mo. 296, 85 S. W. 378 (1904).

baron, hundred, or county courts: and indeed all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began to bring actions of any trifling value in the courts of Westminster Hall, it was found to be an intolerable burden to compel the parties, witnesses and jurors to come from Westmoreland perhaps or Cornwall, to try an action of assault at Westminster. A practice therefore very early obtained, of continuing the cause from term to term, in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre. Afterwards, when the justices in eyre were superseded by the modern justices of assize (who came twice or thrice in the year into the several counties, *ad capiendas assisas,* to take or try writs of assize, of *mort d'ancestor, novel disseisin,* nuisance and the like), a power was superadded by statute Westm. 2, 13 Edw. I, ch. 30, to these justices of assize to try common issues in trespass, and other less important suits, with direction to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial, and not the determination, of the cause, was now intended to be had in the court below, therefore the clause, of *nisi prius* was left out of the conditional continuances before mentioned, and was directed by the statute to be inserted in the writs of *venire facias;* that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's court should be held) on such a day in Easter and Michaelmas terms; *nisi prius,* unless before that day the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms; and there the trial was had.

An inconvenience attended this provision: principally because, as the sheriff made no return of the jury to the court of Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the statute, 42 Edw. III, ch. 11, the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assize and gaol-delivery) should be taken by writ of *nisi prius,* till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias,* which is the sheriff's warrant to warn the jury; and is inserted in another part of the proceedings, as we shall see presently.

For now the course is, to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz., Hilary or Trinity terms; which, from the making up of the issues therein, are usually called issuable terms. And he returns the names of the jurors in a panel (a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which

reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum,* and in the king's bench a *distringas,* commanding the sheriff to have their bodies or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is, "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster, unless before that time, viz., on Wednesday the fourth of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes." And thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford; viz., on the fourth of March aforesaid. And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons the jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius*: among whom (as hath been said) are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits for this purpose. And thus we may observe that the trial of common issues, at *nisi prius,* which was in its original only a collateral incident to the original business of the justices of assize, is now, by the various revolutions of practice, become their principal civil employment: hardly any thing remaining in use of the real assizes but the name.

If the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the venire shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn. And these two, who are called *elisors,* or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array.[19]

---

[19]See also Bacon's Abridgement, tit. Juries. In England the ancient method of selecting and summoning jurors has been superseded by modern acts which confide the preparation of the jury list to designated officials. Jurors are summoned by the sheriff in obedience to precepts directed to him issued by the judges or other officials charged with that duty. See 8 Halsbury's Laws 226. In America common law writs for procuring the attendance of jurors have long since fallen into disuse and the procedure is largely statutory. 24 Cyc. 222, 12 Enc. Pl. & Pr. 318. "Our system of summoning jurors bears little resemblance to that practiced under the common law. In Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania, and West Virginia, a writ of *venire facias,* expressly so called, issues by order of the court before each drawing, but this is the only process. In all other states it is believed that the drawing takes place as a matter of course upon a certain date, and the venire issues only after the drawing is finished and the list of jurors ready to be summoned. Some states continue to designate this process as a *venire;* in others it is known as an "order," "precept," "summons" or simply "process." In many of the statutes no mention is made of

(b) Challenges.

3 Blackstone's Commentaries 363.

Jurors may be challenged *propter affectum* for suspicion of bias or partiality. This may be either a principal challenge, or to the favor. A principal challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favor; as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him; all these are principal causes of challenge, which, if true, can not be overruled, for jurors must be *omni exceptione majores.* Challenges to the favor are where the party hath no principal challenge, but objects only to some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of triers, whose office is to decide whether the juror be favorable or unfavorable. The triers, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest.[20]

JONES *v.* WOODWARTH.

SUPREME COURT OF SOUTH DAKOTA, 1910.

24 S. Dak. 583.

CORSON, J.: This is an appeal by the defendant from a judgment rendered in favor of the plaintiff, and from the order denying a new trial. The action was instituted by the plaintiff to recover of the

---

the process. When the drawing is concluded, the clerk makes a copy of the names of the jurors drawn, which he delivers to the sheriff, which *per se* constitutes the order and authority to the sheriff to summon." Thompson and Merriam on Juries, § 69 (1882).

[20]Brooke's Abridgment, "Challenge"; Coke on Littleton, 155b, *et seq.*; 34 Lib. Ass. 6; *Berry* v. *Wallen,* 1 Overt. (Tenn.) 186 (1804); *McCormick* v. *Brookfield,* 4 N. J. L. 69 (1818); *Mechanics & F. B.* v. *Smith,* 19 Johns. (N. Y.) 115 (1821); *People* v. *Reyes,* 5 Cal. 347 (1855); *Flemming* v. *State,* 11 Ind. 234 (1858).

"Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made on account of partiality or some default in the sheriff or his under-officer who arrayed the panel." III Bl. Comm. 358. "Challenges to the polls, *in capita,* are exceptions to particular jurors, and seem to answer the *rescusatio judicis* in the civil and cannon laws. . . . Challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke: *Propter honoris respectum; propter defectum; proper affectum; and propter delictum.*" III Bl. Comm. 361; 1 Co. Lit. 156.

defendant damages for an alleged breach of a contract entered into by the defendant with the plaintiff for the purchase of 100 head of steers, which the defendant refused to accept.[21]

It is disclosed by the record that upon the case being called for trial, and before the drawing of the trial jury, the defendant interposed a challenge to the array of jurors summoned and returned to try said cause, supported by affidavit, on the ground that the plaintiff in the said action was the sheriff of said county at the time of the drawing of the jury for said term of court, and participated in the drawing of the same, and that he, as such sheriff, summoned and caused to be summoned said jury. This challenge was denied by the court, and the defendant duly excepted. Thereupon a jury was called to the box for examination, and the defendant interposed a challenge to the array on the same grounds previously interposed to the panel. This challenge was also denied, and the defendant excepted. Thereupon the jury was examined as to their qualifications, and the defendant, after having exhausted his challenges, renewed his challenge to the array. This challenge was also denied, and the defendant excepted. It is assigned as error, among others, that the court erred in denying these challenges, and it is contended on the part of the appellant that for this error the case should be reversed.

It is contended by the respondent in support of the ruling of the trial judge that in civil cases a challenge to the panel or to the array is not provided for—the only challenge allowed being the challenge to individual jurors—and hence that the trial court was right in denying appellant's challenges. The law in relation to the formation of the trial jury in a civil case is provided for by section 249 of the Code of Civil Procedure, and following sections: By section 251 is provided: "Either party may challenge the jurors." By section 252, as amended by chapter 171, Laws 1903, the grounds of the challenge are specified. It will be noticed by an examination of these sections of the Code of Civil Procedure that no provision is made for a challenge to the panel or to the array. The learned counsel for the respondent calls our attention to section 3 of the Code of Civil Procedure, which provides, "The code establishes the law of this state respecting the subjects to which it relates, * * *" and also to section 9, which provides, "* * * But in all cases provided for by this code, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated * * *"; and insists that under these provisions of the Code of Civil Procedure no challenge to the panel or array can be allowed in a civil action, as no provisions have been made in the Code of Civil Procedure authorizing such a challenge to the panel or array. Prior to the adoption of the Revised Codes of 1903, there would have been great force in the contention of the respondent, but by that revision an important change was made in respect to the common law being in force in this state. Prior to the revision of 1903

[21]Parts of the opinion of the court and the concurring opinion of McCoy, J., in which Whiting, P. J., joined are omitted. Haney, J., dissented.

by section 2505, Comp. Laws, it is provided, "In this state there is no common law in any case where the law is declared by the codes," but by the revision of 1903 section 6 of the Civil Code was substituted for this section, which reads as follow: "In this state the common law is in force except where it conflicts with the codes or the constitution." It will be noticed that the language of this section is broad and comprehensive, and that it applies to all the codes, and that now "the common law is in force in this state except where it conflicts with the codes or the constitution." It will also be noticed that the word "codes" is used in the plural.

It seems to be the settled practice at common law to allow challenges to the panel or array, both in civil and criminal cases. 3 Blackstone by Cooley 359; 17 A. & E. Encyc. of Law 1111; 24 Cyc. 328; *Cowgill* v. *Wooden,* 2 Blackf. (Ind.) 332; *Woods* v. *Rowman,* 5 Johns. (N. Y.) 133; *Gollobitsch* v. *Rainbow,* 84 Iowa 567; *Munshower* v. *Patton,* 10 Serg. & R. (Pa.) 334; *Lagaux* v. *Wells,* 4 Yeates (Pa.) 43; *Ullman* v. *State,* 124 Wis. 602; *People* v. *Fellows,* 122 Cal. 233; *White* v. *State,* 45 Tex. Cr. 597. The Code of Civil Procedure having made no provision for a challenge to the array or panel, and there being no provision in the constitution in conflict with the common law upon this subject, it would seem quite clear that under the law as it now exists the rule of the common law authorizing such a challenge to the panel or array should be allowed, notwithstanding the provisions of the Code of Civil Procedure which have been heretofore quoted. The Code of Civil Procedure having provided for challenges to individual jurors, those provisions of the code supersede the common law, but, the Code of Civil Procedure not having provided in any manner for the challenge to the panel or the array in civil cases, the common law applicable to such challenge remains in force, and the court therefore erred in denying the challenge to the array or the panel, as the facts stated in the affidavit of the clerk as to the participation of the sheriff in the drawing and summoning of the jury at that term is undisputed.

It is provided in section 716, Pol. Code, that: "In case the sheriff shall be disqualified by reason of being a party to any suit pending in said circuit court, or suspension from office, the coroner shall serve with the said officers in place of the sheriff," and by section 717 it is provided specifically the manner in which the jury shall be drawn by the officers designated. In our opinion these provisions in regard to the drawing of the jury are mandatory, and it must be presumed, we think, that the sheriff knew that, as a party to the action to be tried at that term, he was disqualified from participating in any manner in the drawing or summoning of the jury. In such case it was the duty of the sheriff to notify the other members of the board designated to draw the jury that he was disqualified and that the coroner should be called in to act in his place. While no improper motive may have actuated the plaintiff in failing to so withdraw from the board, still it is the design of the law to remove all temptation from the officer so situated in using any improper influence by

participating in the drawing of the jury and to carry into full effect the intention of the provisions of the constitution (sec. 6, art. 6) which provides: "The right of trial by jury shall remain inviolate." *Fornia* v. *Frazer*, 140 Mich. 631; *Covington Bridge Co.* v. *Smith*, 118 Ky. 74; *S. Cov. Ry.* v. *Schilling* (Ky.), 80 S. W. 510; *Brogden* v. *State*, 47 Tex. Cr. 121; *State* v. *Austin*, 183 Mo. 478. In the case of *Fornia* v. *Frazer*, supra, the learned Supreme Court of Michigan, in discussing a similar question, says: "The statute leaves no discretion as to the officer who shall perform the act of drawing the jury. The clerk, and no other officer, must draw the names from the box. This court in *People* v. *Labadie*, 66 Mich. 702, * * * said: 'The statutes which establish the rule for the drawing of jurors leave no discretion in the officers designated to conduct such drawing but plainly indicate how the proceedings shall be conducted.'"

The summoning of the jury by the sheriff was equally irregular and in violation of the common law, as was his participation in the drawing of the same. To permit the sheriff under such circumstances to summon the jury where he is a party to an action to be tried by them affords him opportunity to exercise an improper influence over them. *Woods* v. *Rowan*, 5 Johns. (N. Y.) 133; *Legaux* v. *Wells*, 4 Yeates (Pa.) 43; *Cowgill* v. *Wooden*, 2 Blackf. (Ind.) 332; *Gollobitsch* v. *Rainbow*, 84 Iowa 567; *Munshower* v. *Patton*, 10 Serg. & R. (Pa.) 334. In the case of *Woods* v. *Rowan*, supra, the Supreme Court of Judicature for the state of New York, in discussing this question, says: "The reason given for not permitting the sheriff to summon a jury, in his own cause is because he is not to be trusted to return the jury (3 Bl. Comm. 354); and so scrupulous is the law on this subject that it is a good reason for quashing the array when made by a person or officer of whose partiality there is any reasonable ground of suspicion. 3 Bl. Comm. 59. Under our act, the opportunity offered the sheriff of selecting the jury is much more circumscribed than it was before; but to a certain extent he has still the power of choosing the triors of the cause. He has an advantage which the other party has not, and however remote or unimportant that advantage may be, if it exists at all, the law does not allow him an opportunity of availing himself of it. It is for this reason, among others, that the sheriff is not competent to summon a jury in the great variety of cases mentioned by Lord Coke. Co. Litt. 156a. It is true that the sheriff no longer selects the whole panel, and that it now is his duty to summon all such persons as shall have been previously balloted by the clerk; and hence it is argued that the challenge to the array in this case was properly overruled. I can not accede to this conclusion. The sheriff certainly may select such of them as he may suppose will best subserve his purpose, and by summoning them, and omitting to summon the rest, he may in many cases as effectually pack a jury as if he had the power of selecting the whole panel. The impartial and equal administration of justice renders it dangerous to trust the sheriff with such a power. It is no answer to this objection to say that it is not to be presumed the sheriff will prostitute his office to such purposes. It is because he may do it that the law interposes; and, if he may,

that is decisive of the question. I have taken some pains to ascertain whether in England it has ever been considered that it was not a good ground of challenge to the array where the sheriff has summoned a special jury; he being a party or otherwise disqualified. As far as my researches have extended, I do not discover that there is any distinction. The rule appears to be universal; and yet, where a special jury is to try the cause, the sheriff has no more power of selecting the jury than he has under our statute. I am satisfied that it is safest to adhere to the rule as we find it settled, a rule wisely introduced for the purpose of guarding against partiality and corruption in trials by jury. The court are of the opinion that the challenge to the array upon the trial ought to have been allowed; and that there must, therefore, be a new trial with costs to abide the event of the suit." This opinion, delivered over a century ago, so clearly and so fully states the law applicable to the case at bar that we do not deem a further discussion of the question necessary. For the error committed by the court in denying the challenge to the array of the jury, the judgment of the court below must be reversed.[22]

Judgment reversed. Haney, J., dissents.

FRANK H. DOWNEY *v.* THOMAS W. FINUCANE.

COURT OF APPEALS OF NEW YORK, 1912.

205 *N. Y.* 251.

WILLARD BARTLETT, J.: This is a civil action to recover damages for fraud and deceit.[23]

The basis of the action is the alleged falsity of a prospectus published to promote the sale of the securities of the United States Independent Telephone Company. This prospectus was not prepared or signed by any of the appellants. The sole signature to the prospectus is that of Albert O. Fenn, care Alliance Bank, Rochester,

---

[22]"The challenge to the array must be certain and specific, 3 Burr. 140; and is an objection to all the jurors returned by the sheriff, collectively, 3 Bl. Comm. 358; Co. Litt. 156, 158; and is founded on some partiality or default in the sheriff or his under-officer, or the clerk who arrayed the panel, 3 Bl. Comm. 359; 1 Archb. Pr. 204." *Conkey* v. *Northern Bank*, 6 Wis. 447 (1858); *Gardner* v. *Turner*, 9 Johns. (N. Y.) 260 (1812); *Pringle* v. *Huse*, 1 Cow. (N. Y.) 432 (1823); *Munshower* v. *Patton*, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678 (1823); *Quinebang Bank* v. *Tarbox*, 20 Conn. 510 (1850); *Clinton* v. *Englebrecht*, 13 Wall. (U. S.) 434, 20 L. ed. 659 (1871); *St. Louis & S. E. R. Co.* v. *Wheelis*, 72 Ill. 538 (1874); *United States* v. *Loughery*, Fed. Cas. No. 15631, 13 Blatch. (U. S.) 267 (1876); *Commonwealth* v. *Walsh*, 124 Mass. 32 (1878); *Boyer* v. *Teague*, 106 N. Car. 576, 11 S. E. 665, 19 Am. St. 547 (1890); *Riley* v. *Chicago, M. & St. P. R. Co.*, 67 Minn. 165, 69 N. W. 718 (1897); such a challenge must be made promptly. *Brunskill* v. *Giles*, 9 Bingh. 13 (1832); *Clears* v. *Stanley*, 34 Ill. App. 338 (1889); *Klemmer* v. *Mount Penn. G. R. Co.*, 163 Pa. St. 521, 30 Atl. 274 (1894); *Wallace* v. *Jameson*, 179 Pa. St. 98, 36 Atl. 142 (1897); *Evansville & S. I. Tr. Co.* v. *Johnson* (Ind. App.), 97 N. E. 176 (1912).

[23]Only so much of the opinion as relates to the right to challenge is printed.

N. Y. The plaintiff's right to recover, therefore, rests upon the agency of Fenn to act in their behalf in endeavoring to procure subscriptions by means of the prospectus.

The appellants, however, contend that Fenn, instead of acting for the individual members of the syndicate, was solely the agent of the United States Independent Telephone Company, and this being so that they can not be held liable for his fraudulent misrepresentations inasmuch as they were merely directors of that corporation.

The five defendants claimed to be entitled to six peremptory challenges each, but the court allowed only six peremptory challenges in all, treating the defendants collectively as but one party, within the meaning of section 1176 of the Code of Civil Procedure, which provides that upon a trial of an issue of fact joined in a civil action in a court of record each party may peremptorily challenge not more than six.[24] The question does not appear to have been considered in any reported case in this state. Numerous authorities from other states are cited in the briefs of counsel, but they are only relevant where statutes exist similar in phraseology to our own, that is to say, where a given number of peremptory challenges is allowed to each party. Such is the statute in Illinois in force since the year 1827, and "during that time it has been general practice and so understood by the entire profession that each side to the case without reference to the number of persons in each in all civil cases have but three peremptory challenges." *Schmidt* v. *C. & N. W. R. Co.*, 83 Ill. 405. The appellants rely upon *Hundhausen* v. *Atkins*, 36 Wis. 518, where the court was called upon to construe a statute regulating peremptory challenges which provided that in civil causes each party should be entitled to three. The defendants had appeared by different attorneys and severed their defenses, and the court held that inasmuch as their defenses were essentially different and each had a distinct issue to maintain, each was to be considered a party within the meaning of the statute. The court, however, added this qualification: "Undoubtedly when several defendants in a civil action join in their defense, or severing in their answers set out but one defense common to them all, they constitute one party limited to the statutory number of challenges given to a party as ruled in this case in the court below. In such a case they might and perhaps ought to join in one answer setting up a common defense; and they should not be permitted to gain additional challenges by the mere act of severing in their pleadings. They have a community of interests and should be left to a community of challenges." Such is the case

---

[24] In England peremptory challenges without cause exist only, as a matter of right, in cases of treason and felony. 18 Halsbury's Laws, 249. If allowed in civil cases it is as a matter of curtesy. *Creed* v. *Fisher*, 9 Exch. 472 (1854). In the United States, a limited number of peremptory challenges are generally authorized by statute in civil as well as criminal cases, but the right is purely statutory. *Gordon* v. *Chicago*, 201 Ill. 623, 66 N. E. 823 (1903); 12 Ency. Pl. & Pr. 475; *O'Neil* v. *Lake Superior Co.*, 67 Mich. 560, 35 N. W. 162 (1887); *Bruce* v. *Beall*, 100 Tenn. 573, 47 S. W. 204 (1898); *Stevens* v. *Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465 (1904).

here. The defendants had a common interest; their answers were substantially identical; and the defense was conducted in the common interest of all. Under the circumstances, whatever might be the rule if different defenses, possibly antagonistic to one another, had been interposed, the defendants were properly treated as only one party within the meaning of section 1176 of the code.

The judgment should be affirmed, with costs.[25]

TEGARDEN *v.* PHILLIPS.

APPELLATE COURT OF INDIANA, 1895.

14 *Ind. App.* 27.[26]

LOTZ, J.: The appellant, George W. Tegarden, as administrator *de bonis non* of the estate of John Phillips, deceased, brought this action against the appellee, Thomas L. Phillips, to recover the sum of $3,000, alleged to be due and owing from the latter to the estate. After issue joined, there was a trial by jury, and a verdict returned for the appellee, upon which the court, after overruling appellant's motion for a new trial, rendered judgment. The appellee was a son and heir at law of appellant's decedent. The only error assigned is the overruling of the motion for a new trial. One of the causes for a new trial was the alleged incompetency of one of the jurors, Thomas J. Grigsby. It appears from the affidavits filed in support of this cause that the juror, on his *voir dire*, was asked whether or not he was related by blood or marriage to either of the parties to the action, and that in answer to such question the juror stated that he was not. It is also made to appear that this juror's wife and the appellee's wife are related by consanguinity within the fifth degree, the juror's wife and the appellee's wife's mother having been first cousins. It is also shown by the affidavits of the appellant and his counsel that they had no knowledge of such relationship when the juror was accepted.

---

[25] Accord: *Sodousky* v. *McGee*, 4 J. J. Marsh. (Ky.) 267 (1830); *Bibb* v. *Reid*, 3 Ala. 88 (1841); *Snodgrass* v. *Hunt*, 15 Ind. 274 (1860); *Stone* v. *Segur*, 93 Mass. 568 (1866); *Bryan* v. *Harrison*, 76 N. Car. 360 (1877); *McClay* v. *Worrall*, 18 Nebr. 44, 24 N. W. 429 (1885); *United States* v. *Alexander*, 2 Idaho 354 (1888); *Hargrave* v. *Vaughn*, 82 Tex. 347, 18 S. W. 695 (1891); *Illinois, Iowa and Minnesota R. Co.* v. *Freeman*, 210 Ill. 270 (1904); *Waters-Pierce Oil Co.* v. *Burrows*, 77 Ark. 74 (1905); *Clark* v. *St. L. & S. R. Co.*, 234 Mo. 396, 137 S. W. 583 (1911); *Galveston H. & S. A. R. Co.* v. *Saunders*, (Tex. Civ. App.) 141 S. W. 829 (1911); *Schwing v. Dunlap*, 130 La. 498, 58 So. 162 (1912); *Crandall* v. *Puget Sound Tract. &c. Co.*, 77 Wash. 37, 137 Pac. 319 (1913). Compare *Strohe* v. *Henchman*, 37 Mich. 490 (1877); *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. 909 (1891); *Texas & P. R. Co.* v. *Stell*, (Tex.) 61 S. W. 980 (1901); *Waggoner* v. *Dodson*, 96 Tex. 6, 68 S. W. 813, 69 S. W. 993 (1904); *Cornell-Andrew Smelting Co.* v. *Boston & P. R. Co.*, 202 Mass. 585, 89 N. E. 118 (1909); *Hannay* v. *Harmon*, (Tex. Civ. App.) 137 S. W. 406 (1911).

[26] 42 N. E. 549 on rehearing of 39 N. E. 212. A part only of the opinion is given.

At common law, relationship by consanguinity or affinity within the ninth degree, computed according to the rules of the civil law, is good grounds for challenge.[27] And it seems that this relationship could not be waived. *Oakley* v. *Aspinwell,* 3 N. Y. 550; *Edwards* v. *Russell,* 21 Wend. (N. Y.) 63. These rules have been changed in this state by statute. The fact that a juror is related to one of the parties within the inhibited degrees does not absolutely disqualify him from serving. The eleventh subdivision of section 240, Rev. Stat. 1894 (sec. 240, Rev. Stat. 1881), provides that "when a person is required to be distinterested or indifferent in acting on any question or matter affecting other parties, consanguinity or affinity within the sixth degree inclusive by the civil law rules, or within the degree of second cousin inclusive, shall be deemed to disqualify such person from acting except by consent of the parties." It has been held that this statute applies to jurors. *Dearmond* v. *Dearmond,* 10 Ind. 191; *Hudspeth* v. *Herston,* 64 Ind. 133. It will be seen from this statute that the relationship may be waived, and the juror permitted to serve. * * *

But, aside from the question of waiver, were the juror and the appellee related, it is clear that they were not related by consanguinity. If related at all, it was by affinity. Appellant's contention is that they were related by affinity, while appellee insists that no relationship exists between them by affinity. Affinity is an artificial relationship. Bouv. Law Dict. defines it thus: "The connection existing in consequence of marriage between each of the married persons and the kindred of the other. It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other. Thus, the relations of my wife—her brothers, her sisters, her uncles—are allied to me by affinity; and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity."[28]

The degrees of relationship by consanguinity of a husband or wife to a third person is determined by counting up to the common ancestor, and down to the related party; and the degree of relationship by affinity is found by counting up to the common ancestor, and then counting down. The juror complained of was related to appellee's wife by affinity only. This did not relate the juror and appellee by affinity. The husbands of second cousins could not possibly fall within the line of computation. The juror can not be related to the appellee without departing from the principle upon which relationship by affinity is determined. It is sometimes said that there is a

---

[27]According to Coke if a juror was of kin to either party in any degree he was disqualified. Co. Litt 157a. But later practice excluded only those related within the ninth degree, 3 Bl. Comm. 363; Tidds Pr. 853. Such is the rule in a number of states while in others the statutes prescribe a nearer degree of relationship for absolute disqualification.

[28]If either party to the marriage be dead and no issue living, the disqualification ceases. *Cain* v. *Ingham,* 7 Cow. (N. Y.) 478 (1827); and note *Vannoy* v. *Givens,* 23 N. J. L. 201 (1851); *Bigelow* v. *Sprague,* 140 Mass. 425, 5 N. E. 144 (1885).

connection between parties, arising from marriage, which is neither consanguinity nor affinity. It is called "*affinitas affinitatis.*" Bouv. Law Dict.; Ersk. Inst. p. 678. It is sometimes confused with and called "affinity." As a general rule, however, this connection is too vague and shadowy for judicial cognizance. In any event, it is not recognized by our statute. Section 240, Rev. Stat. 1894; sec. 240, Rev. Stat. 1881. It is true that in some cases this relationship or connection has been recognized by the courts. Thus, in *Markham* v. *Lee,* 22 Edw. IV, p. 2, cited in *Mounson* v. *West,* 1 Leon. 89, the defendant's challenge to the array was sustained because the sheriff's wife was a sister to the plaintiff's wife. And in 15 Hen. VII, ch. 9, cited in 1 Leon. 89, the challenge was sustained because the brother of the wife of the defendant had married the daughter of the sheriff. In *Foot* v. *Morgan,* 1 Hill (N. Y.) 654, it was held that a justice of the peace who had married the sister of the plaintiff was incompetent to try the case. And in *Railroad Co.* v. *Schuyler,* 28 How. Prac. (N. Y.) 187, it was held that a judge who had married the first cousin of one of the defendants was incompetent to sit. These are the only cases which have come under our observation which directly support appellant's contention. The appellant cites and relies upon the case of *Paddock* v. *Wells,* 2 Barb. Ch. (N. Y.) 231. It is there said: "Relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity." This latter statement is mere dicta, for there was no such question before the court. The question there before the court was whether or not the vice chancellor was competent to sit, he being a first cousin of a former husband of the defendant, there being issue living of the first marriage. We believe the weight of authority, as well as reason and logic, is opposed to appellant's contention. In Co. Litt. 527, it is laid down that the marriage of the juror's son with the daughter of the plaintiff is not a principal cause of challenge, as it would be if the juror himself had married the daughter of the plaintiff. In 2 Steph. Comm., it is said: "The consanguinei of the wife are the affines of the husband, and vice versa; but the affines of the wife are not those of the husband, nor are the affines of the husband those of the wife." In *Waterhouse* v. *Martin,* Peck (Tenn.) 374, it is held that there is no relation by affinity between a party to the suit and the judge, whose son's wife is an aunt of such party. In *Hume* v. *Bank,* 10 Lea (Tenn.) 1, it is held that a judge is not incompetent to sit in a cause in which the husband of his wife's sister is a party. In *Poydras* v. *Livingston,* 2 Mart. (N. S. 482) (La.) 293, it was decided that, although the wives of the judge and the defendant were related by consanguinity in the fourth degree, the husbands were not related by affinity, and that the judge was not disqualified. In *Chinn* v. *State,* 47 Ohio Stat. 575, it was held, in a criminal case, that a defendant was not related by either consanguinity or affinity to his wife's brother's wife. See, also, Coop. Just. 422; Tayl. Civ. Law, 339; 1 Bish. Mar. & Div. 314; Just. Inst. 1, 10, 6; 1 Chit. Bl. 435, note 5. The

juror was not incompetent. Under this rule above stated, it is true that, if two men should marry sisters, one would not be disqualified by this fact alone from serving on a jury where the other is a party. But there are many other grounds for challenging a juror than those enumerated in the statute. A juror must be disinterested, impartial, free from bias and prejudice. If, by reason of his relationship, or by reason of his association with a party, he has become biased or prejudiced, or rendered partial, he may be challenged for such cause. [29] Thornt. Juries & Inst., p. 79.

Judgment affirmed.

THOMPSON *v.* DOUGLASS.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1891.

35 *W. Va.* 337.

BRANNON, J.: Thompson & Jackson brought an action of assumpsit against S. C. Douglass & Co. in the Circuit Court of Barbour county, and recovered judgment; and the defendants brought the case to this court.[30]

The first point of error made against the judgment is that the court excluded five persons from the jury because they were indebted to one of the defendant firm. Challenges of jurors, called challenges to the polls, are of two kinds—peremptory and for cause. Lord Coke said, as we can say to-day, that peremptory challenges were allowed the party "upon his own dislike, without showing any cause."[31] Our law allows each party in civil cases four such challenges and in felony cases, to the state two, and the accused six. Challenges for cause are divided by the common law into challenges for principal cause and challenges to the favor—the former being where the cause assigned positively disqualified; the latter being causes which, though not conclusively disqualifying, yet threw sus-

---

[29] Accord: *Chase* v. *Jennings*, 38 Maine 44 (1854); *North Ark. & W. R. Co.* v. *Cole*, 71 Ark. 38, 70 S. W. 312 (1902); *Louisville & N. R. Co.* v. *Holland*, 173 Ala. 675, 55 So. 1001 (1911). Compare *Den* v. *Clark*, 1 N. J. L. 446 (1794). And see generally as to incompetency through relationship, Y. B. 23 Ass. II; Y. B. 21 Edw. IV., 20; *Hartford Bank* v. *Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274 (1807); *Daily* v. *Gaines*, 1 Dana (Ky.) 529 (1833); *Churchill* v. *Churchill*, 12 Vt. 661 (1839); *Armstrong* v. *Timmons*, 3 Har. (Del.) 342 (1841); *Paddock* v. *Wells*, 2 Barb. Ch. (N. Y.) 331 (1847); *Hardy* v. *Sprowle*, 32 Maine 310 (1850); and note *Trullinger* v. *Webb*, 3 Ind. 198 (1851); *Balsbaugh* v. *Frazer*, 19 Pa. St. 95 (1852); *Morrison* v. *McKinnon*, 12 Fla. 552 (1868); *Rust* v. *Shackleford*, 47 Ga. 538 (1873); *Lynds* v. *Hoar*, 10 Nova Scotia 327 (1875); *Wirebach* v. *First Nat. Bank*, 97 Pa. St. 543, 39 Am. Rep. 821 (1881); *People* v. *Clark*, 62 Hun (N. Y.) 84, 16 N. Y. S. 473, 695, 41 N. Y. St. 448 (1891); *Texas & P. R. Co.* v. *Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410 (1899); *Capwell* v. *Capwell*, 17 Pa. Dist. R. 137 (1907); *Pemiscot L. &c. Co.* v. *Davis*, 147 Mo. App. 194, 126 S. W. 218 (1909); *Walsingham* v. *State*, 61 Fla. 67, 56 So. 195 (1911); *Dalton* v. *Humphries*, 139 Ga. 556, 77 S. E. 790 (1912).

[30] A part of the opinion of the court is omitted.

[31] Co. Litt. 156b.

picion of bias on the juror. Principal challenges were tried by the court, challenges to the favor by three triers; and, while these different modes of trial of challenges existed, it was very important to preserve this distinction in order to determine in which class the challenges would fall, in view of the different methods of trial of each. But our statute law requires challenges to be tried by the court, and thus the distinction between principal cause of challenge and challenge to the favor has become unimportant, and we commonly call all challenges challenges for cause.[32] What Lord Coke said centuries ago may be said now: "The causes of favor are infinite." No enumeration was ever attempted of what causes might be alleged as grounds of challenges to the favor. It would be impossible to specify all that should be allowed in advance by a statute, for they depend upon each particular case, and the circumstances and parties to it. All concede that statutory disqualifications are not the only ones.[33]

The cause assigned for the challenge of these jurors would fall under the head of challenge to the favor. But is the fact that a man is indebted to another good cause of challenge to exclude the indebted party from sitting as a juror in a case wherein the creditor is a party? Would a feeling of favor or fear move him, in the eye of the law, to render a false verdict? Practically, there is some force to say that where a party is greatly favored by a creditor, by indulgence, he would feel a favor towards his friend; and, with perhaps more force, that one largely indebted to another, so much indebted as to be at his mercy for his solvency, and even his home, might from fear fail to render a just verdict adverse to his creditor. On the other hand, it would be going quite far to say that simply the fact that one man is indebted to another would disqualify; that if he owes only a small sum, which he is able to pay at any time, or is a man of large means, or had more means than has his creditor, he should be rejected. I do not say that no case of indebtedness—

---

[32]The tendency of modern legislation is to relegate the trial of all challenges to the court. Thompson and Merriam on Juries, § 172; Proffatt on Trial by Jury, § 167; New York Code Civ. Proc., § 1180; Pennsylvania act of June 5, 1883, P. L. 79, § 1, P. & L. Dig. 4260; Compiled Statutes of New Jersey, vol. III, p. 2978; Rev. L. Mass. (1902) ch. 176, § 28; *O'Fallon Coal Co.* v. *Laquet*, 198 Ill. 125, 64 N. E. 767 (1902).

[33]*Churchill* v. *Churchill*, 12 Vt. 661 (1839); *Paddock* v. *Wells*, 2 Barb. Ch. (N. Y.) 331 (1847); *Bailey* v. *Macaulay*, 13 Ad. & El. (N. S.) 815 (1849); *Hudspeth* v. *Herston*, 64 Ind. 133 (1878); *Mich. A. L. R. Co.*, v. *Barnes*, 40 Mich. 383 (1879); *Kohler* v. *West Side R. Co.*, 99 Wis. 33, 74 N. W. 568 (1898); *Medlock* v. *Commrs.*, 115 Ga. 337, 41 S. E. 579 (1902); *Grant* v. *Nat. R. Spring Co.*, 100 App. Div. 234, 91 N. Y. S. 805 (1905). A juror is not incompetent because he is a member of the same religious denomination or fraternal order as one of the parties to the suit, unless the interests of the particular congregation or lodge to which he belongs are involved. *Purple* v. *Horton*, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167 (1832); *Burdine* v. *Grand Lodge*, 37 Ala. 478 (1861); *Cleage* v. *Hyden*, 6 Heisk. (Tenn.) 73 (1871); *Delaware Lodge* v. *Allmon*, 1 Pennew. (Del.) 160 (1897); *Reed* v. *Peacock*, 123 Mich. 244, 82 N. W. 53, 4 L. R. A. 423, 81 Am. St. 194 (1900); *Smith* v. *Sisters of the Good Shepherd*, 27 Ky. L. 1107, 87 S. W. 1083 (1905); *Searle* v. *Bishop of Springfield*, 203 Mass. 493 (1909); *Sebring* v. *Weaver*, 42 Pa. Super. Ct. 588 (1910).

one showing the debtor to be at the mercy and in the power of his creditor—might not exclude. I have, however, met with no case excluding, or of attempt to exclude, a juror for such cause, except one cited by counsel, *Bank* v. *Smith*, 19 Johns. (N. Y.) 115, where, because the juror was an indorser on a note held by a bank, he was held disqualified by the triers, not by the court—the court having allowed the fact to go before the triers as an item of evidence to show bias; and, as the court above said, it was a decision on the admissibility, not on the sufficiency, of the evidence to show bias; and the judge in the opinion pointedly said that he would not undertake to say that the single circumstance that one was indorser on a note to the bank would of itself support a challenge to the favor, yet it was easy to imagine that an indorser might have bias, as in case the maker was insolvent, and the indorser in great danger at the hands of the bank. No other case is cited.

In this present case simply the fact of indebtedness is shown without any appearance of amounts or the relative pecuniary standing of the parties. We therefore think the jurors were improperly excluded.[84]

What then? Is it reversible error, or harmless error? Where a disqualified juror is put on the jury, it is of course error; but where a qualified juror is improperly rejected, it is a wholly different thing. In such case the man taking his place is qualified and unexceptionable. Is he not as good a juror as the excluded one? Has not the party had what the law designs—a trial by an impartial jury? If you set aside the verdict, upon a new trial he can not get that rejected man. Is that man better than all the balance of the citizens of the state qualified for jury service? Shall a long costly trial be upturned for such cause only to give the party what he has already had—a fair jury? Is the administration of justice to bear the odium of such technicality?

Snow v. *Weeks*, 75 Maine 105, holds that the exclusion of a qualified juror is not reviewable; that the judge "may put a legal juror off, but can not allow an illegal juror to go on." In *Sutton* v.

[84]One who stands in a business relation to a party to the suit which is calculated to influence his verdict will not be permitted to serve as a juror. Y. B. 10 Edw. IV, 12; *Anonymous*, 2 Dyer 176a (1559); *Harrisburg Bk.* v. *Forster*, 8 Watts (Pa.) 304 (1839); *Goodrich* v. *Burdick*, 26 Mich. 39 (1872); *Stumm* v. *Hummel*, 39 Iowa 478 (1874); *Hubbard* v. *Rutlidge*, 57 Miss. 7 (1879); *Cent. R. R. Co.* v. *Mitchell*, 63 Ga. 173 (1879); *Catasauqua Mfg. Co.* v. *Hopkins*, 141 Pa. St. 30, 21 Atl. 638 (1891); *Iroquois Furnace Co.* v. *McCrea*, 191 Ill. 340, 61 N. E. 79 (1901); *McCorkle* v. *Mallory*, 30 Wash. 632, 71 Pac. 186 (1902); *Blair* v. *McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. S. 750 (1907); *Pearce* v. *Quincy Min. Co.*, 149 Mich. 112, 112 N. W. 739, 12 Ann. Cas. 304 and note (1907); *Hall* v. *Chattin*, 17 Idaho 664, 106 Pac. 1132 (1910); *Hufnagle* v. *Del. & H. Co.*, 227 Pa. 476, 76 Atl. 205 (1910). But otherwise if the relationship is not calculated to influence the verdict. *Marsh* v. *Coppock*, 9 Car. & P. 480 (1840); *Cummings* v. *Gann*, 52 Pa. St. 484 (1866); *Richardson* v. *Planters' Bk.*, 94 Va. 130, 26 S. E. 413 (1896); *Van Strike* v. *Potter*, 53 Nebr. 28, 73 N. W. 295 (1897); *Arnold* v. *Producers' Fruit Co.*, 141 Cal. 738, 75 Pac. 326 (1904); *Dimmack* v. *Wheeling Trac. Co.*, 58 W. Va. 226, 52 S. E. 101 (1905); *Joyce* v. *Metropolitan S. R. Co.*, 219 Mo. 344, 118 S. W. 21 (1908); *Border* v. *Carrabine*, 30 Okla. 740, 120 Pac. 1087 (1912).

Fox, 55 Wis. 531, is a *quaere* whether the rejection of a competent juror would be error; but the opinion strongly maintains that it is not. In *Tatum* v. *Young*, 1 Port. (Ala.) 298, it was held that "when a cause has been tried by a legally impartial jury, though the judge, on the application of the plaintiff, against the consent of the defendant, may have rejected a juror for a cause somewhat questionable as to its sufficiency, such rejection of the juror is not available in error." This opinion draws the line between the erroneous rejection and admission of a juror, and says, where the trial has been by a fair jury, there can be no prejudice, and quotes with approval what Judge Story said in *U. S.* v. *Cornell*, 2 Mason (U. S.) 91: "Even if a juror had been set aside by the court for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such a case have suffered any injury."

In *O'Brien* v. *Iron Works*, 7 Mo. App. 257, it was held that "the improper exclusion of a juror upon a challenge is not sufficient ground for reversal, where it does not appear that the party was prejudiced thereby." In *Maner* v. *State*, 8 Tex. App. 361, held that excusing juror for insufficient cause was no material error, when it is not shown that the defendant was prejudiced. See *Dodge* v. *People*, 4 Nebr. 220; *John D. C.* v. *State*, 16 Fla. 554; *Railroad Co.* v. *Franklin*, 23 Kans. 74; *State* v. *Ward*, 39 Vt. 225; *Watson* v. *State*, 63 Ind. 548.

There are some authorities on the other side. I notice that a very limited number cited by prisoner's counsel in *Montague's Case*, 10 Grat. (Va.) 767, sustain the contrary; perhaps only two of the American cases. An abuse of discretion by the court, or where it appears that prejudice in the particular case resulted from the exclusion, would be subject to review. Nothing of this kind appears here, and we are of opinion that the exclusion of these jurors, though on insufficient ground, is not reversible error.[85]

---

[85]While the disallowance of a good cause of challenge may result in a reversal of judgment, the erroneous allowance of a challenge will not, in the absence of abuse of discretion, necessarily have that effect. A party is entitled to an impartial jury, but he is not, as a matter of right, entitled to any particular juror called who happens to be qualified. *Phelps* v. *Hall*, 2 Tyler (Vt.) 401 (1803); *Silvis* v. *Ely*, 3 Watts & S. (Pa.) 420 (1842); *Bibb* v. *Reid*, 3 Ala. 88 (1841); *Mansell* v. *The Queen*, 8 El. & B. 54 (1857); *Smith* v. *Clayton*, 29 N. J. L. 357 (1862); *People* v. *Arceo*, 32 Cal. 40 (1867); *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308 (1874); *Citizens' Bk.* v. *Strauss*, 26 La. Ann. 736 (1874); *Coryell* v. *Stone*, 62 Ind. 307 (1878); *O'Brien* v. *Vulcan Iron Works*, 7 Mo. App. 257 (1879); *Commonwealth* v. *Mosier*, 135 Pa. St. 221, 19 Atl. 943 (1890); *Rhea* v. *State*, 63 Nebr. 461, 88 N. W. 789 (1902); *Glasgow* v. *Metropolitan St. R. Co.*, 191 Mo. 347, 89 S. W. 915 (1905); *International & G. N. R. Co.* v. *Owens*, (Tex.) 124 S. W. 210 (1910); *Comm.* v. *Henderson*, 242 Pa. 372, 89 Atl. 567 (1913). Contra: *Boles* v. *State*, 13 Sm. & M. (Miss.) 398 (1850); *Van Blaricum* v. *People*, 16 Ill. 364, 63 Am. Dec. 316 (1855); *Scranton* v. *Gore*, 124 Pa. 595, 17 Atl. 144 (1889), and compare *Comfort* v. *Mosser*, 121 Pa. St. 455, 15 Atl. 612 (1888); *Clay* v. *Western M. R. Co.*, 221 Pa. 439, 70 Atl. 807 (1908); *Searle* v. *Roman Catholic Bishop*, 203 Mass. 493 (1909). It is generally held that the findings of the court upon questions of fact involved in a challenge are conclusive, but the findings upon questions of law are reviewable on error.

WOOD *v.* STODDARD qui tam, &c.

SUPREME COURT OF NEW YORK, 1807.

2 Johns. (N. Y.) 194

In error on certiorari. The plaintiff below brought an action to recover of the defendant below a sum, received by him for excessive interest, under the act for preventing usury, one moiety of which is directed to go to the use of the town where the offense is committed, and the other moiety to the person prosecuting. The cause was tried in the town of Scipio, where the usurious sum was received. The constable and jury were inhabitants of the same town. The defendant below challenged all the jurors as being interested. The justice before whom the cause was tried overruled the exception, and a verdict was found for the plaintiff.

PER CURIAM: The relaxation of the rule, as to questions of interest, has never been extended to jurors. They must be *omni exceptione majores*, free from every objection, and wholly disinterested. The judgment below must be reversed.

Judgment reversed.[86]

March v. *Portsmouth & C. R. Co.*, 19 N. H. 372 (1849); *Dew* v. *McDivitt*, 31 Ohio St. 139 (1876); *Wirebach* v. *First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821 (1881); *Catasauqua Mfg. Co.* v. *Hopkins*, 141 N. Y. 30, 21 Atl. 638 (1891); *Johnson* v. *State*, 59 N. J. L. 271, 35 Atl. 787 (1896); *Ruschenberg* v. *Southern El. R. Co.*, 161 Mo. 70, 61 S. W. 626 (1900); *State* v. *Register*, 133 N. Car. 746, 46 S. E. 21 (1903); *Graybill* v. *DeYoung*, 146 Cal. 421, 80 Pac. 618 (1905); *Sansouver* v. *Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545 (1908); *Hinton* v. *Atchison & N. R. Co.*, 83 Nebr. 835, 120 N. W. 431 (1909). Other courts hold that the decision of the trial court is reviewable whether the challenge is for principal cause or to the favor. *Winnesheik Ins. Co.* v. *Schueller*, 60 Ill. 465 (1871); *Bulbo* v. *People*, 80 N. Y. 484 (1880); *O'Fallon Coal Co.*, v. *Laquet*, 198 Ill. 125, 64 N. E. 767 (1902).

[86]Accord: 17 Lib. Ass. 15; 28 Lib. Ass. 18; *Day* v. *Savadge*, Hob. 85, 87; *Anonymous*, 1 Salk. 153 (1688); *Queen* v. *Wilts County*, 6 Mod. 307 (1704); *Hesketh* v. *Braddock*, 3 Burr. 1847 (1766); *Alexandria* v. *Brockett*, 1 Cr. C. C. 505 (1808); *Boston* v. *Tileston*, 11 Mass. 468 (1814); *Russell* v. *Hamilton*, 3 Ill. 56 (1839); *Columbus* v. *Goetchius*, 7 Ga. 139 (1849); *Fine* v. *St. Louis Public Schools*, 30 Mo. 166 (1860); *Hawes* v. *Gustin*, 84 Mass. 402 (1861); *Bailey* v. *Trumbull*, 31 Conn. 581 (1863); *Garrison* v. *Portland*, 2 Ore. 123 (1865); *Johnson* v. *Americus*, 46 Ga. 80 (1872); *Diveny* v. *Elmira*, 51 N. Y. 506 (1873); *Watson* v. *Tripp*, 11 R. I. 98, 33 Am. Rep. 420 (1874); *Gibson* v. *Wyandotte*, 20 Kans. 156 (1878); *Goshen* v. *England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253 (1889); *Robinson* v. *Wilmington*, 8 Houst. (Del.) 409 (1889); *Cason* v. *Ottumwa*, 102 Iowa 99, 71 N. W. 192 (1897); *Davey* v. *Jamesville*, 111 Wis. 628, 87 N. W. 813 (1901); *Multnomah County* v. *Willamette Towing Co.*, 89 Ore. 204, 89 Pac. 389 (1907); *Anderson* v. *Wilmington*, 6 Pennew. (Del.) 485, 70 Atl. 204 (1907); *Broadway Mfg. Co.*, v. *Leavenworth Terminal R. Co.*, 81 Kans. 616, 106 Pac. 1034 (1910). Contra: *Middleton* v. *Ames*, 7 Vt. 166 (1835); *Omaha* v. *Olmstead*, 5 Nebr. 446 (1877); *Kemper* v. *Louisville*, 14 Bush (Ky.) 87 (1878); *Jackson* v. *Pool*, 91 Tenn. 448, 19 S. W. 324 (1892); *Marshall* v. *McAllister*, 18 Tex. Civ. App. 159, 43 S. W. 1043 (1898); *Detroit* v. *Detroit Ry.*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. 600 (1903). The principle has been applied to taxpayers of counties. *Peck* v. *Essex*, 21 N. J. L. 656 (1847); *Elliott* v. *Wallowa County*, 57 Ore. 236, 109 Pac. 130 (1910). Contra: *Rathbun* v. *Thurston Co.*, 8 Wash. 238, 35 Pac. 1132 (1894); *Eastman* v *Burke*,

PAGE *v.* THE CONTOOCOOK VALLEY RAILROAD.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, 1850.

21 N. H. 438.

Appeal from the decision of commissioners and selectmen, awarding damages to the appellant for laying out the Contoocook Valley Railroad, across his land.

On the 20th of June, 1850, the Contoocook Valley Railroad and the Concord and Claremont Railroad entered into a contract by indenture, which contract was in force at the time of the trial of this cause, in October, 1850. By this contract, it was agreed that the Concord and Claremont Railroad should run and manage both roads, and that the joint net income of both roads should be divided between them in proportion to the sums expended in constructing and completing each.

After the trial of this cause by the jury, it was discovered that one of the jurors owned eleven shares in the capital stock of the Concord and Claremont Railroad; and, on this ground, the appellant moved to set aside the verdict.

PERLEY, J.: By the contract between the two roads the net income of both was to be divided in proportion to the cost of each. The sums paid to land-owners would be part of the expense of constructing and completing the roads. Under this bargain, stockholders in the Concord and Claremont road would be interested to keep the land-damages paid by the other road, as low as possible, because, on a division of profits, the lower the land-damages paid by the Contoocook Valley road, the smaller would be the amount taken by that road from the common fund, out of which dividends would be made to the stockholders of the two roads.

The juror, who owned stock in the Concord and Claremont road, was, therefore, by virtue of this contract, directly interested in the result of the cause, which he assisted to try.[87] His interest was prob-

---

119 N. Car. 505, 26 S. E. 39 (1896); *Martin* v. *Somervell Co.*, 21 Tex. Civ. App. 308, 52 S. W. 556 (1899); *Pool* v. *Warren Co.*, 123 Ga. 205, 51 S. E. 328 (1905); *Big Sandy R. Co.*, v. *Floyd Co.*, 31 Ky. L. 17 (1907); *Wilson* v. *Wapello*, 129 Iowa 77, 105 N. W. 363 (1905). In a number of states it is provided by statute that the fact that a juror is a resident or taxpayer of a city, town or county is not a good cause of challenge. New York Code of Civil Procedure, § 1179; Pennsylvania, act of April 16, 1840, P. L. 410, § 6, P. & L. Dig. 4260; *Scranton* v. *Gore*, 124 Pa. St. 595, 17 Atl. 144 (1889); Rev. Laws Minn. 1905, § 413; New Jersey Rev. Stat. 1877, p. 530, § 39; W. Va. Code 1906, § 3717; Rev. Laws Mass. (1902) pp. 1492, 1591. In *Boston* v. *Baldwin*, 139 Mass. 315, 1 N. E. 417 (1888) a member of common council of the city of Boston was held not competent to sit as a juror in a case to which the city was a party.

[87] But compare *Augusta S. R. Co.* v. *McDade*, 105 Ga. 134, 31 S. E. 420 (1898). Generally, stockholders are not competent as jurors in actions to which their corporation is a party. Y. B. 21 Edw. IV, 11, 20, 31, 63; *Respublica* v. *Richards*, 1 Yeates (Pa.) 480 (1795); *Silvis* v. *Ely*, 3 Watts & S. (Pa.) 420 (1842); *Fleeson* v. *Savage Silver Min. Co.*, 3 Nev. 157 (1867); *Peninsular R. Co.* v. *Howard*, 20 Mich. 18 (1870); *Butler* v. *Glens Falls &c. R. Co.*, 121 N. Y. 112, 24 N. E. 187 (1890). See N. Y. Code Civ. Proc., § 1180;

ably very trifling in amount, and may not have influenced his judgment at all on the question of damages. But the principle is extremely well settled, that any, even the smallest, degree of interest in the question pending, is a decisive objection to a juror. *Hesketh* v. *Braddock*, 3 Burrows, 1856; *Hawkes* v. *Kennebeck*, 7 Mass. 464; *Wood* v. *Stoddard*, 2 Johns. (N. Y.) 194.

As this objection was not known to the appellant until after the verdict was returned, it was not waived by proceeding to trial without challenge.

The verdict must be set aside, and a new trial granted.

FERDINAND GIRARD *v.* THE GROSVENORDALE COMPANY.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1909.

82 *Conn.* 271.

Action by a servant to recover damages for personal injuries alleged to have been caused by the defendants' negligence. There was a verdict and judgment for the plaintiff and appeal by the defendant.[38]

THAYER, J.: Before the jury was impaneled counsel for the plaintiff, in the absence of the jurors and in the presence of counsel for the defendant, informed the court that the defendant was insured against liability for damage to the plaintiff through negligence, by an insurance company, and that the insurance company was interested and conducting the defense. Counsel for the defendant admitted the fact of the insurance. The plaintiff's counsel claimed the right to inquire of the jurors whether any of them were stockholders, officers, agents, or employes of the insurance company, as affecting the qualification of the jurors. The defendant objected to this, but the court permitted it to be done, and in impaneling the jury such questions were asked of them by the plaintiff's counsel. Exception was taken to this, and it is assigned as error.

So far as appears, the inquiries were made in good faith, for the genuine purpose of learning whether any of the jurors were disqualified by interest, and not for the purpose of getting before the jurors a fact not in issue in the case for the purpose of prejudicing them. The facts were not called to the jury's attention until permission had first been obtained from the court in their absence. It

---

McLaughlin v. *Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 18 Ky. L. 693, 34 L. R. A. 812 (1896); *Martin* v. *Farmers Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656 (1905); *Murchison Nat. Bank* v. *Dunn Oil Mills Co.*, 150 N. Car. 683, 64 S. E. 883 (1909). Compare *Williams* v. *Great West. R. Co.*, 3 H. & N. 869 (1858); *Rogers Grain Co.* v. *Tanton*, 136 Ill. App. 533 (1907); *Stone* v. *Monticello Const. Co.*, 135 Ky. 659, 117 S. W. 369 (1909); *Walter* v. *Louisville R. Co.*, 150 Ky. 652, 150 S. W. 824 (1912).

[38] A part only of the opinion is given. For an error in the charge a new trial was ordered.

was within the discretion of the court to grant this permission if, upon the statements of counsel, there was any reason to believe that any of the jurors would be interested, as stockholders or otherwise in the insurance company, in the result of the action. Ordinarily such interest on the part of jurors in this state in a foreign insurance company would hardly be presumed. But it is possible that the agent of the company who placed the insurance, or claim agent or adjuster who had been employed in attempting to settle the claim, might be among the jurors summoned. It can not, therefore, be said that in all cases it is improper to permit counsel to ask such questions as were permitted in this case to determine whether jurors are disqualified. Cases are cited from other states holding that it is error to permit the fact of the insurance to be brought to the jury's attention by questions asked in the examination of witnesses, by remarks of counsel in argument, or by questions asked of jurors while they are being impaneled. For the reason stated, we think cases may exist in which such questions may properly be permitted in determining the qualifications of the jurors, and that in the present case it does not appear that the court's discretion was improperly exercised.[39]

---

[39]Compare *Meyer* v. *Gundloch-Nelson Mfg. Co.*, 67 Mo. App. 389 (1896); *Spoonick* v. *Backus-Brooks Co.*, 89 Minn. 354 (1903); *Foley* v. *Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284 (1903); *Swift* v. *Platte*, 68 Kans. 1, 72 Pac. 276, 74 Pac. 635 (1903); *Grant* v. *National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. S. 805 (1905); *Faber* v. *Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049 (1905); *Vindicator Consol. Gold Min. Co.* v. *Firstbrook*, 36 Colo. 498, 86 Pac. 313 (1906); *Granrus* v. *Croxton Min. Co.*, 102 Minn. 325, 113 N. W. 693 (1907); *Brusseau* v. *Lover Brick Co.*, 133 Iowa 245, 110 N. W. 577 (1907); *Blair* v. *McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. S. 750 (1907) Aff. 195 N. Y. 520; *Rinklin* v. *Acker*, 125 N. Y. App. Div. 244, 109 N. Y. S. 125 (1908); *Saller* v. *Friedman Bro. Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794 (1907); *Beeler* v. *Butte & London Copper Development Co.*, 41 Mont. 465, 110 Pac. 528 (1910); *Heydman* v. *Red Wing Brick Co.*, 112 Minn. 158, 127 N. W. 561 (1910); *Kenny* v. *Marquette Cement Co.*, 243 Ill. 396, 90 N. E. 724 (1910); *Odell* v. *Genessee Const. Co.*, 145 App. Div. 125, 129 N. Y. S. 122 (1911); *Pekin Stove & Mfg. Co.* v. *Ramey*, 104 Ark. 1, 147 S. W. 83 (1912); *Featherstone* v. *Lowell Cotton Mills*, 159 N. Car. 429, 74 S. E. 918 (1912); *Citizens Light, Heat & Power Co.*, v. *Lee*, 182 Ala. 561, 62 So. 199 (1913); *Walters* v. *Durham Lumber Co.*, 165 N. Car. 388, 81 S. E. 388 (1914); *Egner* v. *Curtis T. & P. Co.*, 96 Nebr. 18, 146 N. W. 1032 (1914); *Inland Steel Co.* v. *Gillespie*, 181 Ind. 633, 104 N. E. 76 (1914) with *Lipschutz* v. *Ross*, 84 N. Y. S. 632 (1903); *Stratton* v. *Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831 (1905); *Harry Bros. Co.* v. *Brady* (Tex. Civ. App.) 86 S. W. 615 (1905); *Howard* v. *Beldenville L. Co.*, 129 Wis. 98, 108 N. W. 48 (1906); *Chybowski* v. *Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833 (1906); *Hoyt* v. *Davis Mfg. Co.*, 112 App. Div. 755, 98 N. Y. S. 1031 (1906); *Aetitus* v. *Spring Valley Coal Co.*, 246 Ill. 32, 92 N. E. 579 (1910); *Pierce* v. *United Gas & E. Co.*, 161 Cal. 176, 118 Pac. 700 (1911); *Armstrong* v. *Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233 (1913); *Mithen* v. *Jeffrey*, 259 Ill. 372, 102 N. E. 778 (1913); *Houston Car Wheel & Machine Co.* v. *Smith*, (Tex. Civ. App.) 160 S. W. 435 (1913); *Putnam* v. *Pacific Monthly Co.*, 68 Ore. 36, 130 Pac. 986, 136 Pac. 835 (1913); *Rothenberg* v. *Collins*, 161 App. Div. 387, 146 N. Y. S. 762 (1914); *Duncan Coal Co.* v. *Thompson*, 157 Ky. 304, 162 S. W. 1139 (1914). See also, *Hollis* v. *United States Glass Co.*, 220 Pa. 49, 69 Atl. 55 (1908); *Simpson* v. *Foundation Co.*, 201 N. Y. 479, 95 N. E. 10 (1911); *Curran* v. *Lorch*, 243 Pa. 247, 90 Atl. 62 (1914).

MOORE *v.* CASS.

SUPREME COURT OF KANSAS, 1872.

10 *Kans.* 288.

Action by Cass to recover from Moore the value of a horse hired by him and claimed by plaintiff to have died in consequence of Moore's negligence. Verdict and judgment for plaintiff. Defendant brings error.[40]

KINGMAN, C. J.: The remaining error urged arose on this state of facts: John Donnelley, one of the jurors who tried the case, upon his examination under oath as to his qualifications as a juryman, stated that he was acquainted with the plaintiff, but not intimately acquainted with him; that he knew nothing about the case and had not formed or expressed an opinion as to it. After the trial five affidavits were read showing the acquaintance between the plaintiff and the juror, and which the plaintiff in error claims show an intimate acquaintance. Neither an acquaintance nor an intimate acquaintance with a party to a suit renders a juror incompetent. It does not necessarily show that the juror would not be impartial. It would depend on the moral character of the man, and his mental organization, what effect his intimacy might have on his judgment, even if this intimacy is caused by strong friendship, which is not always the case. Intimacy frequently grows out of business relations, and is strengthened by habit, and may exist with envy and dislike. This may not be a very amiable feature, but it is true. The fact of intimacy does not of itself disqualify a man as a juror, though in most cases it would cause a peremptory challenge of such a man. The most that can be claimed, then, is that the answers of the juror misled the counsel by their falsehood. It is not necessary to inquire whether that would be a good cause for a new trial, because we are not convinced that the facts stated show even an intimate acquaintance with the plaintiff on the part of the juror. It is shown that he frequented the saloon of the plaintiff as often as once a week; had been seen to drink there, and with the plaintiff, and had played cards in the same company, and these acts had continued for a year or more before the trial. Now all these facts hardly show an intimate acquaintance. Certainly the facts may exist without any intimacy. Again, what constitutes intimate acquaintance is not so cleary defined in men's minds that the juror might not truthfully say that he had no intimate acquaintance with the plaintiff, even if counsel should think otherwise on the same facts. We can not say from the record that the juror answered untruthfully, and so all semblance of error on this point vanishes. The motion for a new trial was properly overruled.[41]

Judgment affirmed.

---

[40] The statement of facts is abridged and the argument and part of the opinion of the court are omitted.

[41] "Mere acquaintance of the jurors with a litigant does not imply bias by them in his favor any more than it raises a presumption of prejudice." *Perkins* v. *Sunset Tel. & T. Co.*, 155 Cal. 713, 103 Pac. 190 (1909). Accord:

GARTHWAITE, GRIFFIN & CO. *v.* TATUM.

SUPREME COURT OF ARKANSAS, 1860.

21 Ark. 336.

FAIRCHILD, J.: This case was brought here by appeal from a judgment for the defendant below, the appellee here. It is like the case of *Gould* v. *Tatum*,[42] just decided, being an action of debt upon a note executed at the same time with the note in that case, in which the issues were the same. The same testimony of Whitt and Lee was given in this case, as in the other, and under like circumstances. A similar motion for a new trial similarly met, and with like result, as shown in the transcript. There was no such evidence as that of the endorsement on the note, and the reading of the declaration in the other case.

The case of *Gould* v. *Tatum* was first tried; upon the next day this case was called, and the same jurors that tried that case were brought to try this case. It was admitted by the parties that the issues were the same as in that case, and that the evidence would be the same, except the note sued on, and the plaintiffs objected to the proposed jurors as disqualified from sitting as a jury in this case. The court overruled the objection.

By their verdict in the other case, the jurors had formed and expressed their opinion upon this case. And the fact that this was done on oath, after hearing all the facts and after full deliberation thereon, amid the solemnities and under the direction of judicial proceedings, could have no other effect than to incline them to render such verdict as they had rendered the day before. The law presumes them to have been under a disqualifying bias, and the objection of the plaintiff should have been sustained.[43]

Judgment reversed.

McFadden v. *Wallace*, 38 Cal. 51 (1869); *Lavender* v. *Hudgens*, 32 Ark. 763 (1878); *Chesapeake & O. R. Co.* v. *Smith*, 103 Va. 326, 49 S. E. 487 (1905); *Decker* v. *Laws*, 74 Ark 286, 85 S. W. 425 (1905). But a juror should be excluded where it appears that his friendship or enmity for a party would weigh in the determination of the case. *March* v. *Portsmouth & C. R.*, 19 N. H. 372 (1849); *McLaren* v. *Birdsong*, 24 Ga. 265 (1858); *Buddee* v. *Spangler*, 12 Colo. 216, 20 Pac. 760 (1888); *Commonwealth* v. *Mosier*, 135 Pa. St. 221, 19 Atl. 943 (1890); *Stinson* v. *Sachs*, 8 Wash. 391, 36 Pac. 287 (1894); *Omaha & R. V. R. Co.* v. *Cook*, 37 Nebr. 435, 55 N. W. 943 (1893); *Omaha St. R. Co.* v. *Craig*, 39 Nebr. 601, 58 N. W. 209 (1894); *Texas Cent. R. Co.* v. *Blanton*, 36 Tex. Civ. App. 307, 81 S. W. 537 (1904); *State* v. *Caron*, 118 La. 349, 42 So. 960 (1907); *Grand Lodge* v. *Taylor*, 44 Colo. 373 (1908). Compare *Onions* v. *Nash*, 7 Price 205 (1819). As to bias see *Chicago & A. R. Co.* v. *Adler*, 56 Ill. 344 (1870); *Winnesheik Ins. Co.* v. *Schueller*, 60 Ill. 465 (1871); *Richmond* v. *Roberts*, 98 Ill. 472 (1881); *U. S. Rolling Stock Co.* v. *Weir*, 96 Ala. 396, 11 So. 436 (1891); *People* v. *Star Co.*, 135 App. Div. 517, 120 N. Y. S. 498 (1909).

[42] 21 Ark. 239 (1860).

[43] At common law the fact that a juror had rendered a verdict on a previous trial of the same case was ground for principal challenge. Y. B. 33 Hen. VI., 1; *Long's Case*, Cro. Eliz. 33 (1583); *Argent* v. *Darrell*, 2 Salk.

GOTTLIEB SCHMIDT *v.* NEW YORK MUTUAL FIRE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1854.

67 *Mass.* 529.

Action of contract on a policy of insurance on the plaintiff's dwelling house, barn, etc., against loss by fire. The defense was that plaintiff purposely set fire to the property insured. Counsel for the plaintiff in his closing argument having stated his belief that some of the jury knew personally that two of the defendant's witnesses were not worthy of belief, the court instructed the jury that they could take into consideration all the evidence they had heard as to the character and standing of any of the witnesses; but that any particular knowledge of any facts, such as the generally infamous character of any of the defendant's witnesses, not testified to, or otherwise appearing in the cause, not within the common knowledge of all the jurors, not being open to comment on the part of the defendant's counsel, or to instruction on the part of the court, but which was in possession merely of some one or more, but not the whole of the jury, could not fairly be taken into view by the jury,

---

648 (1699); *Herndon* v. *Bradshaw*, 4 Bibb (Ky.) 45 (1815); *Lloyd* v. *Nourse*, 2 Rawle (Pa.) 49 (1829); *Weeks* v. *Medler*, 20 Kans. 57 (1878); *Dothard* v. *Denson*, 72 Ala. 541 (1882); *Hunt* v. *Columbia City*, 122 Mo. App. 31, 97 S. W. 955 (1906); *Charleston & W. C. R. Co.* v. *Attaway*, 7 Ga. App. 231, 66 S. E. 548 (1909), so also where the former trial resulted in a disagreement. *Scott* v. *McDonald*, 83 Ga. 28, 9 S. E. 770 (1889); *Hester* v. *Chambers*, 84 Mich. 562, 48 N. W. 152 (1891). Contra: *Whitner* v. *Hamlin*, 12 Fla. 18 (1867); *Atkinson* v. *Allen*, 12 Vt. 619, 36 Am. Dec. 361 (1839). So one who had served as a grand juror on the finding of an indictment is disqualified from serving as a juror on the trial for the offense or the trial of a civil action arising out of the offense. Y. B. 7 Edw. IV., 4; *Roy* v. *Godfry*, 1 Sid. 243 (1676); *Rogers* v. *Lamb*, 3 Blackf. (Ind.) 155 (1832); *Spear* v. *Spencer*, 1 Greene, Iowa 534 (1848); *McGehee* v. *Shafer*, 9 Tex. 20 (1852); *Hawkins* v. *Andrews*, 39 Ga. 118 (1869); *Medlock* v. *Commissioners*, 115 Ga. 337, 41 S. E. 579 (1902); *Ryan* v. *State*, 10 Ohio C. C. (N. S.) 497 (1908).

Where two cases arise out of the same transaction, involve the same issues and are to be decided upon the same evidence, a juror who has tried the first case may be challenged in the second. *Grady* v. *Early*, 18 Cal. 108 (1861); *Baker* v. *Harris*, 1 Winst. (N. Car.) 277 (1864); *Swarnes* v. *Sitton*, 58 Ill. 155 (1871); *Apperson* v. *Longwood*, 12 Heisk. (Tenn.) 262 (1873); *Smith* v. *State*, 55 Ala. 1 (1876); *Weeks* v. *Lyndon*, 54 Vt. 638 (1881); *Stephens* v. *State*, 53 N. J. L. 245, 21 Atl. 1038 (1891); *Railway Co.* v. *Smith*, 60 Ark. 221 (1895), and see *Schallman* v. *Royal Ins. Co.*, 94 Ill. App. 364 (1901). But a juror is not rendered incompetent to sit in a case merely because he has previously sat in a case for a similar cause of action and depending upon the same general considerations. *Algier* v. *Steamer Marie*, 14 Cal. 167 (1859); *Nugent* v. *Trepagnier*, 2 Martin (La.) (O. S.) 205 (1812); *Smith* v. *Wagenseller*, 21 Pa. St. 491 (1853); *Dew* v. *McDivitt*, 31 Ohio St. 139 (1876); *Chariton Plow Co.* v. *Deusch*, 16 Nebr. 384, 20 N. W. 268 (1884); *Comm.* v. *Toth*, 145 Pa. 308, 22 Atl. 157 (1891); *Central R. & B. Co.* v. *Ogletree*, 97 Ga. 325, 22 S. E. 953 (1895); *Jennings* v. *Heinroth*, 71 Ill. App. 664 (1897); *Doyle* v. *Offut*, 135 Ky. 296 (1909); *Manhattan Bldg. Co.* v. *Seattle*, 52 Wash. 226, 100 Pac. 330 (1909); *Commonwealth* v. *Wasson*, 42 Super. Ct. 38 (1910).

and should have no influence on their minds in making up their verdict. Verdict for defendants. Plaintiff excepts.[44]

DEWEY, J.: It was undoubtedly the ancient doctrine that jurors were to render their verdict as well upon facts within their personal knowledge, as upon those derived from the testimony of the witnesses duly sworn and testifying in the case. 3 Bl. Comm. 374. The practice of taking jurors from the vicinage seems to have been adopted under the notion that they might thus be the better qualified from their personal acquaintance with the facts, the parties and their witnesses, to decide the cases that might be brought them. But at the present day it is thought a greater object, and more likely to secure the due administration of justice, to submit cases to impartial and unbiased jurors; and that those are less likely to be so who have come from the immediate neighborhood of the parties, and have been either eye witnesses to the facts, or have had their minds imbued with the popular feeling as to the merits of the controversy.

With this change as to the proper qualifications of a juror, it has very naturally come to be well settled that a juror can not give a verdict founded on facts in his own private knowledge. If the juror knows any particular fact material to the proper decision of the case, he ought to be sworn as a witness in open court, and be publicly examined, so that his evidence, like that of other witnesses, may first be scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and the parties may know upon what evidence the verdict was rendered. 1 Stark. Ev. 499 is direct to this point. The views of this court in the cases of *Parks* v. *Boston*, 15 Pick. (Mass.) 209, 210; *Patterson* v. *Boston*, 20 Pick. (Mass.) 166, and *Murdock* v. *Sumner*, 22 Pick. (Mass.) 156, in all which the subject was somewhat considered fully accord with the principle above stated. A distinction was taken in those cases as to the juror's applying his own general knowledge and experience to the examination of the case, in estimating the weight of the evidence and in assessing damages. While to this extent the juror may properly call to his aid his personal knowledge, learning and experience, as was properly held in those cases, yet no sanction was given to his acting upon his knowledge of a particular fact, known only to himself, and not a matter of common observation or general knowledge.[45]

Exceptions overruled.

---

[44] The statement of facts is abridged and the argument of counsel and part of the opinion of the court are omitted.

[45] Accord: *Bennet* v. *Hartford Hundred*, Style, 223 (1650); *Wright* v. *Crump*, 7 Mod. 1 (1702); *Brunson* v. *Graham*, 2 Yeates (Pa.) 166 (1796); *Ottowa Gas Light & Coke Co.* v. *Graham*, 28 Ill. 73, 81 Am. Dec. 263 (1862); *Simpson* v. *Kent*, 9 Phila. (Pa.) 30 (1871); *Griffin* v. *Harriman*, 74 Iowa 436, 38 N. W. 139 (1888); *Winslow* v. *Morrill*, 68 Maine 362 (1878); *Garside* v. *Ladd Watch Case Co.*, 17 R. I. 691, 24 Atl. 470 (1892). Compare *Kitzinger* v. *Sanborn*, 70 Ill. 146 (1873); *State* v. *Maine Cent. R. Co.*, 86 Maine 309, 29 Atl. 1086 (1894).

"A juror having knowledge of incidental facts, or those collateral to the main issue of the case, is not thereby rendered incompetent to sit in that case. But, where the juror has such knowledge of material facts as will

ARCHIMEDES SMITH *v.* TIMOTHY D. EAMES.

SUPREME COURT OF ILLINOIS, 1841.

4 Ill. 76.

BREESE, J.: This was an action of assumpsit, brought in the Morgan Circuit Court, by Eames against Smith, in which a judgment was rendered for the plaintiff, from which an appeal was taken to this court.[46]

As to the first point, the bill of exceptions taken in the cause, states, that upon calling a jury, after the defendant had exhausted his peremptory challenges, Joseph T. Taggart was called as a juror, and upon being questioned by defendant's attorney, whether he had formed and expressed an opinion in relation to the right of the plaintiff to recover, answered that he had both formed and expressed an opinion. Upon being asked, by plaintiff's counsel, whether he had formed his opinion from conversing with the witnesses, or from his own knowledge of the facts, or from information derived from the parties, or from rumor, he answered, from rumor. Upon being asked, by defendant's attorney, whether he knew who the witnesses were, he said he did not. Upon being asked, by the defendant's counsel, whether he still entertained the opinion he had heretofore formed, as to which party ought to succeed in the matter, he answered, he did, if what he had heard was true. The juryman was not interrogated as to his belief of the truth of the rumors to which he referred, as the bill of exceptions states. The defendant's attorney challenged him for cause, which the court disallowed, and he was sworn as a juror.

In support of the challenge, the appellant's counsel has referred to Co. Litt. 157 a. b.; 2 Peter's Cond. R. 499-500; 2 Johns. (N. Y.) 194; 7 Cow. (N. Y.) 122; Buller's N. P. 307; 1 Johns. (N. Y.) 316; 1 Cow. (N. Y.) 432; 1 Swift's Dig. 737; 1 Burr's Trial 41, 43, 370, 419; 4 Wend. (N. Y.) 238, 241; 9 Pick. (Mass.) 496; Breese (Ill.) 29; Hilliard's Dig. 182.

The counsel for the appellee, to sustain the decision of the circuit

---

tend to bias his opinion, he is incompetent to sit in that case. This rule has been asserted even where the juror swears that he is unbiased. In the application of this rule it seems, therefore, to be a question addressed to the sound discretion of the court, and if the inference is strong, or the presumption great, that the knowledge on the part of the juror is such as will affect the verdict, a challenge for cause should be sustained." 63 L. R. A. 812, note to *State* v. *Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807 (1902). Compare *Blake* v. *Millspaugh*, 1 Johns. (N. Y.) 316 (1806); *Laverty* v. *Gray*, 3 Mart. (La.) (O. S.) 617 (1815); *Lord* v. *Brown*, 5 Den. (N. Y.) 345 (1848); *Trout* v. *Williams*, 29 Ind. 18 (1867); *Buddee* v. *Spangler*, 12 Colo. 216, 20 Pac. 760 (1888); *Harris* v. *State*, 24 Nebr. 803, 40 N. W. 317 (1888); *Johnson* v. *Park City*, 27 Utah 420, 76 Pac. 216 (1904), with *Durell* v. *Mosher*, 8 Johns. 445 (1811); *Harper* v. *Kean*, 11 Serg. & R. (Pa.) 280 (1824); *Royston* v. *Royston*, 21 Ga. 161 (1857); *Burlington & M. R. Co.* v. *Beebe*, 14 Nebr. 463 (1883); *Gradle* v. *Hoffman*, 105 Ill. (1882); *Deldaney* v. *Salina*, 34 Kans. 532, 9 Pac. 271 (1886).

[46] Part of the opinion upon another point is omitted.

court, relies upon the case of *Durrell* v. *Mosher*, 8 Johns. 445, 3rd ed.; 6 Cow. (N. Y.) 564; 7 Cow. (N. Y.) 122, 123; 1 Burr's Trial 369, 370, 380, 381, 408 (note), 418; 1 Cow. (N. Y.) 438.

We have carefully examined all the cases referred to, with a desire to arrive at some rule which shall be suited to our condition, which can be practically enforced, and which shall do no violence to the right of every person to a fair and impartial trial by jury. There is not a perfect coincidence of views in the several cases referred to, nor entire harmony of opinion. The old rule was, that the more a person knew of the facts, of his own knowledge, the better qualified was he to perform the functions of a juror. The doctrine now is, in England, that if a juror has declared that the prisoner is guilty, or will be hanged, or the like, if made out of ill will to him, it is good cause of challenge; but if it was made from personal knowledge of the facts in the cause, it is no ground of challenge.

The leading case in this country upon this subject, is that of Burr, indicted for treason. The opinions and resolutions of Chief Justice Marshall, who tried the case, upon the various objections made to jurors, as they were called, have been received favorably by all the courts of the several states, and it will not be difficult, aided by the light which his brilliant mind has shed upon the subject, to come to a conclusion, correct in principle, and calculated to promote justice. For this purpose, it will be unnecessary to enter into an elaborate review of all the cases cited, but to state simply the general conclusions to which they all tend, and that is, that a juror is disqualified, if he has expressed a decided opinion upon the merits of the case. If, without any qualifications whatever, a juror says the defendant is guilty, or the like, or that the plaintiff ought to recover in the action, or that the verdict ought to be against the plaintiff, he would be disqualified, as not standing impartial between the parties.

If, on the contrary, a juror says that he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts; and, from the rumors, has formed and expressed an opinion in a particular way, if they are true, without expressing any belief in their truth, we should think he would not be disqualified. By hearing reports of a case, not from the witnesses, nor from the parties, but from common fame, and making up an opinion on them, the juror has not prejudged the case, unless the case should turn out to be precisely as the rumors were, a thing very improbable; he has adjudged only the rumors, varying in their hue and color as they circulate through the country. The human mind is so constituted, that it is almost impossible, on hearing a report freely circulated in a county or neighborhood, to prevent it from coming to some conclusion on the subject; and this will always be the case while the mind continues to be susceptible of impressions. If such impressions become fixed, and ripen into decided opinions, they will influence a man's conduct, and will create, necessarily, a prejudice for or against the party towards whom they are directed, and should disqualify him as a juror.

Opinions are formed in different ways: with some, their preconceived prejudices are their opinions; with others, a current rumor fixes their belief; with another class, the most idle gossiping is received as truth itself; while others hesitate long, and demand testimony, before they will assent or dissent. Taking mankind as we find them it may not be unreasonable to believe, that by far the greater part come to no certain conclusion on a statement of facts, until they have evidence of their existence, though they may have impressions in regard to them, which, if not carefully examined, might seem to be fixed opinions, and when called on, it would be so stated. A distinction must be made between such impressions and opinions, and in this consists the rule.

In the case of *The People* v. *Mather*,[47] the court says, "There is no difference between an opinion formed by being an eye-witness of a transaction, or by hearing the testimony of those who were such witnesses, and an opinion founded upon rumors and newspaper publications." This is true if a decided opinion is formed, for it matters not how, or upon what it is formed, whether upon rumors or personal knowledge, so that it is an opinion. But there are grades of opinion. That which the public instinctively forms, upon the happening of any striking occurrence, or of those matters which are current topics of remark, should be distinguished from those deliberate convictions of the mind which are produced by maturely considering the facts and circumstances of a case, and which regulate a man's conduct, or prompt him to action. If a person, without any knowledge of the facts, upon the faith of rumor alone, forms a deliberate opinion, and is convinced, without any evidence, he is not fit to judge his fellows.

But if, in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become fixed and decided, though they may seem to be at first, he would not be disqualified, and this is in accordance with the views expressed by Chief Justice Marshall in Burr's case. He says, "Light impressions, which may be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."[48]

We take it, then, as settled, that the opinion which is to disqualify, must be a decided one, not an impression merely, which rumor may have produced, and which another report may dissipate. The opinion must, also, be a positive one, not depending upon any contingency, not hypothetical. All the cases referred to, recognize this distinction. In *Durrell* v. *Mosher*,[49] it was held, that where a juror, on being called up, said he had no personal knowledge of the matters in dispute, but that if the report of the neighbors was cor-

[47] 4 Wend. (N. Y.) 241 (1830).
[48] 1 Burr's Trial 416.
[49] 8 Johns. (N. Y.) 445 (1811).

rect, the defendant was wrong, and the plaintiff was right, was qualified; for the reason that the opinion was not a fixed and positive one, that it depended on the hypothesis of the truth of the reports. This case has never been overruled, and is approved by all the subsequent cases. It establishes the principle, and for good reasons, that there must be a decided conviction of the mind, on the facts, before the juror can be considered as having formed an opinion which will disqualify. Here the juror showed which way his opinion was, if the reports were true, that he was against the defendant, who had challenged him. In the case before the court, this does not appear. It is not shown by the record, how the opinion of the juror was, whether for or against the party challenging him; and it can not be known whether the party challenging was prejudiced by his being sworn. In most of the cases cited, the opinion of the juror was made known, as in the case in 7 Cow. (N. Y.) 381. There the juror had heard the witnesses in a former trial of the same cause, and had made up his mind conclusively, that the defendants were guilty; and he had freely expressed this opinion. It is, however, the opinion of the majority of the court, that this circumstance should make no difference in the principle. A party ought not be compelled to abide the risk of the opinion which may be formed, being adverse to him, it being considered sufficient that he has formed and expressed an opinion.

It is not perceived that the case at the bar, differs in any essential particulars from the case of *Durrell* v. *Mosher*. Taking the whole statement of the juror in connection, he said he had formed and expressed an opinion from rumor as to who ought to recover, and that he was still of the same opinion, if the rumors were true, placing his opinion entirely upon the hypothesis of the truth of the rumors. He had an opinion from rumor, if the rumors were true, leaving it clearly inferible, that if they were not true he had no opinion. At most, then, he showed that he entertained not a fixed, decided, positive opinion, upon the merits of the case, but had formed just such an one as all persons instinctively form, when they hear a narrative of any occurrence, or the history of any transaction. He showed that he had come to no certain conclusion upon the facts, that his mind was in such a condition as to be open to the testimony that might be offered, and prepared to yield to its force.

On Burr's trial, Hamilton Morrison was called as a juror, and he stated that he had frequently declared, that if the allegations against the prisoner were true, he was guilty; and he was decided to be an impartial juror. In the same case, Mr. Parker was called as a juror, and being examined by the court, said he had formed no opinion of the truth of the depositions, but if they were true, Burr's designs were treasonable; and he was retained as a juror. Opinions of this character, which are hypothetical, do not disqualify.

We then lay down this rule, that if a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is

positive, and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed.

If the opinion be merely of a light and transient character, such as is usually formed by persons in every community, upon hearing a current report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind, and a fixed conclusion thereon, or if it be hypothetical, the challenge ought not to be allowed; and to ascertain the state of mind of a juror, a full examination, if deemed necessary, may be allowed.

Testing this case by this rule, we think the juror was properly received.[50]

Judgment affirmed.

Scates, J., dissented on the application of the law to the facts.

SECTION 3. PROCESS FOR WITNESSES.

St. 5 Eliz. Ch. 9, Sec. 12

If any person or persons, upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; that then the party making default, to lose and forfeit for every such offense ten pounds, and to yield such other recompense to the party aggrieved, as by the discretion of the judge of the court, out of which the said process shall be awarded, according to the loss and hindrence that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness or witnesses; the said several sums to be recovered by the party so grieved against the offender or offenders, by action of debt, bill, plaint or information,

---

[50]Accord: *Mann v. Glover*, 14 N. J. L. 195 (1833); *Irvine* v. *Lumberman's Bank*, 2 Watts & S. (Pa.) 190 (1841); *Thompson* v. *Updegraff*, 3 W. Va. 629 (1869); *Collins* v. *Burns*, 16 Colo. 7, 26 Pac. 145 (1891); *Kumli* v. *Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637 (1892); *Coghill* v. *Kennedy*, 119 Ala. 641, 24 So. 459 (1898); *Pine* v. *Callahan*, 8 Idaho 684, 71 Pac. 473 (1902); *St. Louis, I. M. & S. R. Co.* v. *Stamps*, 84 Ark. 241, 104 S. W. 1114 (1907); *Furlong* v. *American Central Fire Ins. Co.*, 136 Iowa 499, 113 N. W. 1087 (1907); *Smith* v. *Chicago B. & O. R. Co.*, 81 Nebr. 186, 115 N. W. 755 (1908); *Noonan* v. *Luther*, 128 App. Div. 673, 112 N. Y. S. 898 (1908) *semble; In re Hannaher's Will*, 155 Iowa 73, 135 N. W. 34 (1912). Compare *Blake* v. *Millspaugh*, 1 Johns. (N. Y.) 316 (1806); *Theobald* v. *St. Louis Tr. Co.*, 191 Mo. 395, 90 S. W. 354 (1905); *Shane* v. *Butte Elec. R. Co.*, 37 Mont. 599, 97 Pac. 958 (1908); *Devlin* v. *Devlin*, 89 S. Car. 268, 71 S. E. 966 (1911).

in any of the Queen's Majesty's courts of record, in which no wager of law, essoin or protection to be allowed.[51]

COURTNEY *v.* BAKER.

SUPREME COURT OF NEW YORK, 1846.

3 Denio (N. Y.) 27

Error to the mayor's court of the city of Albany. The cause came into the mayor's court upon appeal from a judgment rendered by a justice of the peace. The action was brought by Baker against Courtney and wife, to recover the penalty of fifty dollars alleged to have been forfeited to the plaintiff by the statute (2 R. S. 400, sec. 43),[52] for the failure of the defendant, Mrs. Courtney, to attend court as a witness, pursuant to a subpœna served upon her in a suit in this court in which Baker was the plaintiff and one Wilkins was

[51] "A writ of subpœna *ad testificandum* is a process issued by legal authority to summon witnesses under penalty to appear at the time commanded and the place therein designated, before some officer, body or court, to give evidence upon the matter pending." Per Shull, J., in *Hower* v. *Lanver*, 13 Pa. Dist. R. 745 (1904). The writ is directed to the person who is commanded to appear and testify; consequently it may be served by a constable, sheriff or any private person who is capable of proving the service, unless otherwise provided by statute. *Respublica* v. *St. Clair*, 2 Dall. (Pa.) 101 (1877); *Smith* v. *Wilbur*, 35 Vt. 133 (1862).

At the early common law, one who, without interest in the cause, appeared voluntarily as a witness on behalf of another was liable to be sued for maintenance by the adverse party. Thayer on Evidence, 125 to 129; Y. B. 11 Hen. VI, 41; Y. B. 21 Hen. VI, 15; Y. B. Hen. VI, 6. In chancery, "Persons whose witnesses were frightened by the prospect of proceedings for maintenance applied to the chancellor for a subpœna directed to the witnesses. The witnesses, being thus compelled to testify, ran no risk of proceedings being taken against them." Holdsworth Hist. Eng. Law, vol. III, p. 489. Wigmore on Evidence, vol. III, § 2190. The statute of Elizabeth, *supra* (1562), provided for the issuing of process to compel the attendance of witnesses, but at first it was not the practice to issue an attachment against a witness for disobedience of a subpœna; the injured party was left to his remedy by action at law. *Havithbury* v. *Harvey*, Cro. Eliz. 131 (1588); *Goodwin* v. *West*, Cro. Car. 522, 540 (1639);. Proceedings by attachment were first taken in the Kings Bench. *Hammond* v. *Stewart*, 1 Str. 510 (1721); *Wyatt* v. *Winkworth*, 2 Str. 810 (1729); *Wyatt* v. *Wingford*, 2 Ld. Raym. 1528; *Small* v. *Whitmill*, 2 Str. 1054 (1737); *Chapman* v. *Pointon*, 2 Str. 1150 (1741), and the practice was subsequently followed by the Common Bench. Compare *Stephenson* v. *Brookes*, Barnes, 33 (1740) with *Brodie* v. *Tickell*, Barnes 35 (1750). In *Bowles* v. *Johnson*, 1 W. Bl. 36 (1748), Lee, C. J., is reported as saying: "Attachments are a new practice. I remember the first motion for them. It was then agreed that the same restrictions should be used in attachments as in actions on the 5 Eliz., one of which is that a tender of expenses should be made at the service of the subpœna." *Hallet* v. *Mears*, 13 East 15 (1810) and note; *Milsom* v. *Day*, 3 Moore 333 (1829); *Barrow* v. *Humphreys*, 3 B. & Ald. 598 (1820). For the modern English practice see rules of the supreme court, order XXXVII, rules 20, 26 to 34. *In re Batson*, 70 L. T., N. S., 382 (1894); *Raymond* v. *Tapson*, L. R. 22 Ch. Div. 430 (1882).

[52] N. Y. Code of Civil Procedure, §§ 853, 855.

defendant, which was noticed for trial at the Albany circuit in April, 1845. The plea was the general issue. The plaintiff proved that Mrs. C., who resided in Albany, was served with a subpœna in that cause to appear at the circut on the fifteenth day of April, 1845; that the cause was tried on the twenty-third day of the same month, the witness not being present, and the plaintiff was nonsuited. Mrs. C. was called as a witness on that day, but not appearing, her default was entered. At the time of serving the subpœna, which was on the ninth day of April, the plaintiff paid Mrs. C. fifty cents as witness fees, which she received, but intimated that she should not attend.

The defendant's counsel offered to prove that Mrs. C. attended the court on the fifteenth day of April, and for three or four days thereafter; that her husband then requested the plaintiff to pay her fees, adding that if he did not do so she would not attend further; but he refused to make any further payment. He also offered to show that when the plaintiff subpœnaed Mrs. C. she told him she knew nothing about the matter, and that the plaintiff replied, "I know that, but you have been talking about me and shall attend court." The whole of the evidence so offered was objected to by the plaintiff's counsel and excluded by the court and the defendant's counsel excepted. The court directed the jury, if they believed the evidence, to find a verdict for the plaintiff for the penalty of fifty dollars, and the jury found accordingly, and judgment was thereupon rendered for the plaintiff.

BEARDSLEY, J.: By the act of 1840 the fees of a witness are "fifty cents for each day while attending any court or officer; and if the witness resides more than three miles from the place of attendance, travelling fees at the rate of four cents per mile, going and returning." Laws, 1840, p. 331, sec. 8.[53] A witness is not bound in any case to attend unless duly subpœnaed, for which purpose the statute declares, amongst other things, that "the fees allowed by law to such witness for travelling to and returning from the place where he is required to attend, and the fees allowed for one day's attendance shall be paid or tendered to such witness." 2 R. S. 400, sec. 42, sub. 3.[54] If the witness, when duly subpœnaed refuse or neglect to attend, he is responsible to the aggrieved party for all damages, and may be proceeded against in various ways.

1. By action on the case at common law. It is the duty of the witness to obey the subpœna, and in this action, the injured party may recover such damages as result from the violation of duty by the witness. 1 Ch. Pl. 159, 7th Am. ed.; 1 Stark. Ev. 80, Phil. ed. 1842; 1 Phil. Ev. 7; *Hasbrouck* v. *Baker,* 10 John. 248; *Pierson* v. *Iles, Doug.* 561. This remedy is recognized by the statute, which, so

[53] N. Y. Code of Civil Procedure, § 3318; *O'Rourke* v. *Degnon Realty Co.,* 139 App. Div. 695, 124 N. Y. S. 364 (1910).

[54] N. Y. Code of Civil Procedure, § 852. In Pennsylvania the act of February 23, 1889, P. L. 8, § 1, P. & L. Dig. (2d ed.) 7593, allows witnesses one dollar for each day's attendance at court and three cents for each mile traveling to and from court. Higher fees are, however, given by local statutes. In Philadelphia the witness fee is $1.50 per diem. See also New Jersey Comp. Stats. (1910), p. 2288, § 2; Mass. Rev. Laws (1902), vol. II, p. 1733.

far, is in affirmance of the common law. 2 R. S. 400, sec. 43. See also 5 Eliz., ch. 9, sec. 12, in Doug. 556, and 1 Phil. Ev. 3.[55]

2. By attachment, and this at common law as well as by the statutes last referred to. See also 2 R. S. 535; and 540, sec. 34; *Pearson* v. *Iles*, supra; *Amey* v. *Long*, 9 East 483; 1 Phil. Ev. 7; 2 Tidd's Pr. 8, 8th Phila. ed., 1840.[56]

3. By an action for the penalty of fifty dollars. The revised statutes declare that "every person who shall be duly subpœnaed to attend as witness" "shall be bound to attend, according to the command of such subpœna, and for every failure so to attend, without a reasonable excuse," "shall forfeit to the aggrieved party the sum of fifty dollars." The English statute of 5 Eliz., already referred to, is to the same effect; it imposes a penalty of ten pounds on any witness who makes default and refuses to appear, "having not a lawful or reasonable let or impediment to the contrary," the said penalty "to be recovered by the party so aggrieved."[57]

This penalty is given to the "aggrieved party," and the action can be sustained by no one else. Hence, as in an action on the case at common law for disobeying a subpœna, the plaintiff can only recover the penalty by showing he was damnified by the laches of the witness; if no loss followed, the penalty was not incurred. A party does not acquire a right to this penalty by the mere refusal of a witness to attend when duly subpœnaed. Something more is required. It must be shown that the witness was material, and that damages resulted from his non-attendance. In *Goodwin* v. *West*, which was an action on the statute of 5 Eliz. to recover the penalty of ten pounds, it was moved in arrest of judgment that the declaration was not good, and the third exception taken by counsel was, that the plaintiff did not show that he was endamaged by the non-appearance of the witness; to which it was answered, "that the action being brought only for ten pounds and not for further damages, it is well enough, and the ten pounds is due for her non-appearance to the king and the party. But all the justices held that the declaration was ill for this cause; for there ought to be a party grieved by the non-appearance, otherwise there is no cause for forfeiture; and so is the express scope and words of the statute." In B. R. 15 Car. 1,

---

[55] *Masterman* v. *Judson*, 8 Bingh. 224 (1832); *Heermans* v. *Williams*, 11 Wend. (N. Y.) 636 (1834); *Prentiss* v. *Webster*, 2 Doug. (Mich.) 5 (1845); *Hurd* v. *Swan*, 4 Den. (N. Y.) 75 (1847); *Robinson* v. *Trull*, 4 Cush. (Mass.) 249 (1849); *Connett* v. *Hamilton*, 16 Mo. 442 (1852); *Lane* v. *Cole*, 12 Barb. (N. Y.) 680 (1852); *McCall* v. *Butterworth*, 8 Iowa 329 (1859); *Lamont* v. *Crook*, 6 M. & W. 615 (1840); *State* v. *Lonsdale*, 48 Wis. 348, 4 N. W. 390 (1879).

[56] *Respub.* v. *Duane*, 4 Yeates (Pa.) 347 (1807); *Regina* v. *Russell*, 7 Dowl. 693 (1839); *Chicago & A. R. Co.* v. *Dunning*, 18 Ill. 494 (1857); *Burns* v. *Superior Court*, 140 Cal. 1, 73 Pac. 597 (1903); *Fairfield* v. *U. S.*, 146 Fed. 508 (1906); *Commonwealth* v. *Klein*, 40 Pa. Super. Ct. 352 (1909); *Leber* v. *U. S.*, 170 Fed. 881 (1909); *People* v. *Reid*, 139 App. Div. 551, 124 N. Y. S. 205 (1910).

[57] *McKeon* v. *Lane*, 1 Hall (N. Y.) 319 (1828); *Smith* v. *Merwin*, 15 Wend. (N. Y.) 184 (1836); *Nelson* v. *Ewell*, 2 Swan (Tenn.) 271 (1852); *Carrington* v. *Hutson*, 28 Hun (N. Y.) 371 (1882); *Lombard* v. *Smith*, 37 Ore. 23, 60 Pac. 388 (1900).

Cro. Car. 522, 540, Sir Wm. Jones 430. The same point was adjudged in the common pleas, which judgment was affirmed on writ of error, in the case of *Madison* v. *Shore*, 9 Wm. 3, though this was admitted to be "contrary to a judgment in the like case, anno 30 Eliz., where the like exception was taken and overruled." 5 Mod. 355; 1 Salk. 206; 1 Comb. 449, 458. See also 3 Bac. Ab. Evidence D; *Pearson* v. *Iles*, supra; *Heermans* v. *Williams*, 11 Wend. (N. Y.) 636; *McKeon* v. *Lane*, 1 Hall, 319; *Masterman* v. *Judson*, 8 Bing. 224. A precedent for a declaration for the penalty on 5 Eliz. is given in 7 Wentworth's Pl. 243. It alleges that the evidence that the witness could have given would have been material, and that it was necessary for the party. The declaration in *Pearson* v. *Iles*, supra, contains a similar averment. I regard the principle as sound and entirely settled by authority.[58]

If a defaulting witness was wholly unable to give material evidence in the case, it is manifest that no injury could have arisen for his non-attendance, and consequently he could not have incurred the penalty. In this case, the defendants offered to prove a direct and unqualified admission by the plaintiff, that he was aware the witness knew nothing about the matter in question in the cause wherein she had been subpœnaed, followed by a declaration that she had been talking about him, and therefore should attend the court. This evidence was pertinent to the issue, and should not have been rejected. It would have tended to prove that the witness was in no way material to the plaintiff, and might have satisfied the jury that he had sustained no injury by her non-attendance. This was an essential point in the case, and the court clearly erred in excluding the evidence. I will add, that if, in truth, the witness was subpœnaed for the purpose of annoyance, and not because she was regarded as material, it was a gross abuse of the process of the court, and as such deserved to be punished as a palpable contempt of its authority.

But this is not all, for no forfeiture occurs unless the failure of the witness to attend is "without reasonable excuse." Now let it be granted, which is all the plaintiff could claim, that but for what I am to state, the witness would have been bound to attend the court from the fifteenth of April, the day named in the subpœna, to the twenty-third, when the cause was tried. The witness had been paid for one day's attendance and no more, and it was offered, by the defendants, to prove that she attended on the fifteenth, as the subpœna required, and for three or four days thereafter; that the plaintiff was then called upon to pay her fees, and was informed that she would not remain at court unless they were paid, and that he refused to make any further payment. This evidence the plaintiff objected to, and it was excluded by the court. Upon

---

[58] *Conling* v. *Coxe*, 6 C. B. 703 (1848); *Robinson* v. *Trull*, 4 Cush. (Mass.) 249 (1849); *Carrington* v. *Hutson*, 28 Hun (N. Y.) 371 (1882); *Landenburg* v. *Pennsylvania R. Co.*, 66 N. J. L. 187 (1901); *Nolan* v. *Grider*, 135 Cal. 49, 67 Pac. 9 (1901). Assumpsit will lie to recover back money paid for expenses to a witness who has not attended. *Martin* v. *Andrews*, 7 El. & Black. 1 (1856); *Please* v. *Bamford*, 96 Maine 23, 51 Atl. 234 (1901). Contra: *Leighton* v. *Twombly*, 9 N. H. 483 (1838).

what principle it was rejected, I confess I do not see. If such was the case the plaintiff alone was in fault, and the witness had a most "reasonable excuse" for leaving the court. She was entitled to the daily sum of fifty cents, and it was the plaintiff's duty to see it paid to her. The witness was not bound to trust the party, and rely on him for future payment; the allowance to witnesses is for their daily sustenance, and a refusal to pay is a virtual discharge of the witness, and a very sufficient excuse for omitting further attendance in the cause. If this plaintiff was thus endamaged, it was his own fault, and he must bear the consequences, whatever they may be. No right of action could accrue in his favor under such circumstances, and no penalty was incurred by the witness. A party who would seek redress against a witness, must see that he is not himself in fault, and that everything has been done which the witness had a right to exact.

The court erred in rejecting the evidence offered on these points, and the judgment must be reversed.[59]

Judgment reversed.

BARRUS *v.* PHANEUF.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1896.

166 *Mass.* 123

Contract to recover extra compensation as an expert. At the trial in the superior court, before Maynard, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appear in the opinion.

ALLEN, J.: The jury must have found upon the evidence that the defendant engaged the plaintiff to go into court at a future day, and

---

[59] In civil cases a witness is not bound to attend court unless his fees and expenses have been paid or tendered. *Chapman* v. *Pointon*, 2 Str. 1150 (1740); *Bowles* v. *Johnson*, 1 Wm. Bl. 36 (1748); *Fuller* v. *Prentice*, 1 H. Bl. 49 (1788); *Ashton* v. *Haigh*, 2 Chit. 201 (1814); *Ogden* v. *Gibbons*, 5 N. J. L. 518 (1819); *Betteley* v. *McLeod*, 3 Bingh. N. C. 405 (1837); *Hurd* v. *Swan*, 4 Den. (N. Y.) 75 (1847); *Bedulieu* v. *Parsons*, 2 Minn. 1 (1858); *Bliss* v. *Brainard*, 42 N. H. 255 (1860); *Richards* v. *Goddard*, L. R. 17 Eq. Cas. 238 (1873); *Trimble* v. *Mulhollen*, 8 Pa. Dist. 441 (1899); *Hollister* v. *People*, 116 Ill. App. 338 (1904); *People* v. *Healey*, 139 Ill. App. 363 (1908). Contra: *Smith* v. *Barger*, 9 Yerg. (Tenn.) 322 (1836), and compare *Holden* v. *Shove*, 1 R. I. 287 (1850); *Norris* v. *Hassler*, 23 Fed. 581 (1885). A witness in a civil case is not bound to attend court after the time for which his fees have been paid or tendered. *Atwood* v. *Scott*, 99 Mass. 177 (1868); *Mattocks* v. *Wheaton*, 10 Vt. 493 (1838); *Muscott* v. *Runge*, 27 How. Pr. (N. Y.) 85 (1863). In criminal cases the rule, in the absence of a statute to the contrary, is that no tender of fees is necessary upon the service of the subpoena. *Rex* v. *Cooke*, 1 C. & P. 321 (1824); *Rex* v. *Sadler*, 4 C. & P. 218 (1830); *Ex parte Chamberlain*, 4 Cow. (N. Y.) 49 (1825); *Henley* v. *State*, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126 (1897); *Hancock* v. *Parker*, 100 Ky. 143, 37 S. W. 594, 18 Ky. L. 622 (1896); *Dixon* v. *People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116, 179 and notes (1897); *State v. Kaemmerling*, 83 Kans. 383, 111 Pac. 443, 31 L. R. A. (N. S.) 781 and notes (1910).

testify for him as an expert, in regard to a matter which the plaintiff had examined as a civil engineer. From the dates given, it would seem that this engagement was six weeks before the trial. The plaintiff agreed to do this, and talked over the matter, and went into court and testified, and during the process of the trial advised the defendant's attorney in regard to the questions to be asked to himself and to the other witnesses.

At some time after he had so agreed to appear and testify, the plaintiff was regularly summoned by the defendant as a witness, and was paid the statutory fees, and made no objection thereto, and made no claim for extra compensation; and it would seem that during his testimony he was not, in fact, asked any questions which called for his opinion as an expert.

The defendant contends that, if there was an express promise to pay the plaintiff extra compensation, such promise was without consideration; and that the plaintiff did no more than he was legally required to do under his subpœna.

In this commonwealth, every justice of the peace may issue summonses for witnesses in civil cases. Stat. 1885, ch. 141. This is usually done by the party's attorney, if he be a justice of the peace, or by a justice upon the mere request of a party or of his attorney, without any consideration of the materiality of the evidence or of other circumstances. No doubt here, as in England, the court might interpose to prevent this privilege from being used oppressively. *Raymond* v. *Tapson, 22* Ch. D. 430. But usually no question arises unless a witness fails to attend, in which case the court may issue a warrant to bring him in. Pub. Stat., ch. 169, sec. 6. The issuing of this warrant is a matter of discretion, and before issuing it the court usually must be satisfied that the testimony is material, and that the failure to attend is without reasonable excuse. We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. *In re Roelker,* 1 Sprague, 276; *Webb.* v. *Page,* 1 Car. & K. 23; *Parkinson* v. *Atkinson,* 31 L. J. (N. S.), C. P. 199; 1 Whart. Ev., secs. 380-383. Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of the evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court could require of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have, when his turn should come. *People* v. *Montgomery,* 13 Abb. Pr., (N. Y.) (N. S.), 207; *Flinn* v. *Prairie County,* 60 Ark. 204. If a party is content to rest upon his legal rights, and summons the expert whose testimony he wishes to have, and pays the statutory fees, without any previous engagement or understanding with him, and thus takes his chance of being able to get an attachment to bring the witness into court in case he should

fail to appear, and if he thus succeeds in getting the testimony which he wishes and afterwards refuses to pay any special compensation, the question might be directly presented whether the witness would be entitled to recover anything on a *quantum meruit*. That question does not arise here. The questions here are whether there was any sufficient consideration for an express or implied promise to pay, and whether there was sufficient evidence of an engagement by him to testify as an expert, upon request, which might imply a promise by the defendant to pay him as an expert.

Several cases have arisen in different courts where a professional witness has taken the stand without objection, and afterwards has declined to give professional opinions without special compensation, and has been required by the court to answer. Such decisions do not strictly apply to the case before us, because in all such cases the court has judicially determined that the purposes of justice require the testimony of the witness. *Ex parte Dement*, 53 Ala. 389; *Wright* v. *People*, 112 Ill. 540; *State* v. *Teipner*, 36 Minn. 535. In Indiana, however, the court has refused to require such witness to answer under such circumstances. *Buchman* v. *State*, 59 Ind. 1; *Dills* v. *State*, 59 Ind. 15. In Connecticut, in respect to an ordinary witness, not an expert, the court held that ordinarily an agreement to pay extra fees will not be sustained, but that it might be valid where the witness assumed a duty which the law would not impose on him; and the court added: "If a witness agrees with a party, that he will attend and testify without being summoned, and he is not summoned and so is not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good and may be enforced; for the proceeding or service is not under nor in pursuance of the statute." *Dodge* v. *Stiles*, 26 Conn. 463, 466, 467. A casual intimation that ordinarily a witness can recover only the fees allowed by law is also found in *Pool* v. *Boston*, 5 Cush. (Mass.) 219, 221.[60]

In the present case, we are of opinion that, upon the facts in evidence, there was sufficient consideration to support a promise to pay a reasonable compensation, in addition to the statutory fees, and that the jury was warranted in finding a promise to that effect, or a mutual understanding that the plaintiff was to be so paid. If such promise was made, or such understanding existed, the plaintiff's right to recover would not be taken away or lost by his omission to claim or demand extra compensation, or to notify the defendant that he should make such claim, or by his acceptance of the statutory fee without objection, or by the omission of the defendant at the trial to put any question to him as an expert witness, and the consequent

[60] Where an ordinary witness is within the jurisdiction and amenable to process, an agreement to compensate him in an amount in excess of the legal fees for attending court and testifying to facts within his knowledge, is contrary to public policy and void. *Clifford* v. *Hughes*, 139 App. Div. 730, 124 N. Y. S. 478 (1910); *Collins* v. *Godefroy*, 1 B. & Ad. 950 (1831); *Dodge* v. *Stikes*, 26 Conn. 463 (1857); *Walker* v. *Cook*, 33 Ill. App. 561 (1889); *Lyon* v. *Hussey*, 82 Hun 15, 31 N. Y. S. 281, 63 N. Y. St. 531 (1894); *Cowles* v. *Rochester Folding Box Co.*, 81 App. Div. 414, 80 N. Y. S. 811 (1903); *Ramschasel's Estate*, 24 Pa. Super. Ct. 262 (1904).

omission of the plaintiff to testify as an expert. All these were merely matters for the consideration of the jury in determining whether any such promise was made, or such understanding existed.[61]

Exceptions overruled.

BOSTON & MAINE RAILROAD *v.* STATE.

SUPREME COURT OF NEW HAMPSHIRE, 1910.

75 *N. H.* 513

Motions by the plaintiffs that two witnesses, duly summoned under a caption for the taking of depositions to be used on the trial of the plaintiff's petition for abatement of taxes, be directed to answer certain inquiries put to them in the course of their examination and to produce certain documents in obedience to a *subpoena duces tecum* served upon each.

The plaintiffs had filed in the Supreme Court a petition for abatement of taxes assessed against them by the state board of equalization for the year 1909, and referees had been appointed to hear the parties and report the facts. It was alleged that the plaintiffs' road and equipment had been appraised at a sum in excess of its true value, and assessed for purposes of taxation at a greater percentage of its true value than all other taxable property in the state. For the purpose of showing these facts the plaintiffs subpoenaed Thomas R. Varick, treasurer and manager of John B. Varick Company, and William B. Burpee, treasurer of the Elliott Manufacturing Company. The subpoena served upon Varick di-

---

[61] While the earlier cases showed a disinclination to compel professional men to testify on professional subjects for the ordinary witness fee, the result of the more recent decisions is that the expert must obey the subpœna of the court and testify to facts within his knowledge. *Flinn* v. *Prairie*, 60 Ark. 204, 29 S. W. 459, 27 L. R. A. 669, 46 Am. St. 168 (1895); *Dixon* v. *People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116 (1897); *North Chicago St. R. Co.* v. *Zeiger*, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. 157 (1899); *Bathgate* v. *Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. 158 (1899); *Maine* v. *Sherman*, 74 Nebr. 155, 103 N. W. 1038 (1905); *Commonwealth* v. *Cochran*, 14 Pa. Dist. R. 805 (1905); *Butler* v. *Toronto Mutoscope Co.*, 11 Ontario L. R. 12 (1905); *Chicago & M. E. R. Co.* v. *Judge*, 135 Ill. App. 377 (1907); *State* v. *Bell*, 212 Mo. 111, 111 S. W. 24 (1908); *Philler* v. *Waukesha Co.*, 139 Wis. 1040, 120 N. W. 829, 25 L. R. A. (N. S.) 1040 and note (1909). But an expert is not required to testify either to an opinion or to any other fact which must be ascertained by special labor. And if he does perform work in preparation and qualification to enable him to testify at the request of any person an implied contract for reasonable compensation or an express contract will be valid. *People* v. *Montgomery*, 13 Abb. Pr. (N. S.) (N. Y.) 207 (1871); *Tiffany* v. *Kellog Iron Works*, 59 Misc. 113, 109 N. Y. S. 754 (1908); *Anderson* v. *Minneapolis, St. Paul & S. M. R. Co.*, 103 Minn. 184, 114 N. W. 744 (1908); *Schofield* v. *Little*, 2 Ga. App. 286, 58 S. E. 666 (1907); *Hough* v. *State*, 68 Misc. 26, 124 N. Y. S. 878 (1910); *Gordon* v. *Conley*, 107 Maine 286, 78 Atl. 365 (1910); *Keller* v. *Harrison*, 151 Iowa 320, 128 N. W. 851 (1910). For England see *Batley* v. *Kynock*, L. R. 20 Eq. Cas. 632 (1875); *Mackley* v. *Chillingworth*, L. R. 2 C. P. Div. 273 (1877); *Turnbull* v. *Janson*, L. R. 3 C. P. Div. 264 (1878).

rected him to produce the policies of insurance of the Varick Company; that upon Burpee to produce all the books, papers and inventories tending to show the stock in trade of the Elliott Manufacturing Company.

Varick appeared, testified that he could not give any estimate of the insurance and that he did not bring with him the policies mentioned in the subpoena, because he considered that they were "our private business," and that it would be "an injury to our private business to produce them." He further testified that the had purchased a certain interest in the company, but declined to state the price on the ground that the transaction was his private business.

Burpee stated that he had not brought with him the books and documents enumerated in the subpoena and should decline to make any disclosure as to the stock account and insurance policies of the Elliott Company until he had consulted the directors and counsel.

Counsel for plaintiffs moved in the Supreme Court that each witness be ordered to answer the questions propounded to him and to produce the documents described.[62]

PARSONS, C. J.: In this controversy between the plaintiffs and the state, in which the witnesses are not immediately interested, the witnesses complain that they are asked to disclose by oral testimony and the production of written matter in their possession details of their private affairs for the benefit of strangers. The ground of their objection is not very clearly presented, but it seems to be, aside from a natural disinclination to make public disclosure of their business affairs, that such disclosure may in some way result to their pecuniary disadvantage. "No subject shall * * * be compelled to * * * furnish evidence against himself." Bill of Rights, article 15. But this article relates to criminal proceedings only. *Wood* v. *Weld,* Smith (N. H.) 367, 368. It has not been suggested that response to the inquiries or the requests for the production of papers would tend to incriminate either of the witnesses.

There was at one time in England diversity of opinion whether a witness could be compelled to testify to facts which might expose him to a civil suit or to pecuniary loss, which was settled by a statute declaring that a witness can not by law refuse to answer a relevant question upon the ground that the answer may tend to establish he owes a debt, or is otherwise subject to a civil suit. 46 Geo. III, ch. 37 (May 5, 1806). This statute has generally been accepted in this country as correctly declaring the law. 1 Gr. Ev., sec. 452; 3 Wig. Ev., sec. 2223. It was so held in this state in 1825 (*Copp* v. *Upham,* 3 N. H. 159, 162), a conclusion that does not appear to have been since questioned. A witness has no greater right to conceal facts by withholding documentary proof of them in his possession than to refuse to answer orally to matters within his knowledge. There is no difference in principle between compelling proof of the truth by either method. *Bull* v. *Loveland,* 10 Pick. (Mass.) 9, 14; *Burnham*

[62]The statement of facts is abridged and part of the opinion of the court omitted.

v. *Mowbray*, 14 Gray (Mass.) 226, 240; *Amey* v. *Long*, 9 East 373; 3 Wig. Ev., sec. 2193.[63] In either case, the evidence when properly called for must be produced, unless its production is excused by some specific privilege. That the disclosure may result in pecuniary loss to the witness or is personally distasteful to him is not such a privilege.[64]

While the witnesses are naturally disinclined to disclose the details of their private business for the benefit of third parties, the duty to do so when required in the administration of justice is one devolving upon them as members of a civilized community. Except for such duty, the promise of protection to each member of the community by the twelfth article of the bill of rights, and of a certain remedy for wrong by recourse to the laws, declared to be the right of each subject by the fourteenth article, would be of no value. This remedy through judicial procedure is part of the protection guaranteed to each member of the community from the community, by the twelfth article, and to effect which each member is by the same article declared to be bound to contribute his share of the expense and to yield his personal service when necessary. There could be no judicial administration of rights without the personal service of members of the community, and their efforts as such officers would be futile if other members of the community possessing knowledge of, or other evidence as to, the controversy were not obliged to yield their services when necessary. The service rendered by the witnesses in appearance at the caption in obedience to the subpoena was doubtless not agreeable to them and was not performed without pecuniary sacrifice. Inconvenience, monetary loss, or disinclination they did not regard as an excuse for disobeying the

[63] *Summers* v. *Moseley*, 2 Cr. & M. 477 (1834).

[64] In general a witness is not bound to answer a question which would tend to expose him to a prosecution for crime. *Coburn* v. *Odell*, 30 N. H. 540 (1855); *Commonwealth* v. *Trider*, 143 Mass. 180, 9 N. E. 510 (1887); *People* v. *Forbes*, 143 N. Y. 219 (1894); *Twining* v. *State of New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97 (1908); and the rule is the same in actions for penalties which, though civil in form, are criminal in their nature. *Lees* v. *U. S.*, 150 U. S. 476. 37 L. ed. 1150, 14 Sup. Ct. 163 (1893). But a witness can not refuse to testify because his answer may be against his pecuniary interest or may expose him to a civil action. *Baird* v. *Cochran*, 4 Serg. & R. (Pa.) 397 (1818); *Taney* v. *Kemp*, 4 H. & J. (Md.) 348, 7 Am. Dec. 673 (1818); *Planters' Bank* v. *George*, 6 Martin (La.) (O. S.) 670, 12 Am. Dec. 487 (1819); *Copp* v. *Upham*, 3 N. H. 159 (1825); *Bull* v. *Loveland*, 27 Mass. 9 (1830); *In re Kip*, 1 Paige (N. Y.) 601 (1829); *Ward* v. *Sharp*, 15 Vt. 115 (1843); *Alexander* v. *Knox*, 7 Ala. 503 (1845); *Ex parte Mumford*, 57 Mo. 603 (1874); *Levy* v. *Superior Court*, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811 (1895); *New York Life Ins. Co.* v. *People*, 95 Ill. App. 136 (1900); *Russie Cement Co.* v. *Woolworth Co.*, 68 Misc. 454, 125 N. Y. S. 82 (1910). Contra: *Starr* v. *Tracy*, 2 Root (Conn.) 528 (1797); *United States* v. *Grundy*, 3 Cranch (U. S.) 337, 2 L. ed. 459, and note (1806); *Benjamin* v. *Hathaway*, 3 Conn. 528 (1821); *Bank of United States* v. *Washington*, 3 Cranch (C. C.) 295 (1828). A witness will not be compelled to furnish evidence irrelevant to the issue, if the disclosure of such irrelevant facts would be injurious to his business. *Ex parte Jennings*, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. 720 (1899); *Peterson* v. *Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162 (1903); *In re Park*, 138 Fed. 421 (1905). See also *Ripley* v. *Seligman*, 88 Mich. 177, 50 N. W. 143 (1891); *In re Osborne*, 141 Mass. 307, 4 N. E. 618 (1886); *Alvord* v. *Alvord*, 109 Iowa 113 (1899).

subpoena requiring their presence. Neither is a valid excuse for failure to testify or obey the *subpoena duces tecum.* The service is one which they are constitutionally bound to render and for which they perhaps can obtain full recompense only when they may be compelled to ask like protection from the community. The constitution merely recognizes and declares, but does not create the duty. "Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue tried in any of the queen's courts, unless he can show some exception in his favor." Willes, J., in *Ex parte Fernandez,* 10 C. B. (N. S.) 3, 39. "For three hundred years it has been recognized as a fundamental maxim that the public * * * has a right to every man's evidence." 3 Wig. Ev., sec. 2192.

It is further suggested that the inquiries as to the value of stock in trade call for the exposure of trade secrets which are privileged. Upon what ground the average value of the stock in trade of a trading or manufacturing corporation can be called a "trade secret" has not been explained. But whatever view might be taken as between competitors in the same line of business, the amount of the stock in trade of such organizations is not a matter which, as it relates to taxation, they are privileged to keep secret. On the contrary, in order to enable the state to execute the sovereign power of taxation, such corporations are required to make a return to the taxing officers each year of the amount of such stock. P. S., ch. 55, sec. 7, cl. 6; Ib., ch. 57, secs. 4-8. The matter is public—not secret.

In the legal search for truth made for the protection of members of the community, the parties and the state are entitled to all evidentiary matter in the knowledge or control of each member of the community which will aid the inquiry. As to some matters greater injustice would be done by compelling the witnesses to disclose than by determining the controversy without their aid. Such matters are exceptions to the general duty to give evidence. 3 Wig. Ev., secs. 2192, 2193.[65] As the questions which the witnesses have refused to

[65] "What the state of the law actually is would be difficult to decide precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can as yet hardly be ventured." Wigmore on Evidence, vol. III, § 2212. Compare *Tetlow* v. *Savournin,* 15 Phila. (Pa.) 170 (1881); *Star K. P. Co.* v. *Greenwood,* 3 Ont. 280 (1883); *Moxie Nerve Food Co.* v. *Beach,* 35 Fed. 465 (1888); *Dobson* v. *Graham,* 49 Fed. 17 (1889); *Gorham Mfg. Co.* v. *Emery Bird Thayer Dry-goods Co.,* 92 Fed. 774 (1899); *Herreschoff* v. *Knietsch,* 127 Fed. 492 (1904); *International Curtis Marine Turbine Co.* v. *Cramp Ship, &c., Co.,* 176 Fed. 925 (1910); *Burnett* v. *Phalon,* 11 Abb. Pr. (N. Y.) 157 (1860); *Saccharine Corp.* v. *Chemicals & Drugs Co.,* L. R. (1900) 2 Ch. Div. 556; *In re Park,* 138 Fed. 421 (1905); *In re Lathrop-Haskins & Co.,* 184 Fed. 534 (1910); *In re Bolster,* 59 Wash. 655, 110 Pac. 547 (1910). See also *State* v. *Davis,* 68 W. Va. 142, 69 S. E. 639 (1910); *Wilson* v. *U. S.,* 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. 538 (1911); *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. 676 (1911); *Ex parte Gould,* 60 Tex. Cr. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835 and note (1910). In bankruptcy proceedings, *In re Wheeler,* 158 Fed. 603 (1907).

answer are not privileged, the plaintiffs are as a matter of law entitled to the evidence asked for. But while it is the duty of witnesses to furnish all the facts in their possession which are not privileged, the performance of that duty should not be made any more unpleasant or arduous than is necessary. There seems to be considerable doubt whether the question as to the price paid for the interest in the John B. Varick Company will be material at the trial; and as the witness does not wish to make the same public, should he volunteer to attend the hearing before the referees the question should not be insisted upon in the deposition.[66]

The motions are granted.

IN RE THAW.

UNITED STATES DISTRICT COURT, W. DIST. PA., 1908.

172 Fed. 288[67]

YOUNG, J.: This is a writ of *habeas corpus ad testificandum*. The respondent moves the court to quash the writ and dismiss the proceeding.

The writ was granted upon the petition of the relator, setting out that the evidence of Henry Kendall Thaw was necessary in a certain proceeding in bankruptcy, pending in this district. As is customary in such proceedings, it not appearing from the petition that the writ ought not to issue, the usual order was made, allowing the writ, and the case now comes before us to determine the whole matter. It is not in the nature of an appeal from the order of the court granting the writ, but is the proper and orderly consideration of the whole matter after the service of the writ and the return of the respondent.

It appears from the record that, Thaw having filed his petition in bankruptcy, it became necessary to subject him to the usual examination provided by the Act of Congress Act July 1, 1898, ch.

---

[66] A *subpoena duces tecum* must state with reasonable certainty and precision the particular documents desired. An order to produce all papers concerning the matter in dispute is not sufficiently specific. *American Car & Foundry Co.* v. *Alexandria W. Co.*, 221 Pa. 529, 70 Atl. 867 (1908); *Attorney General* v. *Wilson*, 9 Sim. 526 (1839); *Lee* v. *Angas*, L. R. 2 Eq. 59 (1866); *United States* v. *Babcock*, 3 Dillon (U. S.) 566, Fed. Cas. No. 14484 (1876); *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426 (1880); *In re Storror*, 63 Fed. 564 (1894); *Carson* v. *Howley*, 82 Minn. 204, 84 N. W. 746 (1901); *Dancel* v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753 (1904); *Miller* v. *Mutual Reserve Fund Life Assn.*, 139 Fed. 864 (1905); *Hale* v. *Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 652 (1906); *United States* v. *Terminal R. Assn.*, 154 Fed. 268 (1907); *Ex parte Gould*, 60 Tex. Cr. 442, 132 S. W. 364 (1910). A *subpoena duces tecum* can only be used to compel the production of documentary evidence. *In re* Shephard, 3 Fed. 12 (1880); *Johnson Steel St. R. Co.* v. *North Branch Steel Co.*, 48 Fed. 191 (1891).

[67] A petition for revision of the order of the district court in this case was dismissed by the circuit court of appeals, 166 Fed. 71.

541, 30 Stat. 544, U. S. Comp. Stat. 1901, p. 3418. The referee, having made an order for his examination, it was found that he was beyond the jurisdiction of the court, and in the custody of Dr. Lamb, superintendent of the Matteawan State Hospital for the Criminal Insane in the state of New York, where he had been committed by the Supreme Court of the state of New York as an insane criminal. This writ was then allowed, directed to Dr. Lamb, to produce the body of the prisoner to testify in the bankruptcy matter now pending in this court.

Section 753 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 952)[68] provides that:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless," among other things, "it is necessary to bring the prisoner into court to testify."

We have, then, in this section the authority to grant the writ to bring a prisoner from his place of confinement to testify; but the power should only be exercised when there is necessity of having the evidence of the prisoner. Unless the necessity is so great that the ends of justice may be defeated if the evidence were not produced, the court of the jurisdiction where the evidence is needed will be slow to grant a writ which will remove a person confined by the court of another jurisdiction from his place of confinement. The comity that exists between courts, the reluctance of federal courts to interfere with the jurisdiction of state courts, will and ought to restrain us from interfering with the orderly and effective administration and execution of the law in sister courts.

After a careful examination of this record in the light of the law and practice, as we understand it and have indicated, we have concluded that no necessity has arisen for the bringing of the prisoner away from his proper place of confinement into the district. If his evidence is necessary, his deposition can be taken. Section 21, cls. "a" and "b," of the bankrupt act (act July 1, 1898, ch. 541, 30 Stat. 552; U. S. Comp. Stat. 1901, p. 3430), provide all the means for a thorough examination of the bankrupt.

The writ must therefore be quashed, and the petition dismissed, with costs.[69]

---

[68] See also N. Y. Code Civ. Proc., § 2008 et seq.; California Code Civ. Proc., §§ 1995-7. In England under the Prison Act of 1898 (61 and 62 Vict. Ch. 41) § 11, a Secretary of State on proof that the presence of any prisoner at any place is required, in the interest of justice, may, by writing under his hand, order that the prisoner be taken to that place. See also, rules of Supreme Court, order XXXVI, rule 35; *Jenks* v. *Ditton*, 76 L. T. 591 (1897). In *Weldon* v. *Neal*, L. R. 15 Q. B. D. 471 (1885), the court refused a habeas corpus to a party to a suit, in custody, to enable her to appear in court to argue in person a rule for a new trial.

[69] *Adams* v. ———, 3 Keb. 51 (1672); *Geery* v. *Hopkins*, 2 Ld. Raym. 851 (1702); *Rex* v. *Burbage*, 3 Burr. 1440 (1763); *Rex* v. *Roddam*, Cowp. 672 (1777); *In re Price*, 4 East 587 (1804); *Noble* v. *Smith*, 5 Johns. (N. Y.) 357 (1810); *Attorney General* v. *Fadden*, 1 Price 403 (1815); *People* v. *Stone*, 10 Paige (N. Y.) 606 (1844); *Marsden* v. *Overbury*, 18 C. B. 34 (1856); *State* v. *Kennedy*, 20 Iowa 372 (1866); *State* v. *Adair*, 68 N. Car. 68 (1873); *Ex parte Harris*, 73 N. Car. 65 (1875); *Maxwell* v. *Rives*, 11 Nev. 213 (1876); *Roberts* v. *State*, 72 Ga. 673 (1884); *United States* v. *Barefield*, 23

SECTION 4. RIGHT TO OPEN AND CLOSE.

WESTERN AND ATLANTIC RAILROAD COMPANY *v.* BROWN.

SUPREME COURT OF GEORGIA, 1897.

102 *Ga.* 13.

Action for damages before Judge Milner, Whitefield Superior Court, October term, 1896.

Brown sued the railroad company for $500, by reason of the negligent killing of a jennet. The defendant admitted the killing, but denied that the jennet was worth $500 or any other large sum, and denied that the killing was due to any fault or negligence on the part of the defendant or its servants. There was a verdict for the plaintiff for $108.16 2/3 and costs of suit. A motion for a new trial was overruled, and defendant excepted. The motion alleges, in addition to the general grounds, that the court erred: In ruling that the plaintiff was entitled to the opening and conclusion, the defendants' attorneys stating to the court before the argument began that defendant admitted the killing, and the law then implied negligence, which made a prima facie case for recovery.[70]

LITTLE, J.: Before the argument of the case began,[71] counsel for defendant admitted the killing of the animal to recover for which

---

Fed. 136 (1885); *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91, 60 Am. Rep. 250 (1886); *People* v. *Willard*, 92 Cal. 482, 28 Pac. 585 (1891); *Roberts* v. *State*, 94 Ga. 66, 21 S. E. 132 (1894); *People* v. *Sebring*, 14 Misc. 31, 35 N. Y. S. 237 (1895); *Hancock* v. *Parker*, 100 Ky. 143, 37 S. W. 594 (1896); *Hayden* v. *Comm.*, 140 Ky. 634, 131 S. W. 521 (1910).

In *Koecker* v. *Koecker*, 7 Phila. (Pa.) 364 (1870) it is said by Paxson, J., "The writ of *habeas corpus ad testificandum* is a common law writ, and may always be issued by a common law court in a proper case. It may issue to bring up a witness who is in prison charged with crime, or under sentence therefor, or who is under execution for debt, or where he is under duress, as a seaman on board of a man-of-war. The proper practice is to apply for a rule to show cause based upon an affidavit setting forth substantially: 1st, That the witness is a prisoner, or under duress. 2d, That his testimony is material, and if he has to be brought a great distance, the materiality of his testimony should appear from the affidavit; and 3d, If the witness is not in prison, that he or she is willing to attend, and it has been held that in such case the witness should have been served with a subpœna."

[70] Part of the opinion of the court is omitted.

[71] The weight of authority is in favor of the view that the burden of proof and consequent right to open and close must be determined at the commencement of the trial and from an inspection of the pleadings only. *Lake Ontario Nat. Bank* v. *Judson*, 122 N. Y. 278, 25 N. E. 367 (1890); *Pontifex* v. *Jolly*, 9 Car. & P. 202 (1839); *Central of Georgia R. Co.* v. *Morgan*, 110 Ga. 168 (1899); *Hollander* v. *Farber*, 52 Misc. 507, 102 N. Y. S. 506 (1907); *Jackson* v. *Winchester*, 4 Dall. (Pa.) 205 (1800); *Miller Brew. Co.* v. *De France*, 90 Iowa 395, 57 N. W. 959 (1894). In Illinois the trial court may in its discretion permit the defendant, on going to trial, to withdraw the general issue and rely on special pleas, and in such case defendant, having the affirmative, has the right to open and close. *Gardner* v. *Meeker*, 169 Ill. 40, 48 N. E. 307 (1897).

the suit was brought, and asked for the opening and conclusion, which was denied. We think the denial was right. The effect of the admission did not go far enough to shift the burden. To entitle the plaintiff to recover he must have shown two things: the killing; the value. The killing being shown, the law would presume negligence; but it would not have presumed a value as we understand it. The burden is not shifted until the admissions show a prima facie right to recover, to rebut which the defendant undertakes. So long as any portion of the burden of making out his case by proof rests on the plaintiff, he is entitled to open and conclude, unless the defendant introduces no evidence.[72] The admissions here went only half-way the road the plaintiff had to travel before he could reach a stopping place; the other half proved to be a stony path for him, but he finally passed over it and established that he had done so to the satisfaction of the jury; and there being evidence to sustain their verdict, we will not interfere.

Judgment affirmed.[73]

PYLES *v.* PIEDMONT MT. AIRY GUANO COMPANY.

SUPREME COURT OF FLORIDA, 1909.

58 *Fla.* 348

Error to Circuit Court, Marion county. Action by the Piedmont Mt. Airy Guano Company against Samuel R. Pyles. Judgment for plaintiff, and defendant brings error.

WHITFIELD, C. J.: The Piedmont Mt. Airy Guano Company, a corporation, brought an action against Samuel R. Pyles in the Circuit Court for Marion county upon an indorsement of a note for $1,142.30, dated July 1, 1904, given by George Close to the plaintiff below.

---

[72] *Harvey* v. *Mitchell,* 2 Moo. & R. 366 (1841); *Commonwealth* v. *Hoe,* 26 Leg. Int. 124 (1869); *East Tenn., Va. & G. R. Co.* v. *Fleetwood,* 90 Ga. 23, 15 S. E. 778 (1892).

[73] *Brunswick & W. R. Co.* v. *Wiggins,* 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513 and note (1901). See also Best on Right to Begin, § 40 et seq. Where the case stated in the complaint upon a money demand in contract is admitted, and nothing is left for a complete determination in the plaintiff's favor, but a mere computation of interest on the demand for the period claimed, the defendant, upon an affirmative defense set up in his answer has the right to open and close. *Brennan* v. *Security Life Ins., &c., Co.,* 4 Daly (N. Y.) 296 (1872). So where the amount of plaintiff's claim is admitted and defendant relies on a counterclaim. *Power* v. *Turner,* 37 Mont. 52, 97 Pac. 950 (1908). Where, however, the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant. *Carter* v. *Jones,* 1 Moo. & R. 281 (1833); *Mercer* v. *Whall,* 5 Ad. & El. (N. S.) 447 (1845); *Sawyer* v. *Hopkins,* 22 Maine 268 (1843); *Huntington* v. *Conkey,* 33 Barb. (N. Y.) 218 (1860); *Baltimore & O. R. Co.* v. *McWhinney,* 36 Ind. 436 (1871); *Cunningham* v. *Gallagher,* 61 Wis. 170, 20 N. W. 925 (1884); *Elder* v. *Oliver,* 30 Mo. App. 575 (1888); *Railway Co.* v. *Taylor,* 57 Ark. 136 (1893); *Parrish* v. *Sun Printing & P. Assn.,* 6 App. Div. 585, 39 N. Y. S. 540 (1896); *Chicago & A. R. Co.* v. *Hill,* 130 Ill. App. 218 (1906); *Baltimore City* v. *Hurlock,* 113 Md. 674, 78 Atl. 558 (1910); *Mann* v. *Dempster,* 181 Fed. 76 (1910).

Among the defenses interposed was that the notes sued on became mixed and mingled with other notes made to the defendant and the indorsement "was a result purely of accident, mistake and inadvertence" and the defendant "did not then have any intention whatever of signing the said note." [74]

Error is assigned on the rulings of the court that the plaintiff have the opening and conclusion of the argument.

In the absence of a statute or rule upon the subject, where the plaintiff has anything to prove in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and conclude the argument to the jury belongs to the plaintiff. The unvarying test to be applied is which party would, upon the pleadings and record admissions and without any proof, be entitled to a verdict. If the plaintiff would succeed on the pleadings alone, the defendant may begin and conclude the argument; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff may begin and conclude the argument to the jury. Where there are several issues, and the plaintiff has anything to prove under any one of them in the first instance, in order to recover, the right to open and close the argument is with him. In every case where the general issue or a general or special denial is pleaded, the right to open and close is with the plaintiff, for then he has something to prove in the first instance, no matter what may be the nature of the controversy, or what special defenses may be set up.[75]

In this case the action is on a promissory note; but there is a common count and a plea of the general issue, which requires the plaintiff to prove something at least before he can recover. Therefore the court properly ruled that the right to open and conclude the argument to the jury was with the plaintiff.

Judgment affirmed.[76]

---

[74] Part of the opinion of the court is omitted.

[75] 1 Thompson on Trials, § 228; Abbot's Trial Brief, 395; *Brunswick & W. R. Co.* v. *Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513 (1901).

[76] Accord: *Bates* v. *Forcht*, 89 Mo. 121, 1 S. W. 120 (1886); *Harvey* v. *Brouilette*, 61 Vt. 525, 17 Atl. 722 (1889); *Staner* v. *Joyce*, 120 Ind. 99, 22 N. E. 89 (1889). Compare *Barker* v. *Malcolm*, 7 Car. & P. 101 (1835); *Conselyea* v. *Swift*, 103 N. Y. 604 (1886); *Montgomery* v. *Hunt*, 93 Ga. 438, 21 S. E. 59 (1893).

The general rule is that he who has the affirmative of the issue shall begin and close. *Heidon* v. *Ibgrave*, 3 Leon. 162, Gouldsb. 23 (1586); *Leech* v. *Armitage*, 2 Dall. (Pa.) 125 (1791); *Mercer* v. *Whall*, 5 Ad. & El. (N. S.) 447 (1845); *Booth* v. *Millns*, 15 M. & W. 669 (1846); *Shadbolt* v. *Findeisen*, 88 Ill. App. 432 (1900); *Zweibel* v. *Myers*, 69 Nebr. 294, 95 N. W. 597 (1903); *Harrison* v. *Russell*, 17 Idaho 196, 105 Pac. 48 (1909). Where the defendant pleads the general issue or a general denial, the right to open and close is with the plaintiff. *Ayer* v. *Austin*, 23 Mass. 225 (1828); *Kearney* v. *Gough*, 5 Gill & J. (Md.) 457 (1833); *Toppan* v. *Jenness*, 21 N. H. 232 (1850); *Price* v. *Seward*, Car. & M. 23 (1841); *Cox* v. *Vickers*, 35 Ind. 27 (1870); *Hudson* v. *Wetherington*, 79 N. Car. 3 (1878); *Farrington* v. *Jennison*, 67 Vt. 569, 32 Atl. 641 (1895); *Von Storch* v. *Von Storch*, 196 Pa. 545, 46 Atl. 1062 (1900); *Semler Milling Co.* v. *Fyffe*, 127 Ill. App. 514 (1906); *Convert* v. *Bishop B. Co.*, 152 Ill. App. 516 (1910); *Piercy* v. *Frankfort Marine Acci-*

DENNY *v.* BOOKER.

COURT OF APPEALS OF KENTUCKY, 1811.

2 Bibb (Ky.) 427.

This was an action of detinue, brought by John P. Booker, in the Jefferson Circuit Court, against Ann Denny for a negro girl slave, named Rachel. Plea that the slave was in the possession of, and belonged to Edward Denny, at the time of his death, and that she had taken out letters of administration of the estate, and held the negro by virtue thereof; issue and verdict and judgment for the plaintiff in the court below, from which Denny has appealed to this court.[77]

CLARK, J.: The second assignment of error is, the court erred in refusing to permit the counsel for the plaintiff in error to open and conclude the argument. It is a rule of practice that the person holding the affirmative of a proposition has the right to open and conclude the argument, and if this right is withheld, it is said in the case of *Churchill* v. *Rogers*[78] to be error.

---

dent Co., 142 App. Div. 839, 127 N. Y. S. 354 (1911). The plaintiff begins and has the right to reply where the defendant's pleadings, or any part of them, deny the whole, or any part, of the plaintiff's pleadings, so as to leave any affirmative allegation on his side to be established by proof. *Inglis* v. *Inglis*, 2 Dall. (Pa.) 45, 1 L. ed. 282 (1790); *Hodges* v. *Holder*, 3 Camp. 366 (1813); *Davidson* v. *Henop*, 1 Cr. (C. C.) 280 (1804); *Beall* v. *Newton*, 1 Cr. (C. C.) 404 (1807); *Jackson* v. *Hesketh*, 2 Stark. 454 (1819); *Bedell* v. *Russell*, 1 Ry. & Moo. 293 (1825); *Cotton* v. *James*, 3 Car. & P. 505 (1829); *Kimble* v. *Adair*, 2 Blackf. (Ind.) 320 (1830); *Jackson* v. *Pittsford*, 8 Blackf. (Ind.) 194 (1846); *Lexington Fire, Life, &c. Ins. Co.* v. *Paver*, 16 Ohio 324 (1847); *Belknap* v. *Wendell*, 21 N. H. 175 (1850); *Buzzell* v. *Snell*, 25 N. H. 474 (1852); *Huffman* v. *Alderson*, 9 W. Va. 616 (1876); *Johnson* v. *Maxwell*, 87 N. Car. 18 (1882); *Cilley* v. *Preferred Acc. Ins. Co.*, 109 App. Div. 394, 96 N. Y. S. 282 (1905); *Leesville Mfg. Co.* v. *Morgan Wood & Iron Co.*, 75 S. Car. 342, 55 S. E. 768 (1906); *Mitchem* v. *Allen*, 128 Ga. 407, 57 S. E. 721 (1907); *Wright* v. *Collins*, 111 Va. 806, 69 S. E. 942 (1911); *Coffman* v. *Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596 (1911); where, however, the burden of proof is upon the defendant to establish the only issue in the cause, he should be given the right to open and close the argument. *Gibson* v. *Reiselt*, 123 Ill. App. 52 (1905); *Heilbronn* v. *Herzog*, 165 N. Y. 98 (1900); *Viehman* v. *Boelter*, 105 Minn. 60, 116 N. W. 1023 (1908); *Darrell* v. *Sparks*, 142 Mo. App. 460, 127 S. W. 103 (1910). Contra: *Dorr* v. *Tremont Nat. Bank*, 128 Mass. 349 (1880).

[77] Part of the opinion of the court is omitted.

[78] Hardin (Ky.) 182 (1808). Accord: *Davis* v. *Mason*, 21 Mass. 156 (1826); *Judge of Probate* v. *Stone*, 44 N. H. 593 (1863); *Colwell* v. *Brower*, 75 Ill. 516 (1874); *Porter* v. *Still*, 63 Miss. 357 (1885); *Lake Ontario Nat. Bank* v. *Judson*, 122 N. Y. 278, 25 N. E. 367 (1890); *Smith* v. *Trader's Nat. Bank*, 74 Tex. 541, 12 S. W. 221 (1889); *Merzbach* v. *New York*, 163 N. Y. 16, 57 N. E. 96 (1900); *Nagle* v. *Schnadt*, 239 Ill. 595, 88 N. E. 178 (1909). Elsewhere it has been held a matter in the discretion of the trial court to be interfered with only in cases of injustice or abuse of discretion. *Robeson* v. *Whitesides*, 16 Serg. & R. (Pa.) 320 (1827); *Bransford* v. *Freeman*, 1 Eng. L. & Eq. 444 (1850); *Geach* v. *Ingall*, 14 M. & W. 95 (1845); *Smith* v. *Coopers*, 9 Iowa 376 (1859); *Lucas* v. *Sullivan*, 33 Mo. 389 (1863); *Smith* v. *Frazier*, 53 Pa. St. 226 (1866); *Lancaster* v. *Collins*, 115 U. S. 222; 29 L. ed. 373, 6 Sup. Ct. 33 (1885); *Aultman* v. *Falkum*, 47 Minn. 414, 50 N. W. 471 (1891); *Oexner* v. *Loehr*, 133 Mo. App. 211, 113 S. W. 727 (1908).

But it is not conceived that a party by pleading affirmatively what only amounts to the negative of the issue can acquire this right. The plea filed by the plaintiff in error is in reality nothing more than the general issue of *non detinet*, and would on that account have been bad on demurrer.[79] It did not release the plaintiff below from proving title to the slave, nor was the burden on the defendant thereby increased.

Judgment affirmed.[80]

SECTION 5. DEMURRER TO EVIDENCE.

COPELAND *v.* NEW ENGLAND INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1839.

39 *Mass.* 135.

MORTON, J., delivered the opinion of the court.[81] This is assumpsit on a policy of insurance on the brig Adams. It is alleged that the brig was totally lost upon a coral reef near the Isle of Pines on the coast of Cuba. The admissions of the parties reduced the case to the simple question whether the loss was caused by any of the perils insured against. To prove the affirmative the plaintiffs introduced the testimony of four witnesses, and here submitted their case. The defendants believing this evidence to be insufficient to support the action demurred to it. The plaintiff joined in the demurrer; and the case has been argued upon the evidence thus brought before us.

This mode of trial is very unusual in this state. No case of the kind has happened since the commencement of our reports; and

---

[79] *Richards* v. *Frankum*, 6 M. & W. 110 (1840).

[80] Averments affirmative in form but negative in substance do not shift the burden of proof or give to the party making them the right to open and close. *Smith* v. *Davies*, 7 Car. & P. 307 (1836); *Crowley* v. *Page*, 7 Car. & P. 789 (1837); *Chambers* v. *Hunt*, 18 N. J. L. 339 (1841); *Haines* v. *Kent*, 11 Ind. 126 (1858); *Beatty* v. *Hatcher*, 13 Ohio St. 115 (1861); *Shulse* v. *McWilliams*, 104 Ind. 512, 3 N. E. 243 (1885); *Georgia R. R.* v. *Williams*, 74 Ga. 723 (1885); *Florence Oil &c. Co.* v. *Farrar*, 109 Fed. 254 (1901); *Barker Cedar Co.* v. *Roberts*, 23 Ky. L. 1345 (1901); *Doerhoefer* v. *Shewmaker*, 29 Ky. L. 1193, 97 S. W. 7 (1907). To entitle a defendant to open and close because of admissions in his pleadings, such admissions must cover the plaintiff's entire cause of action, so as to dispense with the necessity of any proof on plaintiff's part to make out a *prima facie* case. *Cammack* v. *Newman*, 86 Ark. 249, 110 S. W. 802 (1908); *Hyatt* v. *Clements*, 65 Ind. 12 (1878); *Benedict* v. *Penfield*, 42 Hun (N. Y.) 176, 4 N. Y. St. 685 (1886); *Abel* v. *Jarratt*, 100 Ga. 732, 28 S. E. 453 (1897); *Sorensen* v. *Sorensen*, 68 Nebr. 483, 94 N. W. 540 (1903); *Louisville H. & St. L. R. Co.* v. *Schwab*, 127 Ky. 82, 105 S. W. 110 (1907). Where, however, the defendant has the affirmative of the issue, the fact that the complaint alleges facts not essential for the plaintiff to aver or prove which are denied by the answer, will not deprive defendant of his right to open and close. *Murray* v. *New York Life Ins. Co.*, 85 N. Y. 236 (1881); *Hurliman* v. *Seckendorf*, 9 Misc. 264, 29 N. Y. S. 740 (1894); *Lewis* v. *Donohue*, 27 Misc. 514, 58 N. Y. S. 319 (1899).

[81] The statement of facts and part of the opinion of the court are omitted.

it is believed that very few instances occurred before that time.[82] But however unusual the resort to this mode of trial may be, it can not be questioned that the legal right to demur to evidence exists under proper regulations and restrictions. However, as its purpose seems to be, to withdraw facts from the tribunal specially provided for their determination, it is no favorite of our system. And when the hazard and disadvantage which it imposes upon the party demurring, are duly considered,[83] and the few cases to which it may properly apply are recollected, there will be no danger of its coming into common practice.

There are undoubtedly cases, though they are rare, in which a demurrer to evidence may be safely and properly taken. Where all the evidence in a case consists of written instruments, and these are introduced by the party having the affirmative, his opponent may safely demur to the evidence and be sure thereby to bring the merits of his case before the court. As it would be the province of the court to determine the construction and legal operation of the instruments, they would have, by the concession of the parties, all the materials necessary to enable them to determine the legal rights of the parties in the action. The facts being thus before them, they in applying the law to them are in the exercise of their appropriate duty.

But a demurrer is not confined to written evidence. Where witnesses positively testify to certain definite facts, and there is no discrepancy between them, and no other evidence to be offered, a demurrer will properly bring these facts before the court, and enable them to judge whether they will sustain the action or defense which they are introduced to support.

But it not infrequently happens, that the plaintiff or party having the affirmative, attempts to support the issue on his part by indirect and circumstantial evidence. And when the positions are to be established by inferences from many other facts, it is difficult, if not impracticable, to admit a demurrer.

It may be well here to consider the effect of a demurrer to evidence. And we shall do it with the more care, because we apprehend that it was not duly considered or perfectly understood by the counsel on either side. It seems to have been supposed to be an admission of the truth of the evidence; and the

---

[82] *Golden* v. *Knowles*, 120 Mass. 336 (1876); *Rockwell* v. *Congress Hotel Co.*, 237 Ill. 98, 86 N. E. 740 (1908). In a number of states the practice of demurring to the evidence has fallen into disuse, having been superseded by a motion for a nonsuit or by a motion to direct a verdict for the defendant. See cases collected in *Hopkins* v. *Railroad*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354 (1895), and *Bass* v. *Rublee*, 76 Vt. 395, 57 Atl. 965 (1904); *Denman* v. *Johnston*, 85 Mich. 387, 48 N. W. 565 (1891); *Colegrove* v. *N. Y. & H. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418 (1859); *Finch* v. *Conrade*, 154 Pa. 326, 26 Atl. 368 (1893); *Bank* v. *Carr*, 15 Pa. Super. Ct. 346 (1900); 13 P. & L. Dig of Pa. Dec. 23154.

[83] "He that demurs to parol evidence, engages in an uphill business. For every fact is taken *pro confesso*, which the jury might, with the least degree of propriety, have inferred from his evidence." Per Tilghman, C. J., in *Dickey* v. *Schreider*, 3 Serg. & R. (Pa.) 413 (1817).

court have been called upon, supposing it all to be true, to determine what inferences may be drawn from it, and whether it would be competent for the jury upon it to find a verdict for the plaintiffs. And it has been argued that if we would set aside a verdict found for the plaintiffs on this evidence, we must render judgment for the defendants, on the demurrer.

But we think this is a mistaken view of the subject and fails to give to the demurrer its legal effect. It leaves it to the court to draw inferences from the circumstances proved and to judge of the weight of the evidence, which would be trenching upon the province of the jury. The effect of a demurrer to evidence is not only to admit the truth of the evidence, but the existence of all the facts which are stated in that evidence, or which it conduces to prove. Hence that most acute and learned pleader, Mr. Justice Gould, says that this demurrer, "though called a demurrer to evidence, is essentially a demurrer to the facts shown in evidence." Gould on Pleading, 47, 48, 49. As a demurrer to a declaration asks the opinion of the court upon the facts properly pleaded, so a demurrer to evidence asks their opinion upon the facts shown in evidence. In both cases the decision is purely a matter of law, and can not involve any questions of fact on the evidence.

The true question always raised by this kind of demurrer is not what is competent for the jury to find, but what the evidence tends to prove. This view is fully sustained by a most clear and elaborate opinion given by the learned Lord Chief Justice Eyre, in pronouncing the judgment of the House of Lords in the case of *Gibson* v. *Hunter*, 2 H. Blackstone 187. This case contains a most lucid and able discussion of the whole subject. He says the precise operation of a demurrer to evidence is to take from the jury and refer to the judges the application of the law to the fact. In the nature of things the facts are first to be ascertained. Where the evidence is written, or if in parol, is positive, definite and certain, the party offering the evidence is bound to join in demurrer. But the reason of the rule "does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if there be no demurrer in such cases, there will be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the fact on an issue is meant to be withdrawn from a jury and transferred to the judges. If the party who demurs will admit the evidence of the fact, the evidence of which fact is loose and indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance, in this parol evidence, than in a matter in writing, and the reason for compelling the party who offers the evidence to join in demurrer, will then apply, and the doctrine of demurrers to evidence

will be uniform and consistent." See also *Middleton* v. *Baker,* Cro. Eliz. 752.[84]

This doctrine seems to be founded upon and well supported by the case of *Wright* v. *Pindar,* reported in Style 34, and also in Aleyn 18. In Style, Chief Justice Rolle says "that matter of fact ought to be agreed in a demurrer to evidence, otherwise the court can not proceed upon the demurrer; for the judges can not try the matter of fact, for that were for the judges to give the verdict, which belongs to the jury to do." And in Aleyn 18, the decision is thus stated: "And it was resolved, that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court. And if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges the matter can not join in the demurrer with him; but ought to pray the judgment of the court, that he may not be admitted to his demurrer unless he will confess the matter of facts to be true. And for that the defendant did not so in this case, both parties having misbehaved themselves, the court can not proceed to judgment." * * *

Now, in the case at bar, the defendants demur generally to evidence, which is circumstantial, loose and indeterminate. And so far from reciting the facts and conclusions which the evidence tends to prove, and which they intend to admit, they refer generally to all evidence as it exists in the form of depositions, consisting of great variety of interrogatories and cross-interrogatories, and the answers to them, which are neither direct and positive nor consistent. This we think to be clearly irregular. To quote the language of Judge Story, "the defendants have demurred, not to facts, but to evidence of facts, not to admissions, but to mere circumstances of presumption." [85]

The evidence offered in this case tends to show, and undoubtedly does show, that the brig insured, in a squall (not a severe one, to be sure) ran upon a coral reef and was totally lost. This proof, by itself, clearly would support the plaintiff's action. But the defendants contend that the testimony of the same witnesses tends to show that the vessel was run on shore intentionally or through the gross incapacity of the master. Now these are distinct substantive facts, which the defendants wish to establish. It is true the evidence tends strongly, very strongly, to prove them. But the defendants can not avail themselves of these grounds of defense on a demurrer to the evidence. If the plaintiff's evidence does not show a *prima facie* case, the defendants may demur. But if they wish to set up any facts in defense, they must resort to the jury to have them established.

---

[84] s. c. *Baker's Case,* 5 Co. Rep. 104 (1600), and see *Newis* v. *Lark,* Plowd. 403, 411 (1871); *Fitz Harris* v. *Boiun,* 1 Lev. 87 (1663); *Hurst* v. *Dippo,* 1 Dall. (U. S.) 20, 1 L. ed. 19 (1774); *Miller* v. *Ware,* 1 C. & P. 237 (1824), note; *Nelson* v. *Whitfield,* 82 N. Car. 46 (1880).

[85] *Young* v. *Black,* 7 Cranch (U. S.) 565, 3 L. ed. 440 (1813).

The depositions introduced by the plaintiffs were taken by the defendants, and thus the facts may be presented in an order and a form most favorable to the latter. The defendants, too, by demurring, admit the facts which the evidence conduces to prove for the plaintiffs, and can not avail themselves of such as it tends to show for the defendants. The plaintiffs, by joining in the demurrer, did not admit the truth of that part of the testimony which is favorable to the defendants, much less any inferences which may be drawn from it. If the defendants wish to set up any facts to exonerate or discharge them, they must look to the jury to establish them. The court can not examine, compare and weigh the different parts of the evidence. It would be performing a duty which the law has not imposed upon them, and which they uniformly refuse to accept from the agreement of the parties themselves.

Without going into further examination of the evidence, we are fully convinced that the demurrer was not properly tendered, that the evidence did not present a proper case for a demurrer, that the plaintiffs ought not to have joined in it, but to have prayed the judgment of the court whether the defendants should be admitted to it.

The court have an important discretion in allowing or disallowing demurrers to evidence.[86] Although a demurrer is a matter of right and the opposite party may be compelled to join in it, when properly presented, yet he should always be careful to see that it contains the proper admissions before he joins in it. On the whole, we are satisfied that the demurrer was tendered and joined without fully examining and duly considering the nature and effect of the measure.

And we think, not as Lord Chief Justice Rolle said, "that both parties have misbehaved themselves," but in the language of the Supreme Court of the United States, "that the demurrer has been so incautiously framed that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament the settled practice is to award a new trial, upon the ground that the issue between the parties has not been tried." This was done in the analogous cases of *Wright* v. *Pindar*, and *Gibson* v. *Hunter*, by the House of Lords, and in *Fowle* v. *Common Council of Alexandria*,[87] by the Supreme Court of the United States.

Venire facias de novo awarded.

---

[86] *Shields* v. *Arnold*, 1 Blackf. (Ind.) 109 (1820); *Maus* v. *Montgomery*, 11 Serg. & R. (Pa.) 329 (1824); *Morrison* v. *McKinnon*, 12 Fla. 552 (1868); *Van Stone* v. *Stillwell*, 142 U. S. 128, 35 L. ed. 961, 12 Sup. Ct. 181 (1891); *University of Va.* v. *Snyder*, 100 Va. 567, 42 S. E. 337 (1902). Compare *Fowler* v. *Macomb*, 2 Root (Conn.) 388 (1796).

[87] 11 Wheaton (U. S.) 320, 6 L. ed. 608 (1826). Accord: *Dormady* v. *Bank*, 2 Scam. (Ill.) 236 (1840); *Ingram* v. *Jacksonville St. R. Co.*, 43 Fla. 324, 30 So. 800 (1901).

"The demurrant attacks the evidence of his adversary, and in the very nature of things, this attack can not be aided by his own evidence. The sufficiency of the adversary's evidence to support the issue upon his part is the only question presented by the demurrer, and this question must be determined without reference to the evidence of the demurring party; indeed, such a party does not and can not have any evidence. The evidence of the adversary is alone involved in the issue raised by the demurrer." *Fritz* v. *Clark*, 80 Ind. 591 (1881); *Goodman* v. *Ford*, 23 Miss. 592 (1852). Every

SECTION 6. NONSUIT.

WASHBURN *v.* ALLEN.

SUPREME JUDICIAL COURT OF MAINE, 1885.

77 Maine 344.

FOSTER, J.: This action was tried before the presiding justice, without the intervention of a jury. The parties upon both sides had introduced their evidence, and at this stage of the trial the plaintiff claimed to become nonsuit, to which the defendant objected; thereupon the court ruled, as a matter of law, that the plaintiff could not become nonsuit against the defendants' objection.[88]

Before proceeding to consider the authorities that bear upon this question, it may be remarked that nonsuits may be classed under two divisions. (1) Involuntary; as when ordered by the court against the plaintiff's objection. (2) Voluntary, when allowed by the court on the plaintiff's own motion. Into the one or the other of the two classes the decided cases fall. The case under consideration comes within the last, and brings us to consider the rule of practice applicable in such cases.

---

fact is taken against the party demurring as true, and no testimony can be considered which impugns its truth. *Davis* v. *Steiner,* 14 Pa. St. 275, 53 Am. Dec. 547 (1850); *Cocksedge* v. *Fanshaw,* 1 Dougl. 118 (1779); *Doe* v. *Rue,* 4 Blackf. (Ind.) 263, 29 Am. Dec. 368 (1836); *McKowen* v. *McDonald,* 43 Pa. St. 441, 82 Am. Dec. 576 (1862); *Plant* v. *Edwards,* 85 Ind. 588 (1882); *Lake Shore, &c., R. Co.* v. *Foster,* 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319 (1885); *Hopkins* v. *Railroad,* 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354 (1895); *Des Moines Life Assn.* v. *Crim,* 134 Fed. 348, 67 C. C. A. 330 (1904); *Mugge* v. *Jackson,* 50 Fla. 235, 39 So. 157 (1905); *Meily* v. *St. Louis & F. S. R. Co.,* 215 Mo. 567, 114 S. W. 1013 (1908); *Carter* v. *Prairie Oil & Gas Co.,* 80 Kans. 792, 104 Pac. 563 (1909). In Virginia and West Virginia an anomalous practice exists by which the evidence of both parties is put in the demurrer, the demurrant admitting all that may reasonably be inferred from the evidence of the adverse party and waiving so much of his evidence merely as is contradicted or impeached thereby. *Trout* v. *Va. & Tenn. R. Co.,* 23 Gratt. (Va.) 619 (1873); *Chesapeake, &c., R. Co.* v. *Sparrows,* 98 Va. 630, 37 S. E. 302 (1900); *Bowers* v. *Bristol Gas. &c. Co.,* 100 Va. 533, 42 S. E. 296 (1902); *Bowman* v. *Dewing,* 50 W. Va. 445, 40 S. E. 576 (1901).

A demurrer to evidence must be in writing. *Landt* v. *McCullough,* 218 Ill. 607, 75 N. E. 1069 (1905); *Rockwell* v. *Congress Hotel Co.,* 237 Ill 98, 86 N. E. 740 (1908); *Bridgeport Wooden-ware Mfg. Co.* v. *Railroads,* 103 Tenn. 490, 53 S. W. 739 (1890); *Skinner Mfg. Co.* v. *Wright,* 51 Fla. 324, 41 So. 28 (1906); *Newport, &c., Co.* v. *Nicolopoolos,* 109 Va. 165, 63 S. E. 443 (1909).

Upon demurrer to evidence, the damages may be assessed by the principal jury conditionally before they are discharged; or they may be assessed by another jury upon a writ of inquiry after the demurrer is determined. *Darrose* v. *Newbolt,* Cro. Car. 143 (1629); *Feay* v. *Decamp,* 15 Serg. & R. (Pa.) 227 (1826); *Young* v. *Foster,* 7 Port. Ala. 420 (1838); *Mobile & O. R. Co.* v. *McArthur,* 43 Miss. 180 (1870); *Holmes* v. *Phoenix Mut. Life Ins. Co.,* 49 Ind. 356 (1874); *Hanover Fire Ins. Co.* v. *Lewis,* 23 Fla. 193, 1 So. 863 (1887); *Galveston, &c., R. Co.* v. *Templeton,* 87 Tex. 42, 26 S. W. 1066 (1894).

[88] The argument of counsel and part of the opinion of the court are omitted.

The English practice differs somewhat from that of our own courts. At common law, as early practiced in the English courts, upon every continuance or day given over before judgment, the plaintiff was demandable, and upon his nonappearance might have been nonsuit. Bacon's Abr. Nonsuit, D.; Co. Litt. 139b. And no verdict could be returned and given, unless in his presence, or that of his counsel, but the plaintiff was said to be nonsuit. Therefore it was usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to withdraw himself and be voluntarily nonsuited. 3 Black. Comm. *376; *Murphey* v. *Donlan,* 5 B. & C. 178, 11 Eng. Com. Law 195. And whenever the plaintiff ought to appear in court, he was at liberty to withdraw. Co. Litt. 138, b, 139, a; *Robinson* v. *Lawrence,* 7 Exch. 123. The plaintiff had a right to be nonsuited at any state of the proceedings he might prefer, and thereby reserve to himself the power of bringing a fresh action for the same subject-matter; and the right continued to the last moment of the trial, even till after verdict rendered, or, where the case was tried by the court without the intervention of a jury, until the judge had pronounced his judgment. *Outhwaite* v. *Hudson,* 7 Exch. 380. Consequently, if he was not satisfied with the damages given by the jury, he might become nonsuit. Bacon's Abr. Nonsuit, D.; *Keat* v. *Barker,* 5 Modern 208.

But by statute, 2 Henry IV, ch. 7 (A. D. 1400), it was ordained and established, that if the verdict passed against the plaintiff, he should not be nonsuited, which before that time was otherwise at common law.

Notwithstanding this statute, which was an amendment of the common law, it was held that the plaintiff might be nonsuited after the finding of a special verdict, and the reason of this would seem to be that a special verdict is in the nature of a statement of facts; and also after a demurrer and argument thereon, and a rule for judgment for defendant, though it could not be done at the same term. Bacon's Abr. Nonsuit, D.; *Alderly* v. *Alderly,* Cro. Jac. 35. And this statute was afterwards construed as applying only to cases where the jury had passed upon the whole matter. *Earl of Oxford* v. *Waterhouse,* Cro. Jac. 575; Com. Dig. Pleader, w. 5. Except in the cases above stated, the plaintiff could always become nonsuit upon any continuance.[89]

In 1740, the English practice was further regulated by statute of 14 Geo. II, ch. 17, which provided: "That where issue is, or shall be, joined in any action or suit at law in any of his majesty's courts of record, and the plaintiff or plaintiffs, in any such action or suit, hath or have neglected, or shall neglect, to bring issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice thereof having first been given), to give the

[89]Under the modern English practice a plaintiff can not elect to be nonsuited; if he offers no evidence at the trial, the defendant is entitled to a verdict. *Fox* v. *Star Newspaper Co.,* L. R. (1898) 1 Q. B. 636; affirmed L. R. (1900) App. Cas. 19, and see rules of supreme court, order XXVI, rules 1-4.

like judgment for the defendant or defendants in every such action or suit, as in the case of nonsuit." [90]

It would seem that the practice in England, under the common law, as well as since the more modern statutes, has been perhaps more liberal in favor of allowing nonsuits to plaintiffs as matter of right, than is prescribed in this country. According to the practice there, as appears by the decisions of their courts, a plaintiff could not be nonsuited on the trial against his assent, but might insist, as matter of right, on the cause going to the jury, and thus taking his chance of a verdict. *Dewar* v. *Purday*, 4 Ad. & El. 633.[91]

Whatever may be practice elsewhere, the courts of Massachusetts and New Hampshire have never adopted the early English practice, but, on the contrary, have declared that, after a cause has been opened to the jury, the plaintiff can not become nonsuit, as a matter of legal right, but the court might allow it, at that stage of the case, in its discretion. In *Haskell* v. *Whitney*, 12 Mass. 47, Jackson, J., in pronouncing the opinion of the court says: "The plaintiff, or demandant, may, in various modes, become nonsuit, or discontinue his suit, at his pleasure. At the beginning of every term, at which he is demandable, he may neglect or refuse to appear. If the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or, after issue joined, he may decline to open his cause to the jury. The court also may, upon sufficient cause shown, allow him to discontinue, even when it can not be claimed as a right; as after the cause is opened, and the evidence submitted to the jury."[92]

We have carefully examined not only the authorities cited, but many others, in support of the extension of the rule to authorize a nonsuit, as matter of right, up to the time of verdict, but we are not satisfied that, as against the decisions of our own courts, the English practice, or the old common law doctrine should prevail. In the cases to which we have referred, our courts have fully recognized, though they have not seen fit to follow, the ancient common law as laid down many years ago in England. Many of the customs of our courts are different from those existing at that time, when no verdict could be returned for or against a plaintiff unless he or his counsel was present in court, and to avoid which, or, if in his favor, and the damages were not satisfactory to him, he might withdraw himself and become nonsuit. *Cessante ratione legis, cessat ipsa lex.*

[90] *Mewburn* v. *Langley*, 3 T. R. 1 (1789); *Porzelius* v. *Maddocks*, 1 H. Bl. 101 (1789); *Burton* v. *Harrison*, 1 East 346 (1801); Barnes' notes 313.

[91] See note 99 to *Ringold* v. *Haven*, post p. 403.

[92] The court also cites *Locke* v. *Wood*, 16 Mass. 317 (1819); *Means* v. *Welles*, 12 Metc. (Mass.) 356 (1847); *Lowell* v. *Merrimack Mfg. Co.*, 11 Gray (Mass.) 382 (1858); *Shaw* v. *Boland*, 15 Gray (Mass.) 571 (1860); *Truro* v. *Atkins*, 122 Mass. 418 (1877); *Burbank* v. *Woodward*, 124 Mass. 357 (1878); *Judge of Probate* v. *Abbott*, 13 N. H. 21 (1843); *Wright* v. *Bartlett*, 45 N. H. 289 (1864); *Pollard* v. *Moore*, 51 N. H. 188 (1871); *Fulford* v. *Converse*, 54 N. H. 543 (1874); *Parker* v. *Burns*, 57 N. H. 602 (1876); *Farr* v. *Cate*, 58 N. H. 367 (1878); *Proprietors* v. *Davis*, 2 Maine 356 (1822); *Theobald* v. *Colby*, 35 Maine 179 (1853); *Philips* v. *Echard*, Cro. Jac. 35 (1605); *Larrabee* v. *Rideout*, 45 Maine 193 (1858).

Hence, not only upon principle, but authority, we may safely found this rule: That the plaintiff, before opening his case to jury, or to the court, when tried before the court without the intervention of the jury, may become nonsuit as a matter of right; after the case is opened, and before verdict, leave to become nonsuit is within the discretion of the court; after verdict there can be no nonsuit.[93] * * *

In this case both parties had introduced their evidence. The plaintiff thereupon stated that he voluntarily became nonsuit. The defendants objected. The court then ruled, as matter of law, that the plaintiff could not become nonsuit against the defendant's objection, and ordered judgment for defendants.

This, we think, was error; it was, in effect, expressly denying that the trial court had the power, in the exercise of its discretion, to grant the nonsuit asked for by the plaintiff, and which, as we have stated, could have been done, in the discretion of the court, at that stage of the case.

Exceptions sustained.

EASTON BANK *v.* CORYELL.

SUPREME COURT OF PENNSYLVANIA, 1844.

9 Watts and S. (Pa.) 153.

Error to the common pleas of Bucks county. This was an action of assumpsit on a promissory note brought by the Easton Bank against Coryell and Murray. After the charge of the court, the jury retired to deliberate upon their verdict, and after the lapse of some time came into court. After they had entered the jury box and nine of them had been called, and before the clerk had finished calling them, the plaintiff asked to suffer a nonsuit. The court decided that it was too late, and refused to allow it, and plaintiff excepted. The refusal was one of the assignments of error.

---

[93] Accord: *Benoist* v. *Murrin*, 48 Mo. 48 (1871); *United States* v. *Humason*, 8 Fed. 71 (1881); *Bettis* v. *Schrieber*, 31 Minn. 329, 17 N. W. 863 (1883); *Johnson* v. *Bailey*, 59 Fed. 670 (1894); *Derick* v. *Taylor*, 171 Mass. 444 (1898); *Carpenter* v. *N. Y., N. H. & H. R. Co.*, 184 Mass. 98, 68 N. E. 28 (1903). In other jurisdictions the plaintiff may suffer a voluntary nonsuit at any time before the case is submitted to the jury. *Amos* v. *Sinnott*, 5 Ill. 440 (1843); *Adams* v. *Shepard*, 24 Ill. 464 (1860); *McClelland* v. *Louisville, N. A. &c. R. Co.*, 94 Ind. 276 (1883); *National Broadway Bank* v. *Lesley*, 31 Fla. 56 (1893); *Morrisey* v. *Chicago & N. W. R. Co.*, 80 Iowa 314, 45 N. W. 545 (1890); *Toulouse* v. *Pare*, 103 Cal. 251, 37 Pac. 146 (1894); *Bauman* v. *Whiteley*, 57 N. J. L. 487, 31 Atl. 982 (1895); *Osborne* v. *Davies*, 60 Kans. 695, 57 Pac. 941 (1899); *Greenfield* v. *Carey*, 70 N. J. L. 613, 57 Atl. 269 (1904); *McPherson* v. *Seattle Elec. Co.*, 53 Wash. 358, 101 Pac. 1084 (1909); *Snyder* v. *Collier*, 85 Nebr. 552, 123 N. W. 1023 (1909); *Knight* v. *Ill. Cent. R. Co.*, 180 Fed. 368 (1910); *Strottman* v. *R. Co.*, 228 Mo. 154, 128 S. W. 187 (1910); *Van Wagemen* v. *Chladek*, 27 S. Dak. 436, 131 N. W. 507 (1911). The New York Code of Civil Procedure provides, § 1182: "It is not necessary, in an action in a court of record to call the plaintiff, when the jurors are about to deliver their verdict; and the plaintiff, in such an action, can not submit to a nonsuit, after the cause has been committed to the jury, to consider the verdict."

PER CURIAM. There is no apparent error in the charge; but the plaintiff was erroneously compelled to submit to a verdict. It was ruled in *McLughan* v. *Bovard*,[94] for reasons not necessary to be repeated, that a plaintiff is entitled to become nonsuit at any time before the jury have declared their readiness to give their verdict in answer to the prothonotary's formal inquiry; but in this instance they were not ready, for they had not all been called and counted, in compliance with the ceremony that precedes the question of readiness. It is better to hold fast to the established criterion, whatever it may be, than introduce uncertainty by departing from it.[95]

Judgment reversed.

MERCHANTS' BANK OF CANADA *v.* ALBERT R. SCHULENBERG.

SUPREME COURT OF MICHIGAN, 1884.

54 *Mich.* 49.

SHERWOOD, J.: This case has once before been in this court (48 Mich. 102), but the questions then raised have no bearing upon the points made in the present record. The action is assumpsit upon a Canadian judgment rendered in the Court of Queen's Bench in the province of Ontario. The plea was the general issue, with notice of set-off and other special matters in bar of the suit. Under the set-off defendant claimed to be entitled to a judgment. There was no contest as to the amount of the plaintiff's claim upon the trial. The record of the Ontario judgment was introduced in evidence without objection, and the plaintiff's counsel rested his case.

The defendant then examined two witnesses upon his part, and, when nearly ready to close the defense, counsel for plaintiff announced to the court that he was taken by surprise by the defendant's testimony; was not then prepared to meet it; and asked leave of the court to submit to a nonsuit, with the right to move to set the same aside. This application of plaintiff's counsel was objected to by the

---

[94] 4 Watts (Pa.) 308 (1835). See Pa. Act of April 16, 1903, P. L. 216, § 1.

[95] Accord: *Price* v. *Parker*, 1 Salk. 178 (1696); *Keat* v. *Barker*, 5 Mod. 208 (1696); *Usher* v. *Sibley*, 2 Brev. (S. Car.) 32 (1806); *Chedoteau* v. *Dominquez*, 7 Mart. (O. S.) (La.) 490 (1820); *Wooster* v. *Burr*, 2 Wend. (N. Y.) 295 (1829); *McCredy* v. *Fey*, 7 Watts (Pa.) 496 (1838); *Outhwaite* v. *Hudson*, 7 Exch. 380 (1852); *Stevens* v. *Esling*, 2 F. & F. 136 (1860); *People's Bank* v. *Stewart*, 93 N. Car. 402 (1885); *Helwig* v. *Hosmer*, 73 Mich. 258, 41 N. W. 268 (1889); *Piedmont Mfg. Co.*, v. *Buxton*, 105 N. Car. 74, 11 S. E. 264 (1890); *Hoodless* v. *Winter*, 80 Tex. 638, 16 S. W. 427 (1891); *Jackson* v. *Meritt*, 21 D. C. 276 (1892); *Felts* v. *Del. L. & W. R. Co.*, 170 Pa. St. 432, 33 Atl. 97 (1895); *Crumley* v. *Lutz*, 180 Pa. 476, 36 Atl. 929 (1897). See *Sharpe* v. *Sowers*, 152 N. Car. 379 (1910). "The ancient practice was for the officer of the court to ask the jury, after they had considered of their verdict, if they were agreed in their verdict. If they answered in the affirmative, the officer then called the plaintiff by name to hear the verdict; and if he appeared the verdict was pronounced. If he did not appear to prosecute his suit he was nonsuited." Per Abbott, C. J., in *Murphy* v. *Donlon*, 5 B. & C. 178 (1826).

defendant, on the ground that since the suit was commenced the Statute of Limitations had commenced to run against the claim stated in his notice of set-off. The objection was overruled by the court, and counsel for the defendant excepted. Counsel for defendant thereupon admitted the plaintiff's claim of $531,000 stated in his declaration, and claimed his readiness to make proof of his offset to the amount of $646,348, and insisted upon his right to proceed with the trial, establish his claim, and have a verdict for the surplus in his favor, and requested the court to permit him to do so. Counsel for plaintiff objected, the court sustained the objection, and defendant's counsel again excepted. These two exceptions are now before us for consideration, and only these.

The question is simply this: Whether, under our statute, when the defendant has given notice of set-off and claims a balance in his favor, the plaintiff can discontinue his suit, or be permitted to discontinue it, without the consent of and against the wishes of the defendant.

Set-off is a mode of defense. By it the existence of the demand sued upon is, in a certain sense, admitted; but at the same time, the defendant sets up a demand against the plaintiff to counterbalance it, in whole or in part, and under our statute the defendant may have judgment for any balance found in his favor. Originally the defendant's claim could only be allowed to the extent of the plaintiff's demand proved on the trial. Toml. Law Dict.; Babbington on Set-off 1. At common law the defendant was in no instance allowed to recover judgment for damages for a positive claim against the plaintiff. To obviate the rigor of this rule of law, and to avoid a multiplicity of suits where mutual cross-demands existed, unconnected with each other, and to have the whole adjudicated upon in one action, was the great object of the statute of set-off. *Ward* v. *Fellers*, 3 Mich. 281.

The right of set-off at law is given by statute, and is, of course, limited by it. The common law never recognized it. Bacon Abr. tit. "Set-off;" *Woods* v. *Ayres*, 39 Mich. 345.

How. Stat., sec. 6886 of the chapter authorizing set-off in justice's court, reads as follows: "If the amount of set-off duly established, be equal to the plaintiff's debt, judgment shall be entered for the defendant, with costs; if it be less than the plaintiff's debt, the plaintiff shall have judgment for the residue only, with costs; if it be more than the plaintiff's debt, and the balance found due to the defendant from the plaintiff in the action be three hundred dollars or under, judgment shall be rendered for the defendant for the amount thereof, with costs; and execution shall be awarded as upon a judgment in a suit brought by him; but no such judgment shall be rendered against the plaintiff when the contract which is the subject of suit, shall have been assigned before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action." The same provisions are made applicable to proceedings in courts of record, in cases of set-off. See How. Stat., secs. 7367, 7368.

The object of the statute is beneficial and equitable, and in its operation it proceeds upon equitable principles. *Downer* v. *Eggleston*, 15 Wend. (N. Y.) 55, 56.

The doctrine of set-off was borrowed from the doctrines of compensation of the civil law, and constituted an important part thereof. 2 Poth. Obl. No. 13, p. 99; *Duncan* v. *Lyon*, 3 Johns. (N. Y.) ch. 359; *Reab* v. *McAlister*, 8 Wend. (N. Y.) 115; *Whitaker* v. *Rush*, 1 Ambler 407. This doctrine was also followed to some extent in the English courts before the statutes of set-off were enacted. See *Chapman* v. *Derby*, 2 Vern. 117; *Lindsay* v. *Jackson*, 2 Paige (N. Y.) 581. And while it is true that the right of set-off is statutory and we can not enlarge the right beyond what the statute reasonably allows, yet the courts may, and it is their duty in determining, regulating and applying the practice in securing and enforcing that right, to be liberal in their action, and to give the law such construction as will secure all the benefits and advantages intended.

The right of the plaintiff at common law to voluntarily submit to a nonsuit, or to discontinue his suit at any time before the jury have rendered their verdict, is well supported by the authorities, and has always been the practice in this state when no set-off has been pleaded. 3 Chit. Pr. 910; 1 Burril's Pr. 241; *Wooster* v. *Burr*, 2 Wend. (N. Y.) 295; Circuit Court Rule 26; 1 Green's Pr. 447, 279; *Slocomb* v. *Thatcher*, 20 Mich. 52. I think that when the set-off is purely defensive, and no affirmative action is required on the part of the court or jury, the right of the plaintiff to become nonsuited at his pleasure, before verdict or judgment, should be in the discretion of the court; which discretion should not be exercised against the right, except in cases where the rights of the defendant might be prejudiced.

Under the statute, however, authorizing a judgment to be rendered in case of set-off for any balance found due the defendant upon the trial, the rule is and should be different. In such a case, really two suits are pending before the court to be tried at the same time. In the one, the plaintiff has the affirmative of the issue; and in the other, the defendant has the affirmative. It is only after the trial, when the extent of each party's claim has been ascertained, that the liquidation of the smaller claim occurs by way of set-off, or can be made by the court or jury.

The statute requires the defendant to bring forward his claim for adjudication at the time the plaintiff brings his suit, and thereby determines the time when the defendant shall have his claim adjudicated, at the peril of doing so at his own expense. In all other respects, the case stands as though two separate suits were brought to determine the rights of the parties; and I fail to see why both cases should not be governed by the same rules, and receive the same treatment at the hands of the court. Simple justice requires this, and I can see no reason why the equitable rules upon which the whole doctrine of set-off is based should not be carried out in the practice in these cases. Adopting this rule, the plaintiff would have no more right to discontinue the defendant's suit than the latter would that of the former; and such, I think, should be the law.

These views find support in the following authorities, which I think should govern this case: *Thomas* v. *Hill*, 3 Tex. 270; *Bradford* v. *Hamilton*, 7 Tex. 55, 58, 59; *Francis* v. *Edwards*, 77 N. Car. 271, 275; *Riley* v. *Carter*, 3 Humph. (Tenn.) 230; *Ress* v. *Van Patten*, 13 How. Pr. (N. Y.) 258; *Cockle* v. *Underwood*, 3 Duer (N. Y.) 676; *Van Allen* v. *Schermerhorn*, 14 How. Pr. (N. Y.) 287.

I think the exceptions of defendant's counsel to the action of the court, in not allowing the defendant to make full proof of his claim and take judgment therefor, were well taken.

The judgment must be reversed with costs and a new trial granted.

Campbell, J. concurred.

COOLEY, C. J.: In this case the defendant relied upon a set-off, which, he claimed, was larger than the plaintiff's demand, and he brings the case to this court, assigning for error the order of the circuit court permitting the plaintiff, notwithstanding his objection, to submit to a nonsuit.

The general right of the plaintiff to discontinue his suit or to submit to a nonsuit, at any time before verdict, is undoubted, and in the absence of any statute taking away the right, it exists in the cases where set-off is relied upon, to the same extent as in other cases. This is fully recognized in *Cummings v. Pruden*, 11 Mass. 206, and *Branham* v. *Brown*, 1 Bailey (S. Car.) 262. In several states statutes have been passed taking away the right, but we have no such statute. The fact that the statute of set-offs permits judgment to be taken by the defendant for the balance found due him, does not preclude a discontinuance. *Cummings* v. *Pruden*, supra.

But it is said there are decisions to the contrary of these, and several are referred to. The Texas cases are not in point, as they are decided under the civil law, which does not prevail in this state. *Egery* v. *Power*, 5 Tex. 501; *Walcott* v. *Hendrick*, 6 Tex. 406; *Bradford* v. *Hamilton*, 7 Tex. 55.[96] The case of *Francis* v. *Edwards*, 77 N. Car. 271, was decided upon a construction of the code of that state, and therefore has no bearing. In *Riley* v. *Carter*, 3 Humph. (Tenn.) 230, the defendant had obtained judgment for his set-off in justice's court, and the plaintiff removed the case to the circuit court by certiorari, and then, in that court, was given leave to dismiss his suit. This was palpable error, and the court so held; but we discover no analogy between that case and this. The defendant had his judgment, and unless error was shown, had a right to retain it. The three New York cases of *Cockle* v. *Underwood*, 3 Duer (N. Y.) 676; *Rees* v. *Van Patten*, 13 How. Pr. (N. Y.) 258; and *Van Alen* v. *Schermerhorn*, 14 How. Pr. (N. Y.) 287, are not in point because decided under the state code; but so far as they can be considered as having a bearing, they are against the defendant instead of for him, for they all recognize the power of the court

[96] Accord: *Jackson* v. *Furst*, (Tex. Civ. App.) 154 S. W. 243 (1913). See also, in Louisiana: *Jones* v. *Jenkins*, 9 Rob. (La.) 180 (1844); *Davis* v. *Young*, 35 La. Ann. 739 (1883); *State* v. *Rost*, 48 La. Ann. 455, 19 So. 256 (1896).

in its discretion to permit the plaintiff to discontinue; which is all that is necessary to sustain this judgment.

The judgment should be affirmed.[97]

Champlin, J., concurred.

Affirmed.

RINGGOLD *v.* HAVEN & LIVINGSTON.

SUPREME COURT OF CALIFORNIA, 1850.

1 *Cal.* 108.

Action against the defendants as common carriers for not safely transporting goods of the plaintiff from New York to San Francisco. Plea the general issue. On the trial defendants moved for a nonsuit on the ground that the plaintiff's evidence disclosed that the contract for transportation was with Livingston, Wells & Co., and not with defendants. The court refused the nonsuit on the ground that defendants were liable as having made the contract without disclosing their principal. On appeal two questions were considered: 1st. Had the court the legal right to order the plaintiff to be non-

---

[97]There is a conflict of opinion upon the point discussed in the principal case, due, in part, to the language of the statutes and their interpretation. In accord with the view of Cooley, C. J., see *Usher* v. *Sibley*, 2 Brev. (S. Car.) 32 (1806); *Cummings* v. *Pruden*, 11 Mass. 206 (1814); *Branham* v. *Brown*, 1 Bailey L. (S. Car.) 262 (1829); *McCredy* v. *Fey*, 7 Watts (Pa.) 496 (1838); *Sewall* v. *Tarbox*, 30 Maine 27 (1849); *Buffington* v. *Quackenbross*, 5 Fla. 196 (1853); *Clarke* v. *Wall*, 5 Fla. 476 (1854); *Fowler* v. *Lawson*, 15 Ark. 148 (1854); *Fink* v. *Bruihl*, 47 Mo. 173 (1870); *Gilmore* v. *Reed*, 76 Pa. St. 462 (1874); *Anderson* v. *Gregory*, 43 Conn. 61 (1875); *Huffstutler* v. *Louisville Packing Co.*, 154 Ala. 291, 45 So. 418 (1908). The trend of authority is contra. *Means* v. *Welles*, 53 Mass. 356 (1847); *Hancock Ditch Co.* v. *Bradford*, 13 Cal. 637 (1859); *McLeod* v. *Bertschy*, 33 Wis. 176, 14 Am. Rep. 755 (1873); *Tabor* v. *Mackkee*, 58 Ind. 290 (1877); *Egolf* v. *Bryant*, 63 Ind. 365 (1878); *Mathews* v. *Taaffe*, 44 Minn. 400, 46 N. W. 850 (1890); *East St. Louis* v. *Thomas*, 102 Ill. 453 (1882); In re Lasak, 131 N. Y. 624 (1892); *Boone* v. *Bush*, 91 Tenn. 29, 17 S. W. 792 (1891); *Northwestern Mut. Life Ins. Co.* v. *Barbour*, 95 Ky. 7, 23 S. W. 584, 15 Ky. L. 394 (1893); *Rumbough* v. *Young*, 119 N. Car. 567, 26 S. E. 143 (1896); *Samaha* v. *Samaha*, 18 App. Dist. Columbia, 76 (1910); *Lay* v. *Collins*, 74 Ark. 536, 86 S. W. 281 (1905); *Gray* v. *Granger*, 48 Wash. 442, 93 Pac. 912 (1908); *Menke* v. *Barnhart*, 137 Ill. App. 223 (1907); *Zuckerman* v. *Witkowski*, 115 N. Y. S. 157 (1909); *Hamlin* v. *Walker*, 228 Mo. 611, 128 S. W. 945 (1910); *Gurr* v. *Brinson*, 138 Ga. 665, 75 S. E. 979 (1912); *Long* v. *Bagwell*, 38 Okla. 312, 133 Pac. 50 (1913).

In England the rules of the supreme court, order 21, rule 16, provide: "If, in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with." *Roberts* v. *Booth*, L. R. (1893) 1 Ch. Div. 52; *Adams* v. *Adams*, L. R. (1892) 1 Ch. Div. 369. In equity see *Pullman's Palace Car Co.* v. *Cent. Tr. Co.*, 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. 808 (1897); *Boyle* v. *Stallings*, 140 N. Car. 524, 53 S. E. 346 (1906); *Inman* v. *Hodges*, 80 S. Car. 455, 61 S. E. 958 (1908); *Frost* v. *Idaho Irrigation Co.*, 19 Idaho 372, 114 Pac. 38 (1911); *Tee* v. *Noble*, 23 N. Dak. 225, 135 N. W. 769 (1912); *Brooks* v. *White*, 22 Cal. 719, 136 Pac. 500 (1913); *Holmes* v. *Holt*, 90 Kans. 774, 136 Pac. 246 (1913).

suited without his consent? 2nd. Did the court err in refusing the motion for a nonsuit? Both questions were answered in the affirmative and a new trial was granted. Upon the first point the opinion of the court was as follows:[98]

BENNETT, J.: As to the right of the court to direct a compulsory nonsuit. Upon this point we are met by a contrariety of authorities and a diversity of argument. In some of the states, the affirmative, in others the negative, of the proposition is asserted in theory and maintained in practice. In some, it is held, that the court has no right, in any case, to nonsuit the plaintiff even though his evidence be insufficient in law to support his action; whilst, in others, it is settled, that a jury should be allowed to receive no cause until the court is satisfied that the evidence is sufficient in law to authorize the jury to find a verdict in favor of the plaintiff. In all, however, it is agreed, that cases may sometimes, under certain forms, be withdrawn from the jury and reserved for the sole consideration and determination of the court. This last is a common ground in the English courts, in the federal courts of the Union, and in the courts of the various states. The only difference upon the subject which appears to exist, is as to the manner in which the conceded end shall be reached. In the federal courts, and in the courts of some of the states, the object is attained by means of the cumbrous and complicated machinery of a demurrer to evidence; in the courts of others of the states, through the simpler and easier process of motion for nonsuit at the trial. In both cases, the same end is arrived at; and the one remedy as well as the other can be applied only where the plaintiff shall have failed to have made out a case which the law says is proper to be submitted to a jury. The former practice is constantly passing more and more into disfavor, and the latter usurping its place. Thus, at the present day, in the English courts, although it is held, in theory, to be optional with the plaintiff whether he shall be nonsuited or not, and that he may compel the defendant to resort to a demurrer to evidence, yet the constant practice there is for the plaintiff, upon the suggestion of the judge that the evidence is insufficient, to submit to a nonsuit, with leave to move the court in banc to set it aside.[98a] Graham's Pr. 270. In the state of New York the practice of compulsory nonsuit is perfectly well settled. *Clements* v. *Benjamin*, 12 Johns. (N. Y.) 298; *Pratt* v. *Hull*, 13 Johns. (N. Y.) 334; *Stuart* v. *Simpson*, 1 Wend. (N. Y.) 376; *Betts* v. *Jackson*, 6 Wend. (N. Y.) 173. The reasoning of the court upon this subject in *Pratt* v. *Hull* is convincing: "The answer to this abstract question," they say, "can not admit of a doubt. This must be a power vested in the court. It results necessarily from their being made the judges of the law of the case where no facts are in dispute. It is a pure question of law, whether under a given state of facts, the plaintiff is in law entitled to recover. Unless this is a question of law for the courts, there is no meaning in what has been considered a salutary

[98]The statement of facts is abridged from the opinion of the court, only a part of which is printed.

[98a]But see note 89 to *Washburn* v. *Allen*, ante p. 394.

rule in our courts of justice, that to questions of law the judges are to respond, and to questions of fact the jury." The general rule is well laid down in *Stuart* v. *Simpson,* above cited, as follows: "If the evidence would not authorize a jury to find a verdict for the plaintiff, or if the court would set it aside, if so found as contrary to evidence, in such case it is the duty of the court to nonsuit the plaintiff." The power of a court, acting according to the course of the common law, to set aside a verdict, which is contrary to, or unsustained by, the evidence, is too clear to admit of a doubt; and the power of a civil law court of second instance to reverse the judgment of a court of first instance, on the ground that it is against the weight of evidence, is also unquestionable. If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury. Nor, in adopting the practice of nonsuit, is there to be apprehended any danger of encroachment upon the rights of parties or of abridgment of the prerogatives of juries. This system of trial can be expected to operate beneficially, and with certain, not fickle, results, only when the practical sense of a jury is guided by, and acts in subserviency to, established principles of law, expounded and enforced by the court. We are of the opinion, therefore, that the power of compulsory nonsuit should be upheld.[99]

---

[99]At common law a nonsuit was never ordered against the will of the plaintiff. If he failed to make out a case the court directed him to be called and it was usual, in such a case, to submit to a nonsuit with leave to move to set it aside; but if the plaintiff thought proper to answer when he was called, he might do so and insist on taking a verdict. *Pochin* v. *Pawley,* 1 Wm. Bl. 670 (1769); *Dewar* v. *Purday,* 4 N. & M. 633 (1835); *Stancliffe* v. *Clarke,* 7 Exch. 439 (1852); *Ross* v. *Gill,* 1 Wash. (Va.) 87 (1792); *Thweat* v. *Finch,* 1 Wash. (Va.) 217 (1793); *Irving* v. *Taggart,* 1 Serg. & R. (Pa.) 360 (1815); *Mitchell* v. *New England Marine Ins. Co.,* 23 Mass. 117 (1826); *Smith* v. *Crane,* 12 Vt. 487 (1840). Following this rule it has been frequently held that the court has no power to order a nonsuit, where the plaintiff insists on going to the jury. *De Wolf* v. *Rabaud,* 1 Pet. (U. S.) 476, 7 L. ed. 227 (1828); *Booe* v. *Davis,* 5 Blackf. (Ind.) 115 (1839); *Wells* v. *Gaty,* 8 Mo. 681 (1844); *Saunders* v. *Coffin,* 16 Ala. 421 (1849); *Rankin* v. *Curtenius,* 12 Ill. 334 (1851). Compare *Holmes* v. *Chicago & A. R. Co.,* 94 Ill. 439 (1880); *Hill* v. *Rucker,* 14 Ark. 706 (1854); *Castle* v. *Bullard,* 64 U. S. 172, 16 L. ed. 424 (1859); *Case* v. *Hannahs,* 2 Kans. 490 (1864); *Hudson* v. *Strickland,* 49 Miss. 591 (1873); *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 26 L. ed. 539 (1880); *Zittle* v. *Schlesinger,* 46 Nebr. 844, 65 N. W. 892 (1896). In other jurisdictions the power to order a compulsory nonsuit is exercised where the plaintiff's evidence is insufficient in law to maintain the action. *Eddy* v. *Wilson,* 1 G. Greene (Iowa) 259 (1848); *Bailey* v. *Kimball,* 26 N. H. 351 (1853); *Central Railroad* v. *Moore,* 24 N. J. L. 824 (1854); *Ellis* v. *Ohio Life Ins. & Trust Co.,* 4 Ohio St. 628, 64 Am. Dec. 610 (1855); *Naugatuck R. Co.* v. *Waterbury Button Co.,* 24 Conn. 468 (1856); *Gardinier* v. *Otis,* 13 Wis. 460 (1861); *Cooper* v. *Waldron,* 50 Maine 80 (1862); *Aycrigg* v. *N. Y. & E. R. Co.,* 30 N. J. L. 460 (1864); *Deyo* v. *N. Y. Cent. R. Co.,* 34 N. Y. 9, 88 Am. Dec. 418 (1865); *Hill* v. *The Nation Trust Co.,* 108 Pa. St. 1 (1884), see act of March 11, 1875, P. L. 6, extending to all parts of the commonwealth the act of March 11, 1836, P. L. 76, and 13 P. & L. Dig. of Dec. 23154; *Turner* v. *Bowley,* 12 Times Law Rep. 402 (1896); *Hanna*

RUMFORD NATIONAL BANK *v.* ROBAIN ARSENAULT.

SUPREME JUDICIAL COURT OF MAINE, 1911.

108 *Maine Reports* 241[1]

EMERY, C. J.: This was an action against the Richmond Manufacturing Company and three individuals, Riley, Maxwell and Arsenault, as promisors upon a promissory note payable to the plaintiff bank. The note offered and admitted in evidence, however, was signed as promisors only by the Richmond Company, Riley and Maxwell. Arsenault had merely endorsed it as payee and endorser. The defendants asked for an order of nonsuit because of this variance, whereupon the plaintiff by leave of court discontinued as to Arsenault. The court nevertheless then ordered a nonsuit and the plaintiff excepted.

1. The discontinuance as to Arsenault left the action as if originally brought against the other three defendants only, so that at the time of the nonsuit there was no variance as to defendants between the note declared on and that put in evidence.

2. The note was subscribed by Riley and Maxwell personally, and also bore the subscription "Richmond Manufacturing Company by Edwin Riley, Pres., J. L. Cummings, Treas." There was no other evidence that the note was that of the company. This lack of evidence is also urged as sufficient ground for the nonsuit. But the nonsuit can not be maintained on that ground. The note was admittedly the note of Riley and Maxwell, the individual defendants, since they had not denied their signatures as required by Court Rule X. As the case stood, the plaintiff was entitled to a verdict against them, even if not against the company, R. S., ch. 84, sec. 98. The insufficiency of the evidence against the company, (if it was insufficient) might have required a direction for a verdict in its favor if asked for, but did not require, nor authorize, a nonsuit as to the other defendants.

3. In the declaration the note was described as bearing interest while the note in evidence did not bear interest. This variance, however, was not urged at the trial as ground for the nonsuit, and is easily remedied by amendment of the declaration. Hence it can not be admitted here as ground for sustaining the nonsuit.

---

v. *De Garmo*, 140 Cal. 172, 73 Pac. 830 (1903); *Kearns* v. *Southern Railroad*, 139 N. Car. 470, 52 S. E. 131 (1905); *Martin* v. *Werman*, 107 App. Div. 482, 95 N. Y. S. 284 (1905). But where a *prima facia* case is shown the motion must be denied. *Davis* v. *Columbia & Greenville R. Co.*, 21 S. Car. 93 (1883); *Brearley* v. *London & N. W. R. Co.*, 15 Times Law Rep. 237 (1899); *American Mfg. Co.* v. *Smith*, 33 Pa. Super. Ct. 469 (1907); *Sloan* v. *Philadelphia & R. R. Co.* 225 Pa. 52, 73 Atl. 1069 (1909); *Fealey* v. *Bull*, 163 N. Y. 397, 57 N. E. 631 (1900); *Walters* v. *Syracuse Rapid Transit Co.*, 178 N. Y. 50, 70 N. E. 98 (1904).

[1]The reporter's statement of facts is omitted.

4. As a general rule variances that are remediable by allowable amendments or discontinuance are not grounds for a nonsuit unless the plaintiff refuses to make the necessary amendments.[2]

Exceptions sustained. Case to stand for trial.

ISAACS *v.* EVANS.

COURT OF APPEAL, 1900.

16 *Times Law Reports* 480

This was an appeal from a decision of Mr. Justice Farwell. The action related to an alleged partnership in a gold mine in Wales. One of the plaintiffs Thomas Evans (who had assigned his interest to Godfrey D. Isaacs) alleged that he and Meredith Evans the defendant had agreed to acquire a certain property at Garthgell in Merioneth, with a view to mining gold, and that the lease was made to the defendant who had worked the mine and wrongfully refused to recognize the plaintiffs' interest. The defendant denied the partnership, and pleaded the statute of frauds. In reply the plaintiffs set up acts which they alleged to be in part performance.

When the case was opened on behalf of the plaintiffs Mr. Justice Farwell intimated that he would first deal with the question arising under the statute. The plaintiffs' counsel desired to go into the evidence before the question of law was determined, but the learned judge declined to adopt that course; and at the conclusion of the opening he decided against the plaintiffs on the ground that the statute of frauds applied. He therefore dismissed the action with costs. The plaintiffs appealed.[3]

The MASTER OF THE ROLLS (Lord Alverstone) said that the learned Judge had decided this case upon a preliminary discussion arising out of the opening of the learned counsel for the plaintiffs. Inasmuch as he (the Master of the Rolls) thought that there were

---

[2] A nonsuit may be ordered for a material variance between the allegations in the pleadings and the evidence. *Heath* v. *Freeland*, 1 M. & W. 543 (1836); *Waldron* v. *Hopper*, 1 N. J. L. 339 (1795); *Stone* v. *Knowlton*, 3 Wend. (N. Y.) 374 (1829); *Cunningham* v. *Shaw*, 7 Pa. St. 401 (1847); *Beck* v. *Ferrara*, 19 Mo. 30 (1853); *Jenneson* v. *Camden & A. R. Co.*, 5 Clark (Pa.) 409 (1856); *Zeig* v. *Ort*, 3 Chand. (Wis.) 26 (1850); *Hereford* v. *Lake*, 15 La. Ann. 693 (1860); *Flanagan* v. *Wilmington*, 4 Houst. (Del.) 548 (1873); *Johnson* v. *Moss*, 45 Cal. 515 (1873); *Boone* v. *Stover*, 66 Mo. 430 (1877); *Waldhier* v. *Hannibal & S. J. R. Co.*, 71 Mo. 514 (1880); *Huggins* v. *Watford*, 38 S. Car. 504, 17 S. E. 363 (1892); *Elmore* v. *Elmore*, 114 Cal. 516, 46 Pac. 458 (1896); *Morton* v. *Dennis*, 5 Pa. Dist. 342 (1896). But an opportunity to amend is generally allowed. *Police Jury* v. *Mahoudeau*, 27 La. Ann. 224 (1875); *Harkins* v. *Edwards*, 1 Iowa 296 (1855); *Richardson* v. *Carbon Hill Co.*, 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338 (1893); *Littlefield* v. *Maine Cent. R. Co.*, 104 Maine 126, 71 Atl. 657 (1908), subject to the defendant's right to a continuance if surprised. *Bell* v. *Rowland*, 9 Iowa 281 (1859).

[3] The statement of facts is abridged.

The defense then put in their evidence and the case was submitted to the jury, without a motion of any kind being made on behalf of the defendants.

It is now insisted that the question of law that there is no evidence to support the verdict is before the court by reason of defendants' exception to the denial of the motion to dismiss at the end of plaintiff's case.

We are of opinion that this exception is not available here for the reason that the motion was not renewed at the close of the whole evidence.

The learned counsel for appellants insists that this is not the rule of practice and cites a number of cases to sustain his contention. The following are the cases cited:

Ernst v. *Hudson River R. R. Co.*, 24 How. Pr. (N. Y.) 97. This case is not in point, as it presented a single exception upon the refusal of the circuit judge to nonsuit upon the whole evidence after the testimony had been given by the defendant and both parties had rested.

Tiffany v. *St. John*, 65 N. Y. 314. Here the motion was made and denied at close of plaintiff's case, and Mr. Commissioner Dwight, in the Commission of Appeals, said that the propriety of this ruling could be regarded in the light of the additional evidence taken after the denial of the motion. This same rule is laid down in other cases cited by appellants. *Painton* v. *Northern Central Railway Co.*, 83 N. Y. 7; *Commercial Bank of Keokuk* v. *Pfeiffer*, 108 N. Y. 242, 252; *McCotter* v. *Hooker*, 8 N. Y. 497, 503; *Jackson* v. *Leggett*, 7 Wend. (N. Y.) 377. These cases go to the extent of holding that the defendant could not be heard to insist on appeal to this court that his motion to dismiss at the end of plaintiff's case should have been granted, if the defendant's proofs had in any way supplied the defects of plaintiff's case.[6]

Other cases are cited by appellants, but are not in point, as in all of them defendant's motion to dismiss was renewed at the end of the case. *Schenectady & Saratoga Plankroad Co.* v. *Thatcher*, 11 N. Y. 102, 105; *Byrnes* v. *N. Y., L. E. and W. R. R. Co.*, 113 N. Y. 251, 257; *Potter* v. *N. Y. C. and H. R.R. R. Co.*, 136 N. Y. 77, 80. In none of these cases was the point distinctly raised as to the effect of defendant going to the jury after his own case is closed without renewing his motion to dismiss made at the end of plaintiff's evidence.

It is doubtless true that this state of the authorities has proved misleading and tended to create some confusion in the minds of the profession as to the correct practice. It is also true that it may be inferred from some of the cases cited that if defendant's proofs had not supplied the defects of plaintiff's case, the exception at close of

---

[6]Accord: *Weil* v. *Nevitt*, 18 Colo. 10, 31 Pac. 487 (1892); *Ingalls* v. *Olberg*, 70 Minn. 102, 72 N. W. 841 (1897); *Hicks* v. *Southern Ry.*, 63 S. Car. 559, 41 S. E. 753 (1901) *Van Cott* v. *North Jersey St. R. Co.*, 72 N. J. L. 229, 62 Atl. 407 (1905); *Trickey* v. *Clark*, 50 Ore. 516, 93 Pac. 457 (1908); *Lowe* v. *San Francisco & N. W. R. Co.*, 154 Cal. 573, 98 Pac. 678 (1908).

plaintiff's evidence would be available here. It, therefore, is desirable that the practice on this point should be settled.

The rule laid down by the Supreme Court of the United States seems the proper one, to the effect that when a defendant, after the close of the plaintiff's evidence, moves to dismiss, and, the motion being denied, excepts thereto, and then proceeds with his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss can not be assigned as error. *Union Pacific Railway Co.* v. *Daniels,* 152 U. S. 684; *Columbia and Puget Sound R. R. Co.* v. *Hawthorne,* 144 U. S. 202, 206, and cases cited.[7]

This rule is founded upon reason and convenience. In a court whose jurisdiction is limited to the review of questions of law, there ought not to be, as a general rule, any necessity to examine the record at large in order to determine whether an exception is available. The case at bar illustrates this point. It is the contention of appellants that they are entitled to the benefit of the exceptions taken to the denial of the motion to dismiss at the close of plaintiff's case, as that case was not strengthened, but was clearly weakened by the defendants' evidence. In other words, this court is to be asked in all cases to examine the evidence of the defendant, no matter how lengthy it may be, to determine whether the defendant shall have the benefit of an exception concerning which all doubt would be removed by his renewing the motion to dismiss at the close of the whole evidence.

In holding in the case at bar that we can not consider the exception taken at the end of plaintiff's case and thus settling the rule of practice, we do not deprive the appellants of any valuable right, as this brief record very clearly discloses, if we were called upon to examine it, questions that were properly submitted to the jury.

The learned counsel for the respondent has cited us to a number of cases where no motion to dismiss was made by defendant at any time during the trial. The rule in such cases has long been settled that the defendant by failing to move concedes there was a question for the jury. *Barrett* v. *Third Ave. R. R. Co.,* 45 N. Y. 628, 631; *Schwinger* v. *Raymond,* 105 N. Y. 648, 649; *Hawver* v. *Bell,* 141 N. Y. 140, 143; *Pollock* v. *Pennsylvania Iron Works Co.,* 157 N. Y. 699; *Hecla Powder Co.* v. *Sigua Iron Co.,* 157 N. Y. 437.

It follows that the verdict of the jury must stand and the judgment entered thereon should be affirmed, unless there are exceptions disclosed by the record that entitle the defendants to a reversal.[8]

Judgment affirmed.

---

[7]Accord: *Runkle* v. *Burnham,* 153 U. S. 216, 38 L. ed. 694, 14 Sup. Ct. 837 (1894); *Sigafus* v. *Porter,* 179 U. S. 116, 45 L. ed. 113, 21 Sup. Ct. 34 (1900); *Northwestern Steamship Co.* v. *Griggs,* 146 Fed. 472 (1906); *Carr* v. *Manahan,* 44 Vt. 246 (1872); *Hurley* v. *O'Sullivan,* 137 Mass. 86 (1884); *Joliet A. & N. R. Co.* v. *Velie,* 140 Ill. 59, 29 N. E. 706 (1892); *Chicago & G. W. R. Co.* v. *Wedel,* 144 Ill. 9, 32 N. E. 547 (1892); *Lynch* v. *Johnson,* 109 Mich. 640, 67 N. W. 908 (1896); *Field* v. *Thornell,* 106 Iowa 7, 75 N. W. 685, 68 Am. Rep. 281 (1898).

[8]Accord: *Wangner* v. *Grimm,* 169 N. Y. 421 (1902); *Sigua Iron Co.* v. *Brown,* 171 N. Y. 488, 64 N. E. 194 (1902); *Bopp* v. *N. Y. El. V. T. Co.,*

SECTION 7. DIRECTION OF VERDICT.

PLEASANTS *v.* FANT.

SUPREME COURT OF THE UNITED STATES, 1874.

89 *U. S.* 116.

Error to the circuit court for the District of Maryland. R. & H. Pleasants sued Fant in the court below and the only question was whether the defendant was a partner in the firm of Keene & Co. Testimony was offered to prove that Fant had procured for Keene a loan of $10,000 from a bank of which he was president and that Keene had voluntarily promised to give Fant a part of the profits from the transaction, but had mentioned no particular portion of the profits. At the conclusion of the testimony the court said to the jury:

"There is no evidence in this cause from which the jury can find that the defendant had such an interest in the purchase and sale of the cotton by Keene & Co. as will make him, the defendant, a partner as to third persons, and the jury will, therefore, find their verdict for defendant."

Verdict and judgment for defendant. Plaintiff brings error.[9]

MILLER, J.: We are pressed with the proposition that it was for the jury to decide this question, because the testimony received and offered had some tendency to establish a participation in the profits, and the question of liability under such circumstances should have been submitted to them, with such declarations of what constitutes a partnership as would enable them to decide correctly.

No doubt there are decisions to be found which go a long way to hold that if there is the slightest tendency in any part of the evidence to support plaintiff's case it must be submitted to the jury, and in the present case, if the court had so submitted it, with proper instructions, it would be difficult to say that it would have been an error of which the defendant could have complained here.

But, as was said by this court in the case of the *Improvement Company* v. *Munson*,[10] recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party

---

177 N. Y. 33 (1903); *Spencer* v. *State*, 187 N. Y. 484, 80 N. E. 375 (1907); *Seeman* v. *Levine*, 205 N. Y. 514, 99 N. E. 158 (1912); *Barrow* v. *B. R. Lewis Lumber Co.*, 14 Idaho 698, 95 Pac. 682 (1908); *Bordeaux* v. *Atlantic Coast Line R. Co.*, 150 N. Car. 528, 64 S. E. 439 (1909). Compare *Van Ness* v. *North Jersey St. R. Co.*, 75 N. J. L. 273, 67 Atl. 1027 (1907); *Dryden* v. *Pelton-Armstrong Co.*, 53 Ore. 418, 101 Pac. 190 (1909); *Northern Pac. R. Co.* v. *Spencer*, 56 Ore. 250, 108 Pac. 180 (1910).

[9] The statement of facts is abridged and part of the opinion of the court omitted.

[10] 81 U. S. 442, 21 L. ed. 867 (1871).

producing it, upon whom the *onus* of proof is imposed. The English cases there cited fully sustain the proposition,[11] and the decisions of this court have generally been to the same effect.[12]

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.

In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again, if he can strengthen it, except where the local law forbids a nonsuit at

---

[11] *Jewell* v. *Parr*, 13 C. B. 909 (1853); *Toomey* v. *London, Brighton & South Coast R. Co.*, 3 C. B., N. S., 146 (1857); *Ryder* v. *Wombwell*, L. R. 4 Exch. 31 (1868). In the last case it is said by Willes, J.: "It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case, but it is now settled that the question for the judge (subject of course to review) is, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established." See further, Thompson on Trials, vol. II, p. 1595; 6 Encyclopaedia of Pleading and Practice, 667; 38 Cyc. 1563.

[12] *Parks* v. *Ross*, 11 How. (U. S.) 362, 13 L. ed. 730 (1850); *Schuchardt* v. *Allens*, 1 Wall. (U. S.) 359, 17 L. ed. 642 (1863); *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 24 L. ed. 59 (1876); *Hathaway* v. *East Tennessee R. Co.*, 29 Fed. 489 (1886); *Schofield* v. *Chicago, &c., R. Co.*, 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. 1125 (1884); *Treat Mfg. Co.* v. *Standard Steel &c. Co.*, 157 U. S. 674, 39 L. ed. 853, 15 Sup. Ct. 718 (1894); *Delaware L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. 569 (1890); *Hepner* v. *United States*, 213 U. S. 103, 53 L. ed. 720 (1909); *Delk* v. *St. Louis, &c., R. Co.*, 220 U. S. 580, 55 L. ed. 590 (1910).

that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to the rights of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict.

Judgment affirmed.[13]

McDONALD *v.* METROPOLITAN STREET RAILWAY CO.

COURT OF APPEALS OF NEW YORK, 1901.

167 *N. Y.* 66.[14]

MARTIN, J.: This action was for personal injuries resulting in the death of the plaintiff's intestate, and was based upon the alleged negligence of the defendant. An appeal was allowed to this court upon the ground of an existing conflict in the decisions of different departments of the appellate division as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle was asserted which, if allowed to pass uncorrected, would be likely "to introduce confusion into the body of the law." *Sciolina* v. *Erie Preserving Co.*, 151 N. Y. 50. The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor. *Ladd* v. *Ætna Ins. Co.*, 147 N. Y. 478, 482; *Higgins* v. *Eagleton*, 155 N. Y. 466; *Ten Eyck* v. *Whitbeck*, 156 N. Y. 341, 349; *Bank of Monongahela Valley* v. *Weston*, 159 N. Y. 201, 208.

It is believed, the testimony of the plaintiff's witnesses was sufficient to justify the jury in finding the defendant negligent and the plaintiff's intestate free from contributory negligence. The evidence of the defendant was in many respects in direct conflict, and if credited would have sustained a verdict in its favor. Whether the defendant was negligent, the plaintiff's intestate free from contribu-

---

[13] Accord: *Bartelott* v. *International Bank*, 119 Ill. 259, 9 N. E. 898 (1887); *Hite* v. *Metropolitan St. Ry.*, 130 Mo. 132, 31 S. W. 262, 22 S. W. 33, 51 Am. St. 555 (1895); *Sattler* v. *Chicago R. I. & P. R. Co.* 71 Nebr. 213, 98 N. W. 663 (1904); *Westfall* v. *Wait*, 165 Ind. 353, 73 N. E. 1089 (1905); *Vandergrift Const. Co.* v. *Camden, &c., R. Co.*, 74 N. J. L. 669, 65 Atl. 986 (1906); *Cobb* v. *Glenn Boom Lumber Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. 734 (1905); *Walker* v. *Warner*, 31 App. (D. C.) 76 (1908); *Krenz* v. *Lee*, 104 Minn. 455, 116 N. W. 832 (1908); *Hinckley* v. *Danbury*, 81 Conn. 241, 70 Atl. 590 (1908); *Weston* v. *Livezey*, 45 Colo. 142, 100 Pac. 404 (1909); *Wellington* v. *Corinna*, 104 Maine 252, 71 Atl. 889 (1908). In the same manner as for the defendant, a verdict may be directed for a plaintiff who has fully made out his case, where the defendant's evidence does not warrant a finding in his favor. *Tilly* v. *Cox*, 119 Ga. 867, 47 S. E. 219 (1904); *Rochester Mach. Tool Works* v. *Weiss*, 100 Wis. 545, 84 N. W. 866 (1901); *Gilchrist* v. *Brown*, 165 Pa. St. 275 (1895); *Friedline* v. *State*, 93 Ind. 366 (1883); *Harding* v. *Roman Catholic Church*, 113 App. Div. 685, 99 N. Y. S. 945 (1906); *Goldstein* v. *D'Arcy*, 201 Mass, 312, 87 N. E. 584 (1909).

[14] The arguments of counsel and part of the opinion of the court are omitted.

tory negligence, and the amount of damages were submitted to the jury. It, however, having agreed upon a general verdict and failed to answer the questions submitted, the trial judge withdrew them and directed a verdict for the defendant. Upon the verdict so directed a judgment was entered. Subsequently an appeal was taken to the appellate division, where it was affirmed, and the plaintiff has now appealed to this court.

Although there was a direct and somewhat severe conflict in the evidence, the questions of negligence and contributory negligence were clearly of fact, and were for the jury and not for the court unless the right of trial by jury is to be partially, if not wholly abolished. It was assumed below that the plaintiff's evidence established a case which, undisputed, was sufficient to warrant a verdict in her favor. But the court said that at the close of the defendant's evidence the plaintiff's case had been so far overcome that a verdict in her favor would have been set aside as against the weight of evidence. Upon that alleged condition of the proof, it held that the trial court might have properly submitted the case to the jury if it saw fit, but that it was not required to as the verdict might have been thus set aside. The practical result of that decision, if sustained, is in every close case to vest in the trial court authority to determine questions of fact, although the parties have a right to a jury trial, if it thinks that the weight of evidence is in favor of one and it directs a verdict in his favor.

There have been statements by courts which seem to lend some justification to that theory, but we think no such broad principle has been intended and that no such rule can be maintained either upon principle or authority. The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are widely different and should not be controlled by the same conditions and circumstances. In one case there is a re-trial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.

While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial court may, whenever it sees fit, direct a verdict and thus forever conclude the parties, has no basis in the law, which confides to juries and not to courts the determination of the facts in this class of cases.

We think it can not be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credi-

the opinion of the court, because he deemed that as the request for peremptory instruction made on behalf of plaintiffs was followed by special requests seeking to have the jury determine the facts, the asking for a peremptory instruction did not amount to a submission of the facts to the court so as to exclude the right to have the case go to the jury in accordance with the subsequent special requests. He, nevertheless, concurred in the judgment of affirmance, because, after examining the entire case, he was of opinion that prejudicial error had not been committed, as the evidence was insufficient to have justified the submission of the issues to the jury. 147 Fed. 457.

The cases are here because of the allowance of writs of certiorari. They present similar questions of fact and law, were argued together and are, therefore, embraced in one opinion. The scope of the inquiry before us needs, at the outset, to be accurately fixed. To do so requires us to consider the question which gave rise to a division of opinion in the Circuit Court of Appeals. If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence then, as said in *Beuttell* v. *Magone,* 157 U. S. 154, "the facts having been thus submitted to the court, we are limited in reviewing its action, to a consideration of the correctness of the finding on the law and must affirm if there be any evidence in support thereof." If, on the other hand, it be that, although the plaintiffs had requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope, that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell* v. *Magone,* 157 U. S. 154, that where both parties requested a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divergent. To hold the contrary would unduly extend the doctrine of *Beuttell* v. *Magone,* by causing it to embrace a case not within the ruling in that case made. The distinction between a case like the one before us and that which was under consideration in *Beuttell* v. *Magone* has been pointed out in several recent decisions of Circuit Court of Appeals. It was accurately noted in an opinion delivered by Circuit Judge Severens, speaking for the Circuit Court of Appeals for the Sixth Circuit, in *Minahan* v. *Grand Trunk Ry. Co.,* 138 Fed. 37, 41, and was also lucidly stated in the concurring opinion of Shelby, Circuit Judge, in *McCormack* v. *National City Bank of Waco,* 142 Fed. 132, where, referring to *Beuttell* v. *Magone,* he said (p. 133):

"A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It can not be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in *Beuttell* v. *Magone*, 157 U. S. 154, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.

"In New York there are many cases showing conformity to the practice announced in *Beuttell* v. *Magone*, but they clearly recognize the right of a party who has asked for peremptory instructions to go to the jury on controverted questions of fact if he asks the court to submit such questions to the jury. *Kirtz* v. *Peck*, 113 N. Y. 226; *Sutter* v. *Vanderveer*, 122 N. Y. 652.

"The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered. *Minahan* v. *G. T. W. Ry. Co.*, 138 Fed. 37."

From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company can not be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs. The correctness, therefore, of the action of the court in giving the peremptory instruction depends, not upon the mere requests which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury.[17]

---

[17]Compare *Thompson* v. *Simpson*, 128 N. Y. 270, 28 N. E. 627 (1891); *Westervelt* v. *Phelps*, 171 N. Y. 212, 63 N. E. 962 (1902); *First Nat. Bank* v. *Hayes*, 64 Ohio St. 100, 59 N. E. 893 (1901); *Lindquist* v. *Northwestern Port Huron Co.*, 22 S. Dak. 298, 117 N. W. 365 (1908); *Fairbanks* v. *Nichols*, 135 App. Div. 298, 119 N. Y. S. 752 (1909); *Saxton* v. *Perry*, 47 Colo. 263, 107 Pac. 281 (1910); *Mims* v. *Johnson*, 8 Ga. App. 850, 70 S. E. 139 (1911); *Bankers Surety Co.* v. *Miller*, 105 Ark. 697, 150 S. W. 570 (1912); *Rice* v. *Bennett*, 29 S. Dak. 341, 137 N. W. 359 (1912); *Home Fire Ins. Co.* v. *Wilson*, 109 Ark. 324, 159 S. W. 1113 (1913); *United States* v. *Two Baskets*, 205 Fed. 37 (1913); *Krecek* v. *Supreme Lodge*, 95 Nebr. 428, 145 N. W. 859 (1914); *Fairbanks* v. *Austin*, 96 Nebr. 137, 147 N. W. 126 (1914), with *Thompson* v. *Brennan*, 104 Wis. 564, 80 N. W. 947 (1899); *German Sav. Bank* v. *Bates Addition Imp. Co.*, 111 Iowa 432, 82 N. W. 1005 (1900); *Stauff* v. *Bingenheimer*, 94 Minn. 309, 102 N. W. 694 (1905); *Wolf* v. *Chicago Sign Printing Co.*, 233 Ill. 501, 84 N. E. 614 (1908); *Lonier* v. *Ann Arbor Sav. Bank*, 153 Mich. 253, 116 N. W. 1088 (1908); *Osterholm* v. *Boston & Montana Consol. Min. Co.*, 40 Mont. 508, 107 Pac. 499 (1909); *Bank of Commerce* v. *Broyles*, 16 N. Mex. 414, 120 Pac. 670 (1910) reversed on

YOUNG, ADMINISTRATRIX, *v.* CENTRAL RAILROAD OF NEW JERSEY.

SUPREME COURT OF THE UNITED STATES, 1914.

232 U. S. 602.

Memorandum opinion by direction of the court. By Mr. Chief Justice White.

As administratrix of the estate of her deceased husband, the plaintiff in error sued to recover for the loss occasioned by his death alleged to have resulted from the negligence of the defendant railroad company. Over the objection of the defendant the case was submitted by the trial court to the jury and from the judgment entered on the verdict rendered against the railroad company, error was by the company prosecuted from the Circuit Court of Appeals. On the hearing that court concluding that the evidence did not justify the submission of the case to the jury, reversed the judgment and in passing upon a motion made by the railroad company in the trial court, pursuant to the Pennsylvania practice for judgment in its favor *non obstante veredicto*[18] it was held that the motion was well taken and the case was remanded to the trial court not for a new trial, but with directions to enter a judgment for the defendant. 200 Fed. 359. As the case as made by the pleadings depended not merely upon diverse citizenship, but was expressly based on the Employers' Liability Act, error was prosecuted from this court.

We shall not undertake to analyze the evidence or review the grounds which led the court below to conclude that error was committed in submitting the case to the jury, because we think it is adequate to say that after a careful examination of the record we see no reasons for holding that the court below erred in so deciding. As regards, however, the ruling on the motion for judgment *non obstante veredicto,* it is apparent in view of the recent decision in

---

other grounds, 234 U. S. 64, 58 L. ed. 1214; *King* v. *Cox,* 126 Tenn. 553, 151 S. W. 58 (1912); *Virginia-Tennessee Hardware Co.* v. *Hodges,* 126 Tenn. 370, 149 S. W. 1056 (1912); *Hite* v. *Keene,* 149 Wis. 207, 134 N. W. 383, 135 N. W. 354 (1912); *Fitzsimmons* v. *Richardson,* 86 Vt. 229, 84 Atl. 811 (1912); *Perkins* v. *Board of Comrs. of Putnam County,* 88 Ohio St. 495, 103 N. E. 377 (1913); *Midland Valley* v. *Lynn,* 38 Okla. 695, 135 Pac. 370 (1913); *Mann* v. *Franklin Trust Co.,* 158 App. Div. 491, 143 N. Y. S. 660 (1913); *Chesapeake & O. R. Co.* v. *McKell,* 209 Fed. 514 (1913); *Breakwater Co.* v. *Donovan,* 218 Fed. 340 (1914).

[18] In Pennsylvania under the act of April 22, 1905, Pub. L. 286, whenever on the trial of any issue a point requesting binding instructions has been reserved or declined, the party presenting the point may move to have the evidence certified and filed and for judgment *non obstante veredicto* upon the whole record, whereupon it shall be the duty of the court to enter such judgment as should have been entered upon that evidence. The act of April 20, 1911, Pub. L. 70, extends the practice to cases where the jury have disagreed. It has been held that if there was a conflict of evidence on a material fact or any reason why there should not have been a binding direction at the trial there can be no judgment against the verdict entered under the act. *Dalmas* v. *Kemble,* 215 Pa. 410, 64 Atl. 559 (1906); *Duffy* v. *York Haven Water Power Co.,* 233 Pa. 107, 81 Atl. 908 (1911); *Squires* v. *Job,* 50 Pa. Super. Ct. 289 (1912); *Hanick* v. *Leader,* 243 Pa. 372, 90 Atl. 146 (1914).

Slocum v. *Insurance Company*, 228 U. S. 364, that error was committed.[19] It follows that our duty is to affirm and modify; that is, to affirm the judgment of reversal and to modify by reversing so much of the action of the court below as directed the entry of a judgment in favor of the defendant. Conformably to this conclusion it is ordered that the judgment of reversal be, and the same is hereby affirmed, and that the direction for entry of judgment in favor of defendant be reversed and the case is remanded to the trial court with directions to set aside its judgment and grant a new trial.

Affirmed and modified.

SECTION 8. ARGUMENTS OF COUNSEL.

HENRY H. LYMAN, STATE COMMISSIONER OF EXCISE *v.* THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, APPELLANT, IMPLEADED WITH MARGARET A. OUSSANI.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1901.

65 *App. Div. (N. Y.) 27.*

Appeal by the defendant, The Fidelity and Casualty Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of January, 1901, upon the verdict of a jury, and also from an order entered in said clerk's offices on the 28th day of December, 1900, denying the defendant's motion for a new trial made upon the minutes.

PER CURIAM: This action was brought against the principal and surety upon an excise bond to recover the penalty thereof, to wit, the sum of $1,600 for a violation of the Liquor Tax Law (Laws of 1896, ch. 112, as amended) by the principal. The principal and surety answered separately, and the issues raised by the answers were somewhat different. Upon the trial they appeared by separate counsel. At the close of the plaintiff's case a separate motion was made in behalf of each defendant to dismiss the complaint, and in

[19] In *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 57 L. ed. 879 (1912), it was held by a divided court that the "right of trial by jury" secured by Art. 7 of the amendments to the Constitution of the United States did not permit entry, by a federal court, after a verdict in favor of one party, of a judgment for the opposing party under the Pennsylvania statute. Accord: *Pedersen* v. *Delaware, Lackawanna & W. R. Co.*, 229 U. S. 146, 57 L. ed. 1125 (1913); *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906 (1913); *Engemoen* v. *Chicago, St. P. M. O. R. Co.*, 210 Fed. 896 (1914) Minnesota jurisdiction. In *Bothwell* v. *Boston El. R. Co.*, 215 Mass. 407, 102 N. E. 665 (1913) it is pointed out that the decision is not binding on the state courts in determining what abridges trial by jury under their own constitutions, and in passing on the constitutionality of the Massachusetts act of 1909, ch. 236 it is said, per Rugg, C. J., "We are of opinion that the history of our practice as to trial by jury both before and since the adoption of the Constitution shows that the trial by jury of our Constitution has slightly more

many respects upon different grounds. The court decided to submit but two questions of fact to the jury, viz., whether liquor was sold on the premises after one o'clock on the nights of February 22 and 27, 1900. Counsel for the principal then opened the case to the jury for his client, at the close of which counsel for the surety company demanded the right to open the case in behalf of his client and to state to the jury his client's position with reference to the evidence. The court refused to permit such opening and appellant's counsel excepted. At the close of all the evidence the principal's counsel summed up for his client, and the counsel for the surety company asserted his right to also sum up in behalf of appellant. This was objected to by plaintiff's counsel. The objection was sustained by the court and appellant's counsel excepted.

The liability of the defendants was several and was not necessarily the same. We think the court had no right, without appellant's consent, to require it to acquiesce in the opening and summing up by the counsel for the principal and to deprive it of the right and privilege of presenting through its counsel its own views of the conflicting evidence and questions upon which the jury was to pass. Where such a case is being defended in good faith, an arrangement can ordinarily be made at the suggestion of the court, by which one counsel will discuss the question of fact for all of a class of defendants that may be affected alike; and the court has it in its power, by limiting time of counsel in addressing the jury, to prevent the time of the court and the jury being unnecessarily occupied; but we can not assent to the doctrine that the court may say arbitrarily that the attorney or counsel for a principal shall open and sum up the case, not only for his own client, but for the surety whom he does not represent.

No other question in the case calls for serious consideration, but these exceptions require that the judgment and order should be reversed as to appellant and a new trial granted, with costs to appellant to abide the event.[20]

Present—Van Brunt, P. J., Patterson, Ingraham, McLaughlin and Laughlin, JJ.

---

flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character than is ruled by the majority of the court in *Slocum* v. *New York Life Ins. Co.* We are constrained not to adopt the reasoning or the conclusion of that opinion as correctly defining the scope of the legislative power under our Constitution." See article by Prof. E. R. Thayer in 63 Univ. of Pa. L. Rev. 385. See also, *Muench* v. *Heinemann,* 119 Wis. 441, 96 N. W. 800 (1903); *Miller* v. *Bank of Harvey,* 22 N. Dak. 538, 134 N. W. 745 (1912); *Erwin* v. *Shell,* 119 Minn. 496, 138 N. W. 691 (1912); *Steblins* v. *Martin,* 121 Minn. 154, 140 N. W. 1029 (1913); *Brown* v. *Walla Walla,* 76 Wash. 670, 136 Pac. 1166 (1913); *McVeety* v. *Harvey Mercantile Co.,* 24 N. Dak. 247, 139 N. W. 586 (1913); *Knight* v. *Martin,* 124 Minn. 191, 144 N. W. 941 (1914); *Johnston* v. *Nichols,* 83 Wash. 394, 145 Pac. 417 (1915). Compare *Baltimore & Ohio R. Co.* v. *Nobil,* 85 Ohio St. 175, 97 N. E. 374 (1911); *Jones* v. *Chicago B. & O. R. Co.,* (Wyo.) 147 Pac. 508 (1915).

[20]Compare *Sodowsky* v. *McGee,* 4 J. J. Marsh. (Ky.) 267 (1830); *In re Gird's Estate,* 157 Cal. 534, 108 Pac. 499 (1910).

When a question of fact is left to the jury the parties have a right to be heard by counsel. *Douglass* v. *Hill,* 29 Kans. 527 (1883); *Lee* v. *Lee,*

LOUIS P. HYMAN & COMPANY *v.* H. H. SNYDER COMPANY.

COURT OF APPEALS OF KENTUCKY, 1914.

159 *Ky.* 354.[21]

WILLIAM ROGERS CLAY, Commissioner: Another ground urged for reversal is the fact that the trial court limited the time for argument by counsel to ten minutes on a side. Counsel for plaintiff moved the court to extend the time beyond ten minutes. He also moved the court to extend the time to thirty-five minutes. Both motions were overruled.

In almost every jurisdiction it is the rule that the time fixed for argument is within the sound discretion of the trial court, and a case will not be reversed unless it appears that this discretion has been abused. What is a reasonable time for argument depends upon the circumstances of each particular case. In reviewing the discretion of the trial court, appellate courts will take into consideration not only the amount involved, the number of witnesses examined, and the time consumed in developing the testimony, but also the simplicity or complexity of the instructions and of the issues involved, and of the facts and circumstances out of which those issues arise. In this case the amount in controversy was about $2,000. Almost two days were consumed in the trial. A number of witnesses testified on each side. The instructions were somewhat long, and presented issues growing out of plaintiff's claim and defendant's counter-claim. While we appreciate the necessity for the dispatch of legal business, and therefore the further necessity for not interfering with the sound discretion of the trial court in limiting the time for argument, yet that discretion should never be exercised in such a way as to amount to a practical denial of the right of argument. In this case a time limit of ten minutes amounted to a practical denial of that right. For this reason the judgment must be reversed.[22]

---

9 Pa. St. 169 (1848); *Garrison* v. *Wilcoxson*, 11 Ga. 154 (1852); *Millerd* v. *Thorn*, 65 N. Y. 402 (1874); *Houck* v. *Gue*, 30 Nebr. 113, 46 N. W. 280 (1890); *Fareira* v. *Smith*, 3 Misc. 255, 22 N. Y. S. 939, 52 N. Y. St. 124 (1893); *Lanon* v. *Hibbard*, 63 Ill. App. 54 (1895); *Wilken* v. *Exterkamp*, 102 Ky. 143, 420 S. W. 1140, 19 Ky L. 1132 (1897). Compare *Heagy* v. *State*, 85 Ind. 260 (1882); *Gunn* v. *Head*, 116 Ga. 1325, 42 S. E. 343 (1902); *Warner* v. *Close*, 120 Mo. App. 211, 96 S. W. 491 (1906); *Young* v. *McNeill*, 78 S. Car. 143, 59 S. E. 986 (1907).

As to the effect of waiving arguments see *Tyre* v. *Morris*, 5 Har. (Del.) 3 (1848); *Reardon* v. *Smith*, 72 Ill. App. 674 (1897); *New York & L. B. R. Co.* v. *Garrity*, 63 N. J. L. 50, 42 Atl. 842 (1899); *Hackney* v. *Del. & Atl. Tel. Co.*, 69 N. J. L. 335, 55 Atl. 252 (1903); *Conrad* v. *Cleveland, &c., R. Co.*, 34 Ind. App. 133, 72 N. E. 489 (1904); *Henry* v. *Dussell*, 71 Nebr. 691, 99 N. W. 484 (1904); *St. Louis & S. F. R. Co.* v. *Johnson*, 74 Kans. 83, 86 Pac. 156 (1906); *Silber* v. *Public Service R. Co.*, 78 N. J. L. 59, 73 Atl. 232 (1909); *Barney* v. *Quaker Oats Co.*, 85 Vt. 372, 82 Atl. 113 (1912).

[21] Part of the opinion is omitted.

[22] See *Cory* v. *Silcox*, 5 Ind. 370 (1854); *Freligh* v. *Ames*, 31 Mo. 253 (1860); *Trice* v. *Hannibal, &c., R. Co.*, 35 Mo. 416 (1865); *Baldwin* v.

RAY *v.* CHESAPEAKE & OHIO RAILWAY CO.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1905.

57 *W. Va.* 333.

Action by A. S. Ray, administrator of Annie S. Ray against the Chesapeake and Ohio Railway Company. Judgment for plaintiff and defendant brings error.[23]

BRANNON, P. J.: Another alleged error is based on the reading from the code and books of reported cases by counsel of the plaintiff in argument before the jury. Counsel distinctly call upon us to say whether it is not error to allow counsel to read law to the jury against objection. The subject has been much discussed in *Bloyd* v. *Pollock*, 27 W. Va. 75; *Ricketts* v. *C. and O. Ry. Co.*, 33 W. Va. 433; *Gregory* v. *O. R. R. Co.*, 37 W. Va. 606. As stated in the Gregory case reading law from law books to the jury is very dangerous and should not be indulged. So many books and decisions are read, of such diverse statement and conclusion, some good law, some bad, some not pertinent to the case, and misapplied to the facts, and at the close of the argument the law of the case is "confusion worse confounded." How can the most intelligent jury solve the riddle? The safer course is not to read law to the jury. As in this case it may entail reversal. The court has full power to refuse to allow it. It consumes time and lengthens trials. Attorneys should argue and apply the facts and get the law by instructions from the court, if desired. If it is true that the jury is the judge of evidence and the court of the law, then it follows that law should not be read to the jury; for if the jury is not the judge of the law, why read law books to it? The courts of the United States do not allow it. In most of the states it is not allowed. *Sullivan* v. *Royer*, 72 Cal. 248, 1 Am. Stat. 51 and note; *Phoenix* v. *Allen*, 11 Mich. 501; *Hudson* v. *Hudson*, 90 Ga. 581. "The practice of counsel reading from law books when arguing to the jury is exceedingly dangerous and should not be indulged in." *Steffenson* v. *Chicago*, 51 N. W. 610. "The court may, in civil cases, refuse to permit counsel to read law to a jury, and this can not be assigned as error. It is the province of the court, in such cases to interpret the law for the jury, and not for the jury to interpret the law for themselves." *Sprague* v. *Craig*, 51 Ill. 288.[24] When, how-

---

Burrows, 95 Ind. 81 (1883); *Commonwealth* v. *Buccieri*, 153 Pa. 535, 26 Atl. 228 (1893); *People's Casualty Claim Adj. Co.* v. *Darrow*, 172 Ill. 62, 49 N. E. 1005 (1898) seven minutes allowed on each side; *Christiansen* v. *Graver Tank Works*, 223 Ill. 142, 79 N. E. 97 (1906); *Mitchell* v. *State*, 86 Ark 486, 111 S. W. 806 (1908); *Mitchell* v. *Robinson*, (Tex. Civ. App.) 162 S. W. 443 (1913). Compare *Nesbitt* v. *Walters*, 38 Tex. 576 (1873); *Senior* v. *Brogan*, 66 Miss. 178, 6 So. 649 (1888); *Zweitusch* v. *Lowy*, 57 Ill. App. 106 (1894); *Neumann* v. *St. Louis Transit Co.*, 109 Mo. App. 221, 84 S. W. 189 (1904).

[23] Part only of the opinion is printed.

[24] While counsel may express their own views of the law, it is, according to some authorities, error to permit them to read extracts from books as the law of the case. *Johnson* v. *Culver*, 116 Ind. 278, 19 N. E. 129 (1888); *Tuller*

ever, law has been read, it becomes a question whether it should cause reversal. If the law is bad, or not pertinent to the case, unless instructions after such argument propound the sound law on the very points to which the bad law relates, it will call for reversal; but if so cured, it will not. If good and pertinent law, it will not call for reversal. The law read in this case was statute and decided law pertinent and sound, except as stated below, and we see no cause for reversal for that cause under cases above cited. I will say, however, that the reading from *Cleveland* v. *Corrigan*, 46 Ohio St. 283, 3 L. R. A. 387, was bad, because it states three clashing lines of authorities, as to the care required of children, leaving it to the jury to say which was the correct one. Perhaps plaintiff's instruction No. 1 cured it; but it should not have been read.

But this does not end the trouble. The attorney read long, confusing recitals of facts from decided cases. For what purpose? From *Omaha* v. *Morgan*, a long recital of the facts of that case—nothing but a recital of facts. What had they to do with this case except to confuse the jury? Was it intended to similarize the two cases? This was not admissible. It is purely evidentiary matter, which everybody concedes to be not allowable, because a jury must try a case by, and only by its own evidence. The facts had little or no similarity with the case before the jury. So far as they had, it was improper; if they had not, then it was improper for that case to touch this case. Then, there is the long detail of facts read from *Swift* v. *Staten Island R. T. R. Co.*, 25 N. E. 378, touching injury to a little girl of fifteen while crossing a railroad track, injured while watching one train by another approaching from another direction. The cases being nearly akin in facts and character, the object was to lend strength to the plaintiff's case by using that case as a precedent; in other words, to try this case by that case. It also contained much argumentation to prove the liability on the facts of that case—mere facts—and thence deduced liability on the defendant in this case.

---

v. *Talbot*, 23 Ill. 357, 76 Am. Dec. 695 (1860); *Phoenix Ins. Co.* v. *Allen*, 11 Mich. 501, 83 Am. Dec. 756 (1863); *Baldwin's Appeal*, 44 Conn. 37 (1876); *Reich* v. *New York*, 12 Daly (N. Y.) 72 (1883); *Griebel* v. *Rochester P. Co.*, 24 App. Div. 288, 48 N. Y. S. 505 (1897); *Marriage* v. *Electric Coal Co.*, 176 Ill. App. 457 (1912). Others hold that the matter lies in the discretion of the court. *Mayfield* v. *Cotton*, 37 Tex. 229 (1872); *People* v. *Anderson*, 44 Cal. 65 (1872); *Curtis* v. *State*, 36 Ark. 284 (1880); *Gilberson* v. *Miller Min. & Smelt. Co.*, 4 Utah 46, 5 Pac. 699 (1885); *Baltimore & O. R. Co.* v. *Kean*, 65 Md. 394, 5 Atl. 325 (1886); *Williams* v. *Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048 (1891); *Stratton* v. *Dole*, 45 Nebr. 472, 63 N. W. 875 (1895); *Commonwealth* v. *Renzo*, 216 Pa. 147, 65 Atl. 30 (1906); *Mahoney* v. *Dixon*, 34 Mont. 454, 87 Pac. 452 (1906). And, the court's refusal of such permission will not be disturbed. *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82 (1890); *Newport News, &c., R. Co.* v. *Bradford*, 100 Va. 231, 40 S. E. 900 (1902); *Stone* v. *Comm.*, 181 Mass. 438, 63 N. E. 1074 (1902); *Meyer* v. *Foster*, 147 Cal. 166, 81 Pac. 402 (1905); *Ryan* v. *Lambert*, 49 Wash. 649, 96 Pac. 232 (1908); *Sullivan* v. *Capital Trac. Co.*, 34 App. Cas. (D. C.) 358 (1910). In *Good* v. *Mylin*, 13 Pa. St. 538 (1850) it was held proper to refuse permission to counsel to read to the jury the opinion of the Supreme Court reversing a former judgment in the same cause. Accord: *Bell* v. *McMaster*, 29 Hun (N. Y.) 272 (1883); *Clark* v. *Iowa Cent. R. Co.*, 162 Iowa 630, 144 N. W. 332 (1913).

It is not allowable to thus introduce evidence and facts of another case, because it lends its impress, influences, or may influence, the jury trying the case in hand. It is matter foreign and extraneous to the case. See *Ricketts* v. *Ches. and O. Ry.*, 33 W. Va. 433, citing 1 Thompson on Trials, sec. 947, saying that counsel had no right to introduce any evidentiary matter not in evidence, and can not under pretence of reading law books read passages which bear on questions of facts before the jury.[25] It is not allowable even to read the facts of the same case as contained in a report of a decision upon it in the Supreme Court. *State* v. *Whit*, 5 Jones L. (N. Car.) 224, 72 Am. Dec. 533.

Judgment reversed.

BOONE *v.* HOLDER.

SUPREME COURT OF ARKANSAS, 1908.

87 *Ark.* 461.

HART, J.: B. E. Boone brought this suit against Albert Holder for alienation of the affections of his wife, Alice Boone. There was a jury trial, and a verdict for the defendant, and plaintiff has appealed.[26]

It is unnecessary to abstract the testimony, except to state that it was sufficient to sustain the allegations of the complaint.

No objections were made to the instructions of the court. The sole ground relied upon for reversal is on account of alleged improper argument of counsel. In his motion for a new trial the plaintiff, Boone, states that R. J. White, counsel for the defendant was, over his objections, permitted to argue to the jury "that if the mouth of the plaintiff's wife was not closed by the iron laws she would swear that Holder, the defendant, never had sexual intercourse with her; that her husband, the plaintiff, had mistreated her; that he had neglected her and had been too intimate with one of the witnesses for the plaintiff—Doshy Holder."

It is a well established rule that it is error, sufficient to reverse a judgment, for the court to suffer counsel, against objection, to state

---

[25] In *Williams* v. *Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048 (1891), it is said: "If, however, the reading from a decision was to bring before the jury the facts of the case decided, or the amount of the verdict, or the comments of the judge on the facts to influence the jury in deciding upon the facts in the case on trial, or in fixing the amount of damages, then clearly the reading ought not to be permitted." Accord: *Porter* v. *Cohen*, 60 Ind. 338 (1878); *Dempsey* v. *State*, 3 Tex. App. 429, 30 Am. Rep. 148 (1878); *Evansville* v. *Wilter*, 86 Ind. 414 (1882); *Williams* v. *State*, 83 Ala. 68, 3 So. 743 (1887); *Mullen* v. *Reinig*, 72 Wis. 388, 39 N. W. 861 (1888); *Laughlin* v. *Street* R. *Co.*, 80 Mich. 154, 44 N. W. 1049 (1890); *East Tenn., &c., R. Co.* v. *King*, 88 Ga. 443, 14 S. E. 708 (1891); *Jackson* v. *Pool*, 91 Tenn. 448, 19 S. W. 324 (1892). Contra: *Harrington* v. *Wadesboro*, 153 N. Car. 437, 69 S. E. 399 (1910), by statute.

See also *Elliott* v. *New York, N. H. & H. R. Co.*, 83 Conn. 320, 76 Atl. 298 (1910).

[26] Part of the opinion is omitted.

facts pertinent to the issue and not in evidence. 12 A. & E. Encyc. of Pl. & Pr., p. 727; Thompson on Trials, 963. Although not expressly decided, the language used by the court in the case of *Little Rock Ry. and Electric Co.* v. *Goerner*, 80 Ark. 158, expresses the same view. The reason for the rule is that a party can not be permitted to present his evidence in the form of argument of his counsel to the jury, but must confine himself to the legal method of establishing his cause of action or defense thereto.

The remarks complained of being a statement of matters material to the issues, the court should have admonished the attorney that the statement was improper, and should have told the jury to disregard it. Having failed to do this, it was prejudicial error to permit counsel to travel out of the record and to base his argument on facts not appearing therein. *Little Rock and Ft. Smith Ry. Co.* v. *Cavanesse*, 48 Ark. 106; *Fort* v. *State*, 74 Ark. 210.[27]

For error in counsel for defendant stating to the jury prejudicial facts which were not in evidence, the judgment must be reversed and the cause remanded for a new trial.

UNITED STATES CEMENT COMPANY *v.* COOPER.

SUPREME COURT OF INDIANA, 1909.

172 *Ind.* 599.

Action by Spencer E. Cooper, by his next friend, against the United States Cement Company. From a judgment on a verdict for plaintiff for $500 defendant appeals.[28]

HADLEY, J.: Appellee's counsel, in his closing argument to the jury, used the following langauge: "The plaintiff is not rich. He was not born with a silver spoon in his mouth. He can not sit in a richly adorned chair with silver and gold piled about his plate. He

---

[27]Among the many cases in accord see: *Mitchum* v. *State*, 11 Ga. 615 (1852); *Tucker* v. *Henniker*, 41 N. H. 317 (1860); *State* v. *Lee*, 66 Mo. 165 (1877); *Union Cent. Life Ins. Co.* v. *Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573 (1880); *Williams* v. *Brooklyn El. R. Co.*, 126 N. Y. 96, 26 N. E. 1048 (1891); *Indianapolis Journal Newspaper Co.* v. *Pugh*, 6 Ind. App. 510, 33 N. E. 991 (1892); *Roso* v. *Detroit*, 96 Mich. 447, 56 N. W. 11 (1893); *Union Pac. R. Co.* v. *Field*, 137 Fed. 14, 69 C. C. A. 536 (1905); *Fisher* v. *Pennsylvania Co.*, 34 Pa. Super. Ct. 500 (1907); *Berger* v. *Standard Oil Co.*, 31 Ky. L. 613, 103 S. W. 245 (1907); *Angelos* v. *Pelias*, 150 Ill. App. 527 (1909); *Bliss* v. *Wolcott*, 40 Mont. 491, 107 Pac. 423 (1910); *Citizens Mut. Fire Ins. Co.* v. *Conowingo Bridge Co.*, 116 Md. 422, 82 Atl. 372 (1911); *Worden Lumber, &c. Co.* v. *Minneapolis, St. P., &c. R. Co.*, 168 Mich. 74, 133 N. W. 949 (1911); *St. L., I. M. & S. R. Co.* v. *Earle*, 103 Ark. 356, 146 S. W. 520 (1912); *Chicago, St. L. & N. O. R. Co.* v. *Rowell*, 151 Ky. 313, 151 S. W. 950 (1912); *Lucas* v. *Peoria & E. R. Co.*, 171 Ill. App. 1 (1912); *Spahn* v. *Peoples R. Co.*, (Del.), 92 Atl. 727 (1912); *Nuckols* v. *Andrews*, 6 Ala. App. 275, 60 So. 592 (1912); *Herricks* v. *Chicago & E. I. R. Co.*, 257 Ill. 264, 100 N. E. 897 (1913); *Buckley* v. *Boston El. R. Co.*, 215 Mass. 50, 102 N. E. 75 (1913); *Fadden* v. *McKinney*, 87 Vt. 316, 89 Atl. 351 (1914).

[28]Only so much of the opinion as relates to the argument of counsel is given.

can not ride in fine chariots. He does not have millions, like the defendant, made from the labor of other men." The appellant, in the presence of the jury, objected to the language at the time, and moved that the court withdraw the same from the jury, which motion was overruled. Appellant thereupon moved that the court withdraw the case from the jury and set aside the submission, which motion was also overruled, and an exception properly reserved. The language complained of was not directed to any issue or legitimate evidence in the case, and was of a prejudicial character. There could have been no justification for its use, and it can not now be said that it did not affect the result.

Judgment reversed and cause remanded, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent herewith.[29]

SECTION 9. CHARGE OF THE COURT.

STUMPS *v.* KELLEY.

SUPREME COURT OF ILLINOIS, 1859.

22 Ill. 140.

Action on the case by Susanna Kelley by her next friend, appellee, against Barbara Stumps, appellant, for damages resulting from injuries inflicted by a vicious cow belonging to the appellant. At the

[29]In addressing the jury appeals to passion and prejudice are not allowable. *Galveston, H. & S. A. R. Co.* v. *Cooper,* 70 Tex. 67, 8 S. W. 68 (1888); *Wagner* v. *Hazle Township,* 215 Pa. 219, 64 Atl. 405 (1906); *Holmes* v. *Loud,* 149 Mich. 410, 112 N. W. 1109 (1907); *Seaboard Air Line R. Co.* v. *Smith,* 53 Fla. 375, 43 So. 235 (1907); *Saxton* v. *Pittsburgh R. Co.,* 219 Pa. 492, 68 Atl. 1022 (1908); *Hyman* v. *Kirt,* 153 Mich. 113, 116 N. W. 536 (1908); *White* v. *Chicago & N. W. R. Co.,* 145 Iowa 408, 124 N. W. 309 (1910); *Jones* v. *Tucker,* 26 Del. 422, 84 Atl. 4, 1012 (1912); *Haake* v. *G. H. Dulle Mill. Co.,* 168 Mo. App. 177, 153 S. W. 74 (1912); *Moore* v. *Springfield, &c. Trac. Co.,* 180 Ill. App. 623 (1913); *Appel* v. *Chicago City R. Co.,* 259 Ill. 561, 102 N. E. 1021 (1913); *Almon* v. *Chicago & N. W. R. Co.,* 163 Iowa 449, 144 N. W. 997 (1914); *Becker* v. *Phila. Rapid Transit Co.,* 245 Pa. 462, 91 Atl. 861 (1914); *Morrison* v. *Carpenter,* 179 Mich. 207, 146 N. W. 106 (1914). But appeals to sympathy based on the evidence are not ordinarily improper. *Dowdell* v. *Wilcox,* 64 Iowa 721, 21 N. W. 147 (1884); *Gulf C. & S. F. R. Co.* v. *Norfleet,* 78 Tex. 321, 14 S. W. 703 (1890); *Henry* v. *Huff,* 143 Pa. St. 548, 22 Atl. 1046 (1891); *Shute* v. *Exeter Mfg. Co.,* 69 N. H. 210, 40 Atl. 391 (1897); *Atlantic Coast Line R. Co.* v. *Jones,* 132 Ga. 189, 63 S. E. 834 (1908); *Eaton* v. *Hope,* 177 Mich. 411, 143 N. W. 241 (1913). In *Ferguson* v. *Moore,* 98 Tenn. 342, 39 S. W. 341 (1897), it is said, per Wilkes, J.: "Tears have always been considered legitimate arguments before a jury, and while the question has never arisen out of any such behavior in this court, we know of no rule or jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel, which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seri-

trial there was a verdict for the plaintiff for $500. Defendant appealed.[80]

WALKER, J.: Courts are created and established for the administration of justice, and all legal and proper means should be employed for the attainment of that end. And how can it be error for the court to instruct the jury as to the law of the case, whether asked to do so or not, we are at loss to conjecture. We have been referred to no authority that so holds, and we can not imagine that such can exist. One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions. The instructions given by the court in this case, without being requested by either party, we think embraced the law as applicable to the case, and it is not denied that it does. And we have no hesitancy in saying that so far from its being error, that the court acted in strict conformity with the duty imposed by the oath of the judge, and the requirements of the law.[81]

Affirmed.

---

ously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court."

[80]The statement of facts is abridged from the opinion of the court, only a part of which is printed.

[81]The court may of its own motion instruct the jury upon the questions of law involved. *Clarke* v. *Baker*, 7 J. J. Marsh. (Ky.) 194 (1832); *Blunt* v. *Commonwealth*, 4 Leigh (Va.) 689, 26 Am. Dec. 341 (1843); *Thistle* v. *Frostburgh Coal Co.*, 10 Md. 129 (1856); *State* v. *Burns*, 8 Nev. 251 (1873); *McLellan* v. *Wheeler*, 70 Maine 285 (1879); *Parker* v. *Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. 233 (1889); *Rosenkovitz* v. *United Rys. & Electric Co.*, 108 Md. 306, 70 Atl. 108 (1908). Contra by statute: *Archer* v. *Sinclair*, 49 Miss. 343 (1873); *Watkins* v. *State*, 60 Miss. 323 (1882). It has been held that the court is not bound to give any instructions unless by the request of the parties. *Reasoner* v. *Brown*, 19 Ark. 234 (1857); *Haupt* v. *Pohlmann*, 1 Robt. (N. Y.) 121 (1863); *McLellan* v. *Wheeler*, 70 Maine 285 (1879); *Stuckey* v. *Fritsche*, 77 Wis. 329, 46 N. W. 59 (1890); *Osgood* v. *Skinner*, 211 Ill. 229, 71 N. E. 869 (1904); *Morgan* v. *Mulhall*, 214 Mo. 451, 114 S. W. 4 (1908). Elsewhere it is held mandatory upon the court to charge with reasonable fulness upon all the material issues presented, even in the absence of requests. *Capital City Brick & Pipe Co.* v. *Des Moines*, 136 Iowa 243, 113 N. W. 835 (1907); *Douglass* v. *Geiler*, 32 Kans. 499, 4 Pac. 1039 (1884); *Barton* v. *Gray*, 57 Mich. 622, 24 N. W. 638 (1885); *Rowell* v. *Vershire*, 62 Vt. 405, 19 Atl. 990, 8 L. R. A. 708 (1890); *Chattanooga & D. R. Co.* v. *Voils*, 113 Ga. 361, 38 S. E. 819 (1901); *Falkner* v. *Pilcher*, 137 N. Car. 449, 49 S. E. 945 (1905), and see *Ball* v. *Interurban St. R. Co.*, 49 Misc. 129, 96 N. Y. S. 739 (1905). But generally, where the charge to the jury is correct, as far as it goes, failure to give further or more specific instructions upon a particular point will not be held error in the absence of any request therefor. *Pennock* v. *Dialogue*, 2 Pet. (U. S.) 1, 7 L. ed. 327 (1829); *Cooper* v. *Altimus*, 62 Pa. St. 486 (1869); *Webber* v. *Dunn*, 71 Maine 331 (1880); *Sudlow* v. *Warshing*, 108 N. Y. 520, 15 N. E. 532 (1888); *Humes* v. *United States*, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. 602 (1897); *Camden & A. R. Co.* v. *Williams*, 61 N. J. L. 646, 40 Atl. 634 (1898); *Nashville & St. L. R. Co.* v. *Heikens*, 112 Tenn. 378, 79 S. W. 1038 (1903); *Miller* v. *Shumway*, 135 Mich. 654, 98 N. W. 385 (1904); *Price* v. *Huddleston*, 167 Ind. 536 (1906); *Bailey* v. *Grand Forks*

INDIANA RAILWAY COMPANY *v.* MAURER.

SUPREME COURT OF INDIANA, 1902.

160 *Ind.* 25.

Action by John Maurer against the Indiana Railway Company. From a judgment for plaintiff, defendant appeals.[82]

HADLEY, C. J.: Suit by appellee to recover damages for injuries received through the alleged negligence of appellant in operating its street railroad in the city of South Bend. Upon issues joined by the general denial, the jury returned its verdict for appellee for $400, and therewith returned their answers to divers interrogatories propounded by the court.

It is averred in the complaint that the plaintiff is old, infirm, and possessed of but one leg; that in alighting from the street car it was necessary for him to use both hands in supporting himself; and that while reaching for and attempting to remove from the car a grip bag which he had, and before he had time to remove it, the defendant suddenly and negligently started the car, thereby causing the plaintiff to be thrown down and dragged by the car, whereby he was injured, etc.

The second instruction given to the jury is complained of. It is in substance as follows: A higher degree of care is required of a street car company towards passengers who are aged and infirm than towards the active and able-bodied, and it is the duty of such company to assist such infirm passengers—if in need of assistance—in alighting from its car when they are passengers thereon; and if it was shown that the plaintiff was a passenger on the defendant's car, and was infirm, and a cripple, and in need of assistance in alighting from the car, and the defendant knew such facts, and the defendant having stopped the car to allow the plaintiff to alight, failed and neglected to assist him, and started the car forward be-

---

Lumber Co., 107 Minn. 192, 119 N. W. 786 (1909); *Grealish* v. *Brooklyn C. & S. R. Co.*, 130 App. Div. 238, 114 N. Y. S. 582 (1909); *Kahn* v. *Bennett*, 223 Pa. 36, 72 Atl. 342 (1909).

A misdirection as to the law which injuriously affects one of the parties is error and ground for reversal. *Carnes* v. *Platt*, 6 Robt. (N. Y.) 270 (1868); *Radcliffe* v. *Hollyfield*, 216 Pa. 367, 65 Atl. 789 (1907). But error will be regarded as harmless if the rights of the appellant have not been prejudiced thereby. 38 Cyc. 1809 and cases cited; *San Juan* v. *St. John's Gas Co.*, 195 U. S. 510, 49 L. ed. 299, 25 Sup. Ct. 108 (1904); *Enstice* v. *Courtright*, 61 N. J. L. 653, 40 Atl. 676 (1898). Where, however, the instructions are correct in themselves, a reviewing court will not reverse because wrong reasons were given for them, unless it clearly appears that the jury were misled or injustice has resulted in consequence of such instructions. *Dale* v. *Arnold*, 2 Bibb (Ky.) 605 (1810); *Easley* v. *Craddock*, 4 Rand. (Va.) 423 (1826); *Carpenter* v. *Pierce*, 13 N. H. 403 (1843); *Budd* v. *Brooke*, 3 Gill (Md.) 198, 43 Am. Dec. 321 (1845); *Rupp* v. *Orr*, 31 Pa. St. 517 (1858); *Blodgett* v. *Berlin Mills Co.*, 52 N. H. 215 (1872); *Marion* v. *State*, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825 (1886).

[82] Part of the opinion of the court is omitted.

fore the plaintiff had fully alighted, thereby throwing and injuring the plaintiff, the defendant should be found guilty of negligence.

Instructions to the jury must be confined to the issues. It is fundamental that a plaintiff can recover only upon the complaint he makes; that is, he can not complain of one thing, and recover for another. Hence in directing the jury as to the rules of law that shall guide them in reaching their verdict, the court must avoid leading them away from the issue made by the pleadings, and into giving effect to facts not in the case. If extraneous and irrelevant facts have been disclosed by the evidence which are likely to influence the jury, the latter should be admonished to disregard them; and a statement of the law relating to such irrelevant facts without limitation, and in such manner as naturally to lead the jury to believe such facts effective in the consideration of their verdict, will constitute reversible error, because inclined to mislead the jury. *Lindley* v. *Sullivan*, 133 Ind. 588, 592; *McKeen* v. *Porter*, 134 Ind. 483, 490; *Nichol* v. *Thomas*, 53 Ind. 42, 52; Elliott, Gen. Pr., 899. The propriety of an instruction is to be determined, not by whether it embodies a correct statement of the law upon a given state of facts, but whether it correctly states the law relevant to the issuable facts given in evidence on the trial.[33]

The court clearly stepped outside the case made by the pleadings in the giving of this instruction. The sole ground of complaint is the untimely starting of the car before the plaintiff had time fully to alight. That the defendant failed to assist the plaintiff in leaving the car is not stated as a cause for damages, or even that such thing had occurred, and therefore, so far as it affected the plaintiff's right to recover damages, it was wholly immaterial whether the defendant did or did not assist him from the car. The record shows that considerable evidence was given, without objection, both in support and in denial of the conductor's claim that he did assist the plaintiff off the car; but the giving of irrelevant evidence without objection furnishes the court no sufficient justification for charging the jury that the defendant might be found guilty of negligence upon a state of facts not properly in the case.[34] The natural effect of such charge

---

[33]Accord: *Hooker* v. *Johnson*, 6 Fla. 730 (1856); *Whitman* v. *Keith*, 18 Ohio St. 134 (1868); *Gulf of California Nav., &c. Co.* v. *State Investment, &c. Co.*, 70 Cal. 586 (1886); *Holt* v. *Pearson*, 12 Utah 63, 41 Pac. 560 (1895); *Baltimore & O. R. Co.* v. *Lee*, 106 Va. 32, 55 S. E. 1 (1906); *Smitley* v. *Pinch*, 148 Mich. 670, 112 N. W. 686 (1907); *Smith* v. *Central Vermont R. Co.*, 80 Vt. 208, 67 Atl. 535 (1907); *Ratner* v. *Chicago City R. Co.*, 233 Ill. 169, 84 N. E. 201 (1908); *Hackett* v. *Chicago C. R. Co.*, 235 Ill. 116, 85 N. E. 320 (1908).

[34]Accord: *Coos Bay R. Co.* v. *Siglin*, 26 Ore. 387 (1894); *Moody* v. *Rowland*, 100 Tex. 363, 99 S. W. 1112 (1907); *Jacksonville El. Co.* v. *Batchis*, 54 Fla. 192, 44 So. 933 (1907); *Latourette* v. *Meldrum*, 49 Ore. 397, 90 Pac. 503 (1907); *Kellogg* v. *Kirksville*, 132 Mo. App. 519, 112 S. W. 296 (1908). Contra: *Scott* v. *Sheakly*, 3 Watts (Pa.) 50 (1834); *Gayarre* v. *Tunnard*, 9 La. Ann. 254 (1854); *Boyce* v. *California Stage Co.*, 25 Cal. 460 (1864); *Collins* v. *Collins*, 46 Iowa 60 (1877); *Bowers* v. *Thomas*, 62 Wis. 480, 22 N. W. 710 (1885); *Sloan* v. *Baltimore & P. R. Co.*, 131 Pa. St. 568, 18 Atl. 903 (1890); *Rome Hotel Co.* v. *Warlick*, 87 Ga. 34, 13 S. E. 116 (1891); *Brusie* v. *Peck Bros. & Co.*, 135 N. Y. 622, 32 N. E. 76 (1892); *Fox* v. *Utter*, 6 Wash.

is to impress the jury that the fact of assistance or non-assistance is material, and the truth may be that in arriving at their verdict the jury found the defendant guilty of negligence in failing to assist the plaintiff to alight, and free from negligence in the untimely starting of the car. We can not therefore say that the instruction was harmless.

Judgment reversed.[85]

ST. LOUIS, I. M. & S. R. CO. *v.* SPENCER.

CIRCUIT COURT OF APPEALS, U. S., EIGHTH CIRCUIT, 1895.

71 Fed. 93.

SANDBORN, J.: About 9 o'clock in the forenoon, on the twenty-fourth day of May, 1894, Sarah Owen Spencer, the defendant in error, was a passenger in a Pullman car attached to a train of the St. Louis, Iron Mountain and Southern Railway Company, the plaintiff in error, which was passing through the yard of that company at Texarkana, in the state of Arkansas. A switchman of the plaintiff in error carelessly threw a switch before the Pullman car had passed it, and this derailed the car, caused it to collide with a train of coal cars, smashed two of the windows on one side of the car, and as the defendant in error alleged, seriously injured her. She brought an action for her damages, and recovered a judgment against the company. The writ of error in this case was sued out to review the proceedings which resulted in this judgment.

Counsel for the plaintiff in error declare in their brief that they rely upon eleven supposed errors to reverse the judgment. The first five are founded upon exceptions to the refusal of the court to give certain requests for instructions to the jury, which they preferred. The first request was that if the jury believed that the injury to the defendant in error resulted without fault of the company, by inevitable accident, or by reason of the diseased condition of the defendant in error, their verdict should be for the plaintiff in error. The second request was that if the jury found from the evidence that the defendant in error was injured by mere accident, without fault on the part of the company or its employes, they should return a verdict for the company. These requests were properly refused.

299, 33 Pac. 354 (1893; *Madison* v. *Missouri Pac. R. Co.*, 60 Mo. App. 599 (1894); *Owaly* v. *Johnson*, 80 Minn. 408, 83 N. W. 393 (1900); *Davis* v. *Atlanta, &c. R. Co.*, 63 S. Car. 370, 41 S. E. 468 (1901); *Struebling* v. *Stevenson*, 129 Iowa 25, 105 N. W. 341 (1905); *National Mutual Fire Insurance Co.* v. *Sprague*, 40 Colo. 344, 92 Pac. 227 (1907); *Childs* v. *Childs*, 49 Wash. 27, 84 Pac. 660 (1908). See 2 Thompson Trials (2d ed.), § 2309 *et seq.*

[85] See *Republic Iron & S. Co.* v. *Radis*, 106 Ill. App. 530 (1903), where it is said: "It is error to instruct the jury upon matters inadmissible in evidence under the pleadings, when proper objections are made, even though the court admits the evidence against the objection." Accord: *Illinois Cent. R. Co.* v. *McKee*, 43 Ill. 119 (1867); *Bick* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 107 Minn. 78, 119 N. W. 505 (1909).

The evidence was undisputed that the derailment of the car was caused by the act of the switchman of the company, who threw the switch before the rear trucks of the car had passed over it. It is error to charge the jury upon an assumed state of facts to which no evidence applies, because it withdraws their attention from the real issues on trial, and tends to fix it upon issues that are not presented by the case.[36]

The requests for instructions of which complaint is made in the third, fourth and fifth supposed errors that are relied upon were substantially given in the general charge of the court. It is not error for the trial court to refuse to charge as requested by counsel, where the rules of law embodied in the requests are properly laid down in the general charge of the court.[37]

The sixth, seventh, eighth, ninth and tenth supposed errors of which complaint is made relate to certain paragraphs in the general charge of the court; but, upon examination of the record, we find that no exceptions to these portions of the charge were taken before the jury retired.

The general charge covers four closely-printed pages of this record. It states uncontroverted facts and propositions of law for the guidance of the jury. Many, perhaps all, of these statements and propositions are correct. The exception of counsel for plaintiff in error to each and every sentence of the charge given was therefore unavailing. "If the entire charge of the court is excepted to, or a series of propositions contained in it are excepted to in gross, and any portion of what is excepted to is sound, the exception can not be sustained."[38]

---

[36]Citing *Northwestern Mut. Life Ins. Co.* v. *Stevens*, 71 Fed. 258 (1895); *Railroad Co.* v. *Huston*, 95 U. S. 702, 24 L. ed. 544 (1877); *New York, N. H. & H. R. Co.* v. *Blessing*, 67 Fed. 277 (1895). Accord: *Etting* v. *Bank of U. S.*, 11 Wheat. (U. S.) 59, 6 L. ed. 419 (1826); *State* v. *Gibbons*, 10 Iowa 117 (1859); *Pelley* v. *Wills*, 141 Ind. 688, 41 N. E. 354 (1895); *Consolidated Trac. Co.* v. *Haight*, 59 N. J. L. 577, 37 Atl. 135 (1896); *Cunningham* v. *Davis*, 175 Mass. 213, 56 N. E. 2 (1900); *Hieskell* v. *Farmers & Mechanics Nat. Bank*, 89 Pa. 155 (1879); *Indiana R. Co.* v. *Maurer*, 160 Ind. 25, 66 N. E. 156 (1902); *Clark* v. *Morris*, 30 App. (D. C.) 553 (1908); *Pelham* v. *Chattahoochie Grocery Co.*, 156 Ala. 500, 47 So. 172 (1908); *Florida East Coast R. Co.* v. *Carter*, 67 Fla. 335, 65 So. 254 (1914). So, also, instructions should not be given embodying mere abstract propositions of law. *Hathorn* v. *Stinson*, 10 Maine 224 (1833); *Mosaic Tile Co.* v. *Chiera*, 133 Mich. 497, 95 N. W. 537 (1903); *Harden* v. *City of Moline*, 179 Ill. App. 101 (1912); *Maionica* v. *Piscopo*, 217 Mass. 324, 104 N. E. 839 (1914).

[37]Citing *Union Pacific R. Co.* v. *Jarvi*, 53 Fed. 65, 3 C. C. A. 433 (1892); *Gulf C. & S. F. R. Co.* v. *Washington*, 49 Fed. 347, 1 C. C. A. 286 (1891); *Union Pac. R. Co.* v. *O'Brien*, 49 Fed. 538, 1 C. C. A. 354 (1891); *Eddy* v. *Lafayette*, 49 Fed. 807, 1 C. C. A. 441 (1891). Accord: *Fleming* v. *Dixon*, 194 Pa. St. 67, 44 Atl. 1064 (1899); *Herbich* v. *North Jersey St. R. Co.*, 67 N. J. L. 574, 52 Atl. 357 (1902); *Virginia P. & P. Co.* v. *Patterson*, 104 Va. 189, 51 S. E. 157 (1905); *Stone* v. *Lewiston B. & B. R. Co.*, 99 Maine 243, 59 Atl. 56 (1904); *McGarry* v. *Healey*, 78 Conn. 365, 62 Atl. 671 (1905); *Davis* v. *Diamond Carriage, &c. Co.*, 146 Cal. 59, 79 Pac. 596 (1905); *Creachen* v. *Bromley Bros. Carpet Co.*, 214 Pa. 15, 63 Atl. 195 (1906); *MacFeat* v. *P. W. & B. R. Co.*, 6 Pennw. (Del.) 513, 69 Atl. 744 (1908); *Amorsen* v. *Swift*, 243 Ill. 93, 90 N. E. 250 (1909).

[38]Citing *McClellan* v. *Pyeatt*, 50 Fed. 686, 1 C. C. A. 613 (1891); *Bracken* v. *Union Pacific R. Co.*, 56 Fed. 447, 5 C. C. A. 548 (1893); *Beaver* v. *Taylor*,

The charge of the court was concluded, and the jury retired to consider their verdict, on January 26, 1895. The exceptions now urged to certain specific portions of the charge first appeared in the bill of exceptions, which was presented to and signed by the judge who tried the case on February 23, 1895. These exceptions are utterly futile. As early as November, 1892, the decision of this court apprised counsel of this fact. In *Price* v. *Pankhurst*,[39] Judge Caldwell, in delivering the opinion of this court, said:

"It is the duty of the party excepting to call the attention of the court distinctly to the portions of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice, which, it has been intimated at the bar, sometimes obtains, of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives that the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court." This rule has been repeatedly affirmed.[40]

Judgment affirmed.

---

93 U. S. 46, 23 L. ed. 797 (1876); *Lincoln* v. *Claflin*, 7 Wall. (U. S.) 132, 19 L. ed. 106 (1868); *Cooper* v. *Schlesinger*, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. 360 (1884); *Burton* v. *Ferry Co.*, 114 U. S. 474, 29 L. ed. 215 (1884); *Rogers* v. *The Marshall*, 1 Wall. (U. S.) 644, 17 L. ed. 714 (1863); *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466 (1884); *Block* v. *Darling*, 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. 832 (1891). Accord: *Walsh* v. *Kelly*, 40 N. Y. 556 (1869); *Steffenson* v. *Chi., M. & St. P. R. Co.*, 51 Minn. 531, 53 N. W. 800 (1892); *Syndicate I. Co.* v. *Catchings*, 104 Ala. 176, 16 So. 46 (1893); *Luedtke* v. *Jeffery*, 89 Wis. 136, 61 N. W. 292 (1894); *Brozek* v. *Steinway R. Co.*, 161 N. Y. 63 (1899); *Luce* v. *Hassam*, 76 Vt. 450, 58 Atl. 725 (1904); *Foote* v. *Kelley*, 126 Ga. 799, 55 S. E. 1045 (1906); *Inland Steel Co.* v. *Smith*, 168 Ind. 245, 80 N. E. 538 (1906). Contra: *Dady* v. *Condit*, 188 Ill. 234, 58 N. E. 900 (1900); *Ellis* v. *Leonard*, 107 Iowa 487, 78 N. W. 246 (1899); *Curtis* v. *Winston*, 186 Pa. St. 492, 40 Atl. 786 (1898); *Mastel* v. *Walker*, 246 Pa. 65, 92 Atl. 63 (1914).

[39] 53 Fed. 312 (1892).

[40] Citing *Bracken* v. *Union Pac. R. Co.*, 56 Fed. 447, 5 C. C. A. 548 (1893); *Emanuel* v. *Gates*, 53 Fed. 772, 3 C. C. A. 663 (1892); *Sutherland* v. *Round*, 57 Fed. 467, 6 C. C. A. 428 (1893); *Park* v. *Bushnell*, 60 Fed. 583, 9 C. C. A. 138 (1894). Accord: *Hickory* v. *United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. 334 (1894). Exceptions to the charge or to the refusal of instructions must be taken at the trial, but the precise time and manner is usually a matter of local practice. See generally 38 Cyc. 1700 and *Vaughan* v. *Porter*, 16 Vt. 266 (1844); *Illinois Cent. R. Co.* v. *Modglin*, 85 Ill. 481 (1877); *Hayes* v. *Solomon*, 90 Ala. 520, 7 So. 921 (1889); *Spooner* v. *Cummings*, 151 Mass. 313, 23 N. E. 839 (1890); *Garoutte* v. *Williamson*, 108 Cal. 135 (1895); *Gehl* v. *Milwaukee Produce Co.*, 116 Wis. 263, 93 N. W. 26 (1903); *Polykranas* v. *Krausz*, 73 App. Div. 583, 77 N. Y. S. 46 (1902); *Broadway Trust Co.* v. *Fry*, 40 Misc. 680, 83 N. Y. S. 103 (1903); N. Y. Code Civil Proc. § 995; *Nadeau* v. *Sawyer*, 73 N. H. 70, 59 Atl. 369 (1904); *Block* v. *Great Northern R. Co.*, 106 Minn. 285, 118 N. W. 1019 (1908); *Lindsay* v. *Dutton*, 227 Pa. 208, 75 Atl. 1096 (1910); *Commonwealth* v. *Johnston*, 44 Pa. Super. Ct. 218 (1910);

WHITNEY *v.* WELLESLEY AND BOSTON STREET RAILWAY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1908.

197 *Mass.* 495.[41]

BRADLEY, J.: If trial by jury is to retain its efficiency, the presiding judge by means of suitable instructions must enable jurors to see their way to a right verdict. The provisions of R. L. ch. 173, sec. 80, which first appeared in Gen. Stat. ch. 115, sec. 5, that "the courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law," were not intended to destroy this salutary power. In the construction of the statute it uniformly has been held that, in charging juries, the judge, although prohibited from stating his opinion as to the credibility of witnesses,[42] may sum up the testimony according to his recollection, submitting its effect, however, to their consideration and judgment, and leaving to them for decision all issues of fact within their province. He may elucidate the proper application of the legal principles involved by illustrations drawn from common experience, or by reference to cases where similar questions have been decided, and define the degree of weight which the law attaches to a whole class of testimony. In any clear analysis of the evidence, however impartial, the attention of the jury necessarily must be directed to the weight and importance of particular facts which they may find to have been proved. If an unbiased analytical statement of the testimony and of the law distinctly indicates the party who is entitled to prevail, this furnishes no just reason for the defeated party to complain, either of the method employed or of the adverse verdict.[43] Besides, it is not a violation of

---

Quimby v. *Jay*, 196 Mass. 584, 82 N. E. 1084 (1907). Where points for charge are declined, it is not necessary to read them to the jury; it is better practice not to read them. *Waldie* v. *Doll*, 29 Cal. 555 (1866); *Ransone* v. *Christian*, 56 Ga. 351 (1876); *Sherman* v. *State*, 17 Fla. 888 (1880); *Walbert* v. *Trexler*, 156 Pa. St. 112, 27 Atl. 65 (1893); *Long* v. *Southern R. Co.*, 50 S. Car. 49, 27 S. E. 531 (1897); *Soper Lumber Co.* v. *Halsted*, 73 Conn. 547, 48 Atl. 425 (1901); *Muthersbaugh* v. *McCabe*, 22 Pa. Super. Ct. 587 (1903).

[41] The statement of facts and part of the opinion of the court are omitted.

[42] *Chapman* v. *Erie R. Co.*, 55 N. Y. 579 (1874); *Chicago & A. R. Co.* v. *Robinson*, 106 Ill. 142 (1883); *Wheeler* v. *Baars*, 33 Fla. 696, 15 So. 584 (1894); *Jones* v. *Warren*, 134 N. Car. 390, 46 S. E. 740 (1904); *Sheppelman* v. *People*, 134 Ill. App. 556 (1907); *Cleveland, C. C. & St. L. R. Co.* v. *Schneider*, 40 Ind. App. 524, 82 N. E. 538 (1907); *Central of Georgia R. Co.* v. *Sowell*, 3 Ga. App. 142 (1907). Compare *Simmons* v. *Penna. R. Co.*, 199 Pa. 232, 48 Atl. 1070 (1901).

[43] At common law, the trial judge may express his opinion upon the weight of the evidence, provided the ultimate decision of the questions of fact is left to the jury. *Petty* v. *Anderson*, 3 Bingh. 170 (1825); *Solarte* v. *Melville*, 7 B. & C. 430 (1827); *Durkee* v. *Marshall*, 7 Wend. (N. Y.) 312 (1831); *Rowell* v. *Fuller*, 59 Vt. 688, 10 Atl. 853 (1887); *Brandt* v. *Frederick*, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199 (1890); *Hurlburt* v. *Hurlburt*, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. 482 (1891); *Doyle* v. *Union Pac. R. Co.*, 147 U. S. 413, 37 L. ed. 223 (1893); *Pool* v. *White*, 175 Pa. 459, 34 Atl. 801 (1896); *Ginder* v. *Bachman*, 8 Pa. Super. Ct. 405 (1898); *Houghton* v. *New Haven*, 79

the constitutional requirement that judges shall be as "free, impartial and independent as the lot of humanity will admit," if the instructions, while judicially fair, are comprehensively strong, rather than hesitatingly barren or ineffective, and neither the tone of a charge, nor the form of verbal delivery are of themselves ground of exception, if no error of law appears.[44] In a word, the judge who discharges the functions of his office is, under the statute as well as at common law, the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings.

In the present case, under the exceptions taken at the close of the charge, the defendant alleged a two-fold grievance, namely, because the testimony had been incorrectly stated, and because the comment upon it was argumentative,[45] rather than expository. The first objection has been waived by the subsequent stipulation, that the evidence had been correctly stated, and, to ascertain if the instructions are open to the second objection, the entire charge is to be considered, and not isolated portions. The plaintiff sued for personal injuries received while a passenger on a car of the defendant, and in defense it was said that her claim was a fraudulent invention to get damages. In her evidence she described the injury as being on her right leg, while a medical witness of the defendant, from a physical examination made shortly after the accident, directly contradicted her, by locating it upon the left leg. But even then the jury could say that, if the injury was proved, the distinction of mem-

---

Conn. 659, 66 Atl. 509 (1907); *Merklinger* v. *Lambert*, 76 N. J. L. 806, 72 Atl. 119 (1908). But in many states the court is restrained from commenting on the facts or expressing an opinion upon the weight of the evidence. *Salter* v. *Myers*, 5 B. Mon. (Ky.) 280 (1845); *Evans* v. *Blackhart*, 12 Ill. 195 (1850); *Wood* v. *Deutchman*, 75 Ind. 148 (1881); *Chicago & A. R. Co.* v. *Robinson*, 106 Ill. 142 (1883); *State* v. *Greer*, 22 W. Va. 800 (1883); *Lorie* v. *Adams*, 51 Kans. 692, 33 Pac. 599 (1893); *Hamlin* v. *Treat*, 87 Maine 310, 32 Atl. 909 (1895); *Tyler* v. *Chesapeake & O. R. Co.*, 88 Va. 389, 13 S. E. 975 (1891); *Supreme Lodge* v. *Lipscomb*, 50 Fla. 406, 39 So. 637 (1905); *Latimer* v. *General E. Co.*, 81 S. Car. 374, 62 S. E. 438 (1908); *Mitchell* v. *Masury*, 132 Ga. 360, 64 S. E. 295 (1908). And in jurisdictions where the judge may comment on the evidence, he must do so in a dispassionate manner. *Monier* v. *Phila. Rapid Transit Co.*, 227 Pa. 273, 75 Atl. 1070 (1910); *Valley Lumber Co.* v. *Smith*, 71 Wis. 304, 37 N. W. 412, 5 Am. St. 216 (1888); *Berkowitz* v. *Schlanger*, 70 Misc. 239, 126 N. Y. S. 664 (1911).

[44] Accord: *Reiger* v. *Davis*, 67 N. Car. 185 (1872); *Rountree* v. *Gurr*, 68 Ga. 292 (1881); *Page* v. *Sumpter*, 53 Wis. 652, 11 N. W. 60 (1881); *Horton* v. *The Chevington, &c. Coal Co.*, 2 Penny. (Pa.) 25 (1882); *Gibbs* v. *Johnson*, 63 Mich. 671, 30 N. W. 343 (1886); *Beal* v. *Lowell & D. St. R. Co.*, 157 Mass. 444, 32 N. E. 653 (1892); *Motherway* v. *Wall*, 168 Mass. 333, 47 N. E. 135 (1897).

[45] The charge should be clear, direct and explicit, *Morris* v. *Morris*, 28 Mo. 114 (1859); *Gafney* v. *St. Paul City R. Co.*, 81 Minn. 459, 84 N. W. 304 (1900); *Rondinella* v. *Metropolitan Life Ins. Co.*, 24 Pa. Super. Ct. 293 (1904), and not argumentative. *Bray* v. *Ely*, 105 Ala. 553, 17 So. 180 (1894); *O'Dea* v. *Michigan C. R. Co.*, 142 Mich. 265, 105 N. W. 746 (1905); *Illinois Cent. R. Co.* v. *Collison*, 134 Ill. App. 443 (1907); *Jones* v. *Monson*, 137 Wis. 479, 119 N. W. 179 (1909). But the fact that particular instructions are argumentative is not reversible error, where the charge, as a whole, properly advises the jury upon the material issues. *McCormick* v. *Parriott*, 33 Colo. 382, 80 Pac. 1044 (1905); *Thrall* v. *Wilson*, 17 Pa. Super. Ct. 376 (1901).

bers was of little consequence. If, in his recapitulation of the testimony, the judge dwelt upon this incident at great length, he did not misquote the evidence, and it can not be said that the illustrations used are wholly inappropriate. The real gravamen of the complaint is, that they conveyed to the jury an argument in favor of the plaintiff. But if standing alone, there is some ground for this criticism, as this portion of the charge should have been more cautiously expressed, upon his attention having been directed to the matter, the judge in full and unexceptional language further instructed them that not only were they to recall the evidence from having heard the witnesses, and depend upon their own judgment as to its evidentiary value, but also that what he had said by way of comment was only[46] to make plain the issues, which were solely for their determination.

Exceptions overruled.[47]

FREDERICK H. HUDSON *v.* MINNEAPOLIS, LYNDALE AND MINNETONKA RAILWAY COMPANY.

SUPREME COURT OF MINNESOTA, 1890.

44 Minn. 52.

Appeal by plaintiff from an order of the District Court for Hennepin county, Lochren, J., presiding, refusing a new trial.

MITCHELL, J.: The ground upon which plaintiff moved for a new trial was an alleged irregularity in the proceedings of the court. The facts, as disclosed by affidavits presented by the respective parties, and the statement of the judge who presided at the trial, were as follows: After the jury had been charged, they retired in the care of an officer to one of the jury-rooms to deliberate on their verdict. Later in the afternoon, the judge, having completed the other work of the day, but without adjourning court, retired to his chambers in the same building. Although court had not adjourned, yet, there being no one in the courtroom where the trial had taken place, the officer in charge of the jury permitted them, in accordance with a common practice, to come out of the jury-room into

---

[46] *New York Firemen's Ins. Co.* v. *Walden*, 12 Johns. (N. Y.) 513, 7 Am. Dec. 340 (1815); *Tracy* v. *Swartwout*, 10 Pet. (U. S.) 80, 9 L. ed. 354 (1836); *Porter* v. *Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341 (1854); *Illinois Cent. R. Co.* v. *Davidson*, 76 Fed. 517, 22 C. C. A. 306 (1896).

[47] Accord: *Stewart* v. *Fuller*, 208 Mass. 359, 94 N. E. 680 (1911). The court may read to the jury from the statutes applicable to the case. *Sommer* v. *Carbon Hill Coal Co.*, 107 Fed. 230, 46 C. C. A. 255 (1901); *McNatt* v. *McRae*, 117 Ga. 898, 45 S. E. 248 (1902), or from decisions which state the law correctly and are applicable to the facts. *Lett* v. *Horner*, 5 Blackf. (Ind.) 296 (1840); *In re Spencer*, 96 Cal. 448 (1892); *Henry* v. *Klopfer*, 147 Pa. 178, 23 Atl. 337, 338 (1892), but not where the extract read is inapplicable or misleading. *Stucke* v. *Milwaukee & M. R. Co.*, 9 Wis. 202 (1859); *Talmadge* v. *Davenport*, 31 N. J. L. 561 (1864); *Dimes Sav. Inst.* v. *Allentown Bank*, 61 Pa. St. 391 (1869); *Stewart* v. *Hunter*, 16 Ore. 62, 16 Pac. 876, 8 Am. St. 267 (1888); *Lendberg* v. *Brotherton Iron Min. Co.*, 75 Mich. 48, 42 N. W. 675 (1889).

the courtroom, the latter being more commodious. After they had deliberated there some time, they notified the officer that they desired further instructions from the judge. The officer communicated this request to the judge, and also notified the clerk of the court, and then made diligent search throughout and around the court-house for the counsel and parties connected with the case, but was unable to find any of them, as they had all left. Thereupon the judge, accompanied by the clerk and the sheriff, entered the court-room; the jury in the meantime having taken their seats together in the jury-box as at the trial. The judge then resumed his seat upon the bench. The officer, in answer to the inquiry of the judge, stated to him that he had searched for the parties and their counsel, and could find none of them about the court-house; that none of them were in or about it. The clerk then called the list of the jurors, who responded to their names as called. The judge then asked them if they had agreed upon a verdict, to which they responded that they had not. The foreman, seconded by another juror, then asked the court a question respecting a matter of law relating to the case. The judge answered the question propounded, and then, together with all others except the jury, retired from the court-room. All this was done publicly, in the presence of the court officers, with the doors of the court-room open, in the day-time, in open session, and before any adjournment of the court for the day. It is also worthy of note, as indicating how little real merit there was in the plaintiff's motion for a new trial, that he does not claim that the instruction given was erroneous, nor does he anywhere state what it was, or excuse himself for not doing so by alleging that he does not know. We fail to see anything irregular, or even lacking in courtesy, in the conduct of the court.

Counsel for plaintiff attempt, rather disingenuously as we think, to use the fact that the jury had been let out into the courtroom so as to convey the impression that the judge entered the jury-room alone, and there held private communication with them respecting the cause. But the fact that the jury had been deliberating in the courtroom for a time, during the absence of others, is wholly immaterial. Under the facts stated, the instruction given by the judge to the jury was not a privy communication, but a communication in open court, and in the regular form of judicial proceedings.[48] Most

[48]It is improper for the judge to communicate with the jury except in open court after they have retired to deliberate upon their verdict. *Bunn* v. *Croul*, 10 Johns. (N. Y.) 239 (1813); *Cook* v. *Green*, 6 N. J. L. 109 (1822); *Benson* v. *Clark*, 1 Cow. (N. Y.) 258 (1823); *Sargent* v. *Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185 (1823); *Fish* v. *Smith*, 12 Ind. 563 (1859); *Sommer* v. *Huber*, 183 Pa. St. 162, 38 Atl. 595 (1897); *Hurst* v. *Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666 (1906); *State v. Murphy*, 17 N. Dak. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609 (1908) and note; *Du Cate* v. *Brighton*, 133 Wis. 628, 114 N. W. 103 (1907); *Berst* v. *Moxom*, 163 Mo. App. 123, 145 S. W. 857 (1912); *Mound City* v. *Mason*, 262 Ill. 392, 104 N. E. 685 (1914). Contra: *Shapley* v. *White*, 6 N. H. 172 (1833). In some cases appellate courts have refused to reverse where the irregularity was trifling and no prejudice shown. *Galloway* v. *Corbitt*, 52 Mich. 460, 18 N. W. 218 (1884); *Mosley* v. *Washburn*, 165 Mass. 417, 43 N. E. 182 (1896); *State* v. *Olds*, 106 Iowa 110, 76 N. W. 644 (1898); *People* v. *Pickert*, 26 Misc. 112, 56 N. Y. S. 1090 (1899).

of the cases cited by counsel refer to communications of the first kind, and hence are not in point. Even in the case of *Sargent* v. *Roberts*, 1 Pick. (Mass.) 337, which is a case of that kind, and lays down a very strict rule, it is added: "No communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the cause." The cases from Ohio involving communications in open court were mainly controlled by a statute of that state, which required that all instructions should be given and the verdict received "in the presence of, or after notice to, the parties or their counsel." But even there it was held no error to receive a verdict or to give instructions in the absence of the parties or their counsel, after they had been loudly called at the court-house door, or, pursuant to a previous understanding, had been notified by ringing the court-house bell. *Crusen* v. *State*, 10 Ohio St. 258; *Preston* v. *Bowers*, 13 Ohio St. 1. *Davis* v. *Fish*, 1 G. Greene (Iowa) 406, was evidently decided mainly upon the ground that the session of the court was held on Sunday, and without any notice to the parties; the court clearly intimating, however, that if the session had been on a business day, and within reasonable hours, some reasonable effort to secure the presence of the absent counsel or party, such as calling them at the door, would be sufficient.

The trial of a case is not concluded until a verdict has been rendered, or the jury has been discharged from the further consideration of the cause, and it is the duty of the counsel to remain in or be represented at the court during its sessions until the trial is ended. The power of the court to recall a jury and give them additional instructions has never been questioned, and counsel and parties can not, by absenting themselves from the court-room before the trial is ended, take away this power, or suspend the right to exercise it until they can be found and brought in. It is no part of the duty of the court to dispatch messengers to hunt up absent parties or counsel, and to suspend business until they return. A proper regard for the dispatch of public business in our courts forbids any such thing. It is customary to send for counsel when the jury come into court for further instructions, and to wait a reasonable time for them to return. It is eminently proper and very desirable that this should be done whenever it conveniently can be, for a court is, and always ought to be, unwilling to give any instructions, if it can be avoided, without affording counsel a full opportunity to suggest corrections or additions; and we have no desire to do anything that would in any way tend to a disregard of those usages and customary forms designed to insure a fair and impartial trial of causes in courts of justice. But the practice of sending for parties or counsel who have absented themselves before the end of the trial is a matter of courtesy, and not of right. *Wiggins* v. *Downer*, 67 How. Pr. (N. Y.) 65; *Cornish* v. *Graff*, 36 Hun. (N. Y.) 160; *Cooper* v. *Morris*, 48 N. J. L., 607; *Alexander* v. *Gardiner*, 14 R. I. 15; *Chapman* v. *Chicago and N. Y. Ry. Co.*, 26 Wis. 295; *Dauntley* v. *Hyde*, 6 Jur. 133. *Hoberg* v. *State*, 3 Minn. 181, 262, involved a case of a private com-

munication by the judge to the jury after they had retired to deliberate on their verdict. Moreover that was a prosecution for a felony, where a more strict rule is usually applied than in civil actions, or even prosecutions for misdemeanors, especially with reference to the personal presence of the accused during all the proceedings had at the trial.

In view of the result reached on the merits, we have not found it necessary to consider the question of practice as to whether proof of an irregularity of this kind can be made by affidavit, or whether the facts must be incorporated into a case or bill of exceptions. See, however, *People* v. *Kelly*, 94 N. Y. 526.

Order affirmed.[49]

SECTION 10. CUSTODY AND CONDUCT OF JURY.

BISHOP OF L. *v.* EARL OF KENT.

EXCHEQUER CHAMBER, 1499.

2 Brooke's Abridgement, 309 pl. 19.[50]

In the exchequer chamber the case was that at the *nisi prius* in the county of Bedford, upon issue between the Bishop of L. and the Earl of Kent, the jury was sworn at the bar, and when the evidence was being given to them, there came such a tempest of thunder

[49] "The court has a large discretion in the matter of giving additional instructions after the jury has retired for deliberation, and may supplement the original charge whenever confident that the ends of justice will be best subserved by doing so. * * * Only in case of abuse, resulting in injury to some substantial right, will an exercise of such discretion be reviewed." *Carter* v. *Becker*, 69 Kans. 524, 77 Pac. 264 (1904). Accord: *Bank of Kentucky* v. *McWilliams*, 2 J. J. Marsh. (Ky.) 256 (1829); *Lee* v. *Quirk*, 20 Ill. 392 (1858); *Sittig* v. *Birkestack*, 38 Md. 158 (1873); *Nichols* v. *Munsel*, 115 Mass. 567 (1874); *Cox* v. *Highley*, 100 Pa. St. 249 (1882); *People* v. *Perry*, 65 Cal. 568, 4 Pac. 572 (1884); *Breedlove* v. *Bundy*, 96 Ind. 319 (1884); *Phillips* v. *New York Cent. & H. R. R. Co.*, 127 N. Y. 657, 27 N. E. 978 (1891); *Allis* v. *United States*, 155 U. S. 117, 39 L. ed. 91, 15 Sup. Ct. 36 (1894); *Miller* v. *Royal Flint Glass Works*, 172 Pa. St. 70, 33 Atl. 350 (1895); *Rainger* v. *Boston Mut. Life Assn.*, 167 Mass. 109, 44 N. E. 1088 (1896); *Douglas* v. *Metropolitan St. R. Co.*, 119 App. Div. 203, 104 N. Y. S. 452 (1907); *Charlton* v. *Kelly*, 156 Fed. 433 (1907); *Traders & Truckers Bank* v. *Black*, 108 Va. 59, 60 S. E. 743 (1908); *Holland* v. *Sheehan*, 106 Minn. 545, 119 N. W. 217 (1909); *First Nat. Bank* v. *Hedgecock*, 87 Nebr. 220, 127 N. W. 171 (1910); *In re Darrow*, 175 Ind. 44, 92 N. E. 369 (1910); *Harrell* v. *Columbia Elec. St. R. &c. Co.*, 89 S. Car. 97, 71 S. E. 359 (1911); *Humphrey* v. *Monida &c. Stage Co.*, 115 Minn. 18, 131 N. W. 498 (1911); *Cheek* v. *Nicholson* (Tex. Civ. App.), 146 S. W. 594 (1912); *Ruck* v. *Milwaukee Brew. Co.*, 148 Wis. 222, 134 N. W. 914 (1912); *Gotoskey* v. *Grawunder* (Tex. Civ. App.), 158 S. W. 249 (1913); *Wiczakowski* v. *Milwaukee Elec. R. & Light Co.*, 157 Wis. 191, 147 N. W. 28 (1914); *Gay* v. *Gay*, 74 W. Va. 800, 83 S. E. 75 (1914). Contra: *Southern Pacific Co.* v. *Wilson*, 10 Ariz. 162, 85 Pac. 401 (1906) statute; *Randolph* v. *Govan*, 22 Miss. 9 (1850) semble.

[50] Translated. The abridged case is reported at length in Y. B. 14 Hen. VII, 29. The opinion of Keble, J., concurring with Woode, J., is reported in Y. B. 15 Hen. VII, 1. The substance of the case is given in the notes to *King* v. *Woolf*, 1 Chitty 401 (1819), and *Smith* v. *Thompson*, 1 Cow. (N. Y.) 221 (1823).

and rain that some of the jury departed without leave of the justices (it seems that they stood open in the street) and a juror came into a house where divers said to him that he take care what he did, for the matter was better for the Earl of Kent than for the bishop; and prayed him to drink with them, and so he did; and after the tempest ceased the jury came back, and no challenge taken to them,[51] and they were sent into an inn, and when they were agreed to give their verdict, the Earl of Kent showed this matter to the justices, who demanded it of the jury, who confessed it; and it was demanded if they were agreed in their verdict, who said yes; and found for the bishop. And the justices were in doubt if the verdict was good, wherefore they were adjourned. And per Woode, J., the juror shall make fine; but the verdict is good and not void. But Vavisor, J., contra; and that jurors are like prisoners till they have given their verdict; for the not giving of the evidence is not material, for if no evidence was given, yet they shall give their verdict for the one party or the other, and the earl has not surceased his time to show this matter, and at least he may show it *amicus curiae;* but Rede, J., contra; for the cause of the departure was lawful. For the law is the same if there comes a sudden affray, and the law is the same if the house be on the point of falling down. But they shall make fine for eating and drinking, for this is a contempt, but the verdict is good and not void; and where they have agreed on their verdict—and take food and drink after the agreement and before the verdict, that shall not render the verdict void. And here it is not void, for he who gave him drink did not entreat him for the Earl of Kent, and also the verdict is given against the Earl. Note the diversity; and Davers, J., accordingly, and that if a deed which accords with the issue and is not prejudicial to either party is put before the jurors in the house, that shall not render the verdict void, and if a party gives money to the jury which passes against him, still the verdict is good and contra if it passes for him, and agreed with Vavisor, that the party had not surceased his time, and also that he might show it as *amicus curiae;* and Tremaile, J., agreed with Rede *in omnibus.* And that where there are two triers in a house and one of them drinks, which was confessed, but not at the cost of any party, their verdict is good, but they shall be fined. And at this time Prisot, J., Hody, C. B., and Brian, J., contra, who held the taking of the meat and drink before that they were agreed shall make the verdict void, notwithstanding that it was not at the costs of any party; but Fineux, J., contra, and that the verdict is good, and that the juror shall make fine, and agreed with Rede *in omnibus;* and as to the surceasing of the time and *amicus curiae,* agreed with Vavisor, and *adjornatur.*

---

[51] When informed of misbehavior by the jury it is incumbent on counsel to move promptly in the matter and not sit silently by and speculate upon the result. *Cooper* v. *Carr,* 161 Mich. 405, 126 N. W. 468 (1910); *Brooks* v. *Camak,* 130 Ga. 213, 60 S. E. 456 (1907); *Western Roofing Co.* v. *South Park Baptist Church,* 137 Mo. App. 101, 119 S. W. 495 (1909); *Francis* v. *Philadelphia, &c., R. Co.,* 13 Mont. County L. Rep. (Pa.) 176 (1897); *McCorkle* v. *Binns,* 5 Binn. (Pa.) 340, 6 Am. Dec. 420 (1812).

And so the best opinion was that fine shall be made, and the verdict good and not void.[52]

WILSON *v.* ABRAHAMS.

SUPREME COURT OF NEW YORK, 1841.

1 *Hill's Reports* 207

The trial of this cause at the Albany circuit lasted nearly two days, and when the court adjourned for rest or refreshment in the progress of the trial, the jurors were allowed to separate. During the adjournment for dinner on the second day of the trial, one of the jurors went into a tavern near the city hall, and drank about half a gill of brandy. This was before the evidence had been closed. The jury afterwards rendered a verdict for the plaintiff for ten dollars damages, which being much less than he supposed himself entitled to recover, he now moved to set aside the verdict for the misbehavior of the juror. There was no allegation that the juror was intoxicated, or that the drinking was at the request or expense of either party, or rendered him less capable than he was before for the proper discharge of his duty.[53]

BRONSON, J.: In civil cases, when the court adjourns for refreshment in the progress of a trial, and before the cause is finally committed to the jury, it is now the usual course to allow the jurors to separate and return to their families or boarding houses for food and rest; and if one of them drinks a glass of spirituous liquor while so absent from court, I can not think it sufficient ground for setting aside the verdict, unless there is some reason to suppose that the juror drank to excess, or at the expense or on the invitation of one of the parties. I agree that it would be well that all men should abstain from the use of intoxicating drinks; but until that sentiment becomes nearly or quite universal, I think it should not be imposed as a law upon a juror in these cases where he is permitted for a night or an hour to go wheresoever he pleases without being attended by an officer. To adopt the language of Parke, J., in *Everett* v. *Youells*, (4 Barn. & Adol. 681), where food was secretly delivered to the foreman, after the jury had retired to consider their verdict, "it would be a fearful thing if verdicts could be set aside on such grounds as this." We might expect to see many verdicts overturned.[54]

---

[52] Co. Lit. 227; Y. B. 24 Edw. III 24; Y. B. 2 Hen. IV 21, 22; Y. B. 14 Hen. VII 1. A separation of the jurors when considering their verdict induced by a sudden alarm of fire in a building within less than one hundred and fifty feet of the jury room, is not, of itself, such misconduct as will vitiate the verdict. *Armleder* v. *Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530 (1877). As to criminal procedure see *Rex* v. *Ketteridge*, 112 Law Times 783 (1915).

[53] Part of the opinion of the court is omitted.

[54] At common law, if the jurors, before verdict, ate or drank at their own expense, they were subject to a fine, but the verdict was not void; if at the cost of a party to the suit the verdict would be set aside. *Anonymous*,

When in the course of the trial, a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drunk so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result.[55]

There is no pretence in this case, that the juror either drank to excess, or at the expense of the defendant, and we think the verdict should not be disturbed.

Motion denied.[56]

---

1 Dyer 37 (1538); *Trewennarde* v. *Skewys*, 1 Dyer 55 (1544); *Anonymous*, 1 Dyer 218 (1562); *Saunders* v. *Freeman*, 1 Plowd. 209 (1562); *Welcden* v. *Elkington*, 2 Plowd. 516 (1578); *Mounson* v. *West*, 1 Leon. 132 (1588); *Mounson* v. *West*, Goldsb. 93; *Harebottle* v. *Placock*, Cro. Jac. 21 (1603); *King* v. *Burdett*, 2 Salk. 645 (1697); *King* v. *Burdett*, 12 Mod. 111, 1 Ld. Raym. 148; *Everett* v. *Youells*, 4 B. & Ad. 681 (1833); *Morris* v. *Vivian*, 10 M. & W. 137 (1842). Compare *Cooksey* v. *Haynes*, 27 L. J., N. S., Exch. 371 (1858), where a jury covertly procured victuals and liquor, and the court ordered a new trial. And see *Hanrahan* v. *Ayres*, 10 Misc. 435, 31 N. Y. S. 458, 64 N. Y. St. 12 (1894).

[55] Compare *Rose* v. *Smith*, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331 (1825); *Repath* v. *Walker*, 13 Colo. 109, 21 Pac. 917 (1889); *Bernier* v. *Anderson*, 8 Idaho 675, 70 Pac. 1027 (1902); *Underwood* v. *Old Colony St. R. Co.*, 31 R. I. 253 (1910), with *McCausland* v. *McCausland*, 1 Yeates (Pa.) 372 (1794); *Richardson* v. *Jones*, 1 Nev. 405 (1865); *State* v. *Cucuel*, 31 N. J. L. 249 (1865); *Hanrahan* v. *Ayres*, 10 Misc. 435, 31 N. Y. S. 458, 64 N. Y. St. 12 (1894); *Hemmi* v. *Chicago G. W. R. Co.*, 102 Iowa 25, 70 N. W. 746 (1897); *Gorham* v. *Sioux City Stock Yards Co.*, 118 Iowa 749, 92 N. W. 698 (1902); *Blaine* v. *Chambers*, 1 Serg. & R. (Pa.) 169 (1814); *Long* v. *Davis*, 136 Iowa 734, 114 N. W. 197 (1907); *St. Louis Belt, &c., R. Co.* v. *Cartan R. E. Co.*, 204 Mo. 565, 103 S. W. 519 (1907); *Walsh* v. *Winston*, 18 Idaho 768, 111 Pac. 1090 (1910).

[56] It has generally been held that during the trial of a civil case and before final submission the court may, in its discretion, permit the jury to separate for rest and refreshments, first admonishing them not to talk about the case with others. *Noel* v. *Denman*, 76 Tex. 306, 13 S. W. 318 (1890); *San Antonio & A. P. R. Co.* v. *Bennett*, 76 Tex. 151, 13 S. W. 319 (1890); *Welch* v. *Welch*, 9 Rich. L. (S. Car.) 133 (1855); *Morrow* v. *Saline Co.*, 21 Kans. 484 (1879); *Stancell* v. *Kenan*, 33 Ga. 56 (1861); *Abel* v. *Hitt*, 30 Nev. 93, 93 Pac. 227 (1908); *Guardian Fire Ins. Co.* v. *Central Glass Co.*, 194 Fed. 851 (1912). And even after the submission of the case the separation of the jury, although irregular, will not warrant a reversal, if it appears that neither party was prejudiced thereby. *Brandin* v. *Grannis*, 1 Conn. 402n. (1814); *Crane* v. *Sayre*, 6 N. J. L. 110 (1822). Compare *Shepherd* v. *Baylor*, 5 N. J. L. 827 (1820); *Smith* v. *Thompson*, 1 Cow. (N. Y.) 221 (1823); *Wright* v. *Burchfield*, 3 Ohio 53 (1827); *Harter* v. *Seaman*, 3 Blackf. (Ind.) 27 (1832); *Pulaski* v. *Ward*, 2 Rich. L. (S. Car.) 119 (1845); *Riggins* v. *Brown*, 12 Ga. 271 (1852); *Downer* v. *Baxter*, 30 Vt. 467 (1857); *Evans* v. *Foss*, 49 N. H. 490 (1870); *Eich* v. *Taylor*, 20 Minn. 378 (1874); *Armleder* v. *Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530 (1877); *Carter* v. *Ford Plate Glass Co.*, 85 Ind. 180 (1882); *Watts* v. *South Bound R. Co.*, 60 S. Car. 67, 38 S. E. 240 (1900).

GULF, COLORADO AND SANTA FE RAILWAY COMPANY *v.* MATTHEWS ET AL.

COURT OF CIVIL APPEALS OF TEXAS, 1902.

28 Tex. Civ. App. 92.

TEMPLETON, J.: The defendants in error, who are the wife and minor children of J. L. Matthews, deceased, brought this suit to recover damages sustained by them on account of his death, which it was alleged was occasioned by the negligence of the plaintiff in error. On a trial before a jury they obtained judgment for $10,000.[57]

Pending the trial of this case in the district court, one of the jurors, who was afterwards selected as foreman of the jury, and J. W. Woolsey, whose mother was a sister of J. L. Matthews, met during a recess of the court. The juror set up the drinks to Woolsey. They then had dinner together, Woolsey paying therefor. After dinner the juror bought cigars for both. They had a private conversation on the streets, which lasted several minutes. Woolsey was looking after and managing the cause for Mrs. Matthews. He employed the attorneys for the plaintiffs and went to Fort Worth to look up testimony. He boarded at the same hotel with Mrs. Matthews during the trial. Woolsey and the said juror lived at Whitewright, where they were in business. They were intimate friends. They testified that the case was not mentioned; that their meeting was accidental and that their conversation was of a purely social nature. The juror bore a good reputation. These facts were shown on the hearing of defendant's motion for a new trial and were insisted upon as a reason why the motion should be granted. We are of opinion that the point was well made, and that the trial court erred in not sustaining the motion upon that ground.

The importance of guarding a jury engaged in the trial of a cause from improper influences is too well understood to require argument. While Woolsey was not a party to this suit and had no pecuniary interest in it, his connection with the case was such that it was manifest impropriety for a juror to exchange courtesies with him. The juror may have been entirely innocent of any wrong intention, and it is even possible that the eating, drinking, smoking, and social intercourse with the kinsman and manager of the plaintiffs did not affect his verdict. However, such conduct was reasonably calculated to do so, and may have done so without the juror knowing it. No matter how innocent the parties may have been, their conduct was improper, and it is impossible to say that injury to the defendant did not result from it. The only safe rule to adopt upon a question like this is to require of the jurors and interested parties such circumspection as will prevent all suspicion of improper influence. The jurors and parties should keep strictly aloof from each other pending the trial, and if they do not, but meet under circumstances from which injury to the other party may be reasonably apprehended, a verdict for the party engaging in intercourse with the juror can not

[57] Part of the opinion is omitted.

be sustained. Such a transaction is incapable of explanation. If parties were permitted to excuse improper conduct of this character on the ground that no wrong was intended and probably no injury was done, it would be impossible to draw the line anywhere short of absolute corruption. We are unwilling to lend encouragement to practices which, if tolerated, would undermine the purity and efficiency of our jury system.

The authorities bearing on this question are numerous and somewhat conflicting. In *Marshall* v. *Watson*, 10 Tex. Civ. App. 127, 40 S. W. 352, the authorities upon which our conclusion is based are collated and reviewed. We concur in the views there expressed, and have found no Texas case which announces a different rule.[88]

Reversed and remanded.

ALEXANDER *v.* JAMESON.

SUPREME COURT OF PENNSYLVANIA, 1812.

5 *Bin.* (*Pa.*) 238.[89]

TILGHMAN, C. J.: This was an issue directed by the orphans' court of Franklin county, to try who were the heirs of a certain John Alexander, deceased. The defendants gave in evidence a

[88]Accord: *Sloan* v. *Harrison*, 1 N. J. L. 123 (1792) (party talks to juror); *Knight* v. *Freeport*, 13 Mass. 218 (1816) (witness talks to juror); *Coster* v. *Merest*, 3 Br. & Bing. 272 (1822) (hand bills distributed reflecting on plaintiff); *Turner* v. *Beardsley*, 19 Wend. (N. Y.) 348 (1838); *Martin* v. *Morelock*, 32 Ill. 485 (1863) (attorney converses with jurors); *McDaniel* v. *McDaniels*, 40 Vt. 363, 94 Am. Dec. 408 (1867) (friends of party talk to jurors); *Erwin* v. *Bulla*, 29 Ind. 95, 92 Am. Dec. 341 (1867); *Keegan* v. *McCandless*, 7 Phila. (Pa.) 248 (1869) (party treats juror); *Hamilton* v. *Pease*, 38 Conn. 115 (1871); *Platt* v. *Threadgill*, 80 Fed. 192 (1897) (cigars for jurors); *Austin & McCargar* v. *Langlois*, 81 Vt. 223 (1908) (counsel plays cards with jurors); *Steenburgh* v. *McRorie*, 60 Misc. 510, 113 N. Y. S. 1118 (1908) (cigars for jurors); *Matter of Vanderbilt*, 127 App. Div. 408, 111 N. Y. S. 558 (1908) (extra pay for jurors); *State* v. *Reid*, 120 La. 200, 45 So. 103 (1907) (treating); *Craig* v. *Pierson Lumber Co.*, 169 Ala. 548, 53 So. 803 (1910) (treating); *Godfrey* v. *Dalquist*, 27 S. Dak. 373, 131 N. W. 209 (1911) (party and juror drink together); *Solomon* v. *Loud*, 173 Mich. 233, 140 N. W. 651 (1912) (paying a juror not in the case to watch the jurors); *Van Loon* v. *St. Joseph R., &c. Co.*, 174 Mo. App. 372, 160 S. W. 63 (1913); *Sandstrom* v. *Oregon, &c., R. Co.*, 69 Ore. 194, 136 Pac. 878, 45 L. R. A. (N. S.) 889 (1913) (treating); *In re Quinn's Estate*, 180 Mich. 502, 147 N. W. 566 (1914). Compare, where the irregularity was held insufficient to vitiate the verdict, *Barlowe* v. *State*, 2 Blackf. (Ind.) 114 (1827); *McIlvaine* v. *Wilkins*, 12 N. H. 474 (1841); *Koester* v. *Ottumwa*, 34 Iowa 41 (1871); *Borland* v. *Barrett*, 76 Va. 128, 44 Am. Rep. 152 (1882); *Vane* v. *Evanston*, 150 Ill. 616 (1894); *Pritchard* v. *Henderson*, 3 Pennew. (Del.) 128, 50 Atl. 217 (1901); *Feary* v. *Metropolitan St. R. Co.*, 162 Mo. 75, 62 S. W. 452 (1901); *Ayrhart* v. *Wilhelmy*, 135 Iowa 290, 112 N. W. 782 (1907); *Deighton* v. *Hover*, 58 Wash. 12, 107 Pac. 853 (1910); *Beach Front Hotel Co.* v. *Sooy*, 197 Fed. 881, 118 C. C. A. 579 (1912); *Lintz* v. *Denver City Tramway Co.*, 54 Colo. 371, 131 Pac. 258 (1913).

[89]The statement of facts, arguments of counsel and concurring opinions are omitted.

manuscript book found in the trunk of the said Alexander after his death. When the jury were about to retire, the counsel for the plaintiffs objected to their being permitted to carry this book out with them; but the court were of opinion that the jury should have it, to which opinion an exception was taken, on which we are now to decide. It is no longer a question whether the book was legal evidence, but the naked point is, whether, having been given in evidence, the court might permit the jury to take it out with them. It is undoubtedly laid down as a principle in some of the English cases that the jury are to take no papers not under seal without the consent of both parties;[60] yet the same cases say that if the court permit them to be taken, it shall be no cause for setting aside the verdict. We are somewhat in the dark as to the reason of this distinction between sealed and unsealed writings, but it is certain that it originated under circumstances not applicable to the present time. The best account of it is to be found in the writings of Lord Hale and Lord Gilbert.[61] They say that in ancient times, men of rank and property had seals by which their families were distinguished. Those were not numerous; and as causes were tried by men in the neighborhood, it was supposed that the seals were so notorious as to be well known to the jury. Papers under seal, therefore, carried their own evidence along with them; and indeed it is probable that in many instances it was thought sufficient to affix a seal without any subscribing witness, so that the instrument was authenticated by the seal alone. But the notoriety of seals has long ceased. Every man now takes what seal he pleases. They are no longer a family distinction, and so far has it been carried in this and some other states, that a flourish with the pen in the place of a seal has been held equivalent to a seal. It is to be observed, that although the rule is laid down as I have mentioned in the English books, yet it does not appear that the point has been brought before any court for the last half century, during which period the commerce of the world has been prodigiously enlarged, and commercial people make very little use of seals in their transactions. I have never known this question expressly decided in Pennsylvania; but I take it, that in practice, the English rule has not been extended here. It has been our custom to deliver to the jury all written papers except depositions taken under rule of court. These have been withheld, because it has been thought unequal, that while the jury were not permitted to call the witnesses before them who had been examined in court, they should take with them the depositions of other witnesses not examined in court.[62] After the uniform practice which has pre-

[60] Y. B. 11 Hen. IV, 17; Y. B. 34 Hen. VI, 25; *Vicary* v. *Farthing Co.*, Cro. Eliz. 411 (1595); *Graves* v. *Short*, Cro. Eliz. 616 (1599); *Olive* v. *Guin*, 2 Siderf. 145 (1658); *Lord Petre* v. *Heneage*, 12 Mod. 519 (1702); *Farmers' Bank* v. *Whinfield*, 24 Wend. (N. Y.) 419 (1840).

[61] Hale's Pleas of the Crown, 307; Gilbert on Evidence, 22; Co. Litt. 227b. See III Holdsworth's Hist. Eng. Law, 196, 324.

[62] Accord: *Negro Jerry* v. *Townsend*, 9 Md. 145 (1856); *Rawson* v. *Curtiss*, 19 Ill. 456 (1858); *Shomo* v. *Zeigler*, 10 Phila. (Pa.) 611, 31 Leg. Int. 205 (1874); *Cockrill* v. *Hall*, 76 Cal. 192, 18 Pac. 318 (1888); *Chamberlain* v. *Pybas*, 81 Tex. 511, 17 S. W. 50 (1891); *Graham* v. *Citizens' Bank*, 45

vailed in this state, I can not consent to the establishment of a rule which in many cases would produce confusion and injustice. I have witnessed the trial of many causes, particularly of the mercantile kind, in which the jury could not decide without the aid of unsealed papers; causes which required the minute and laborious investigation of a variety of books and papers, in which long calculations were necessary, founded on accounts and entries. To tell the jury that they must form their verdict on the recollection of what passed at the bar, would be imposing on them a most unreasonable duty. Under such circumstances, they could do no more than make a vague guess at the truth, and their verdict might be an abuse instead of a satisfactory administration of justice. I am of opinion therefore that the court of common pleas had a right to permit the jury to take out with them the book which had been given in evidence, and that the judgment should be affirmed.

Yeates, J., and Brackenridge, J., delivered concurring opinions.

Judgment affirmed.[63]

W. Va. 701, 32 S. E. 245 (1898); *L. H. & St. L. R. Co.* v. *Morgan*, 110 Ky. 740 (1901); *Standard S. Co.* v. *McMullen*, 100 Ill. App. 82 (1901); *Wintermute* v. *Furniture Co.*, 53 Wash. 539 (1909). Contra: *Wakeman* v. *Marquand*, 5 Martin (La.) (N. S.) 265 (1826); *Hopkinson* v. *Steel*, 12 Vt. 582 (1840); *Stites* v. *McKibben*, 2 Ohio St. 588 (1853); *Howland* v. *Willets*, 9 N. Y. 170 (1853); *Hansborough* v. *Stinnett*, 25 Grat. (Va.) 495 (1874). Matter rests in discretion of judge. *Whitehead* v. *Keyes*, 85 Mass. 495 (1862); *Krauss* v. *Cope*, 180 Mass. 22, 61 N. E. 220 (1901); *Koosa* v. *Warten*, 158 Ala. 496, 48 So. 544 (1909).

[63] Accord: The papers to be taken out resting in the court's discretion, *O'Hara* v. *Richardson*, 46 Pa. St. 385 (1863); *Porter* v. *Mount*, 45 Barb. (N. Y.) 422 (1865); *Clark* v. *Phoenix Ins. Co.*, 36 Cal. 168 (1868). See Cal. Code Civ. Proc. (1915), § 612; *Collins* v. *Frost*, 54 Ind. 242 (1876); *Tabor* v. *Judd*, 62 N. H. 288 (1882); *Hickman* v. *Ford*, 43 Ark. 207 (1884); *Barker* v. *Perry*, 67 Iowa 146, 25 N. W. 100 (1885); *Kittaning I. Co.* v. *O'Neil*, 110 Pa. St. 548, 1 Atl. 592 (1885); *Mooney* v. *Hough*, 34 Ala. 80, 4 So. 19 (1887); *Tubbs* v. *Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. 296 (1891); *Chicago & J. E. R. Co.* v. *Spence*, 213 Ill. 220, 72 N. E. 796, 104 Am. St. 213 (1904); *Raynolds* v. *Vinier*, 125 App. Div. 18, 109 N. Y. S. 293 (1908); *Phillips* v. *Chase*, 201 Mass. 444, 87 N. E. 755 (1909); *Johnson* v. *Fairbank Co.*, 156 Ill. App. 381 (1910). Contra: Unless by consent. *Lotz* v. *Briggs*, 50 Ind. 346 (1875); *Williams* v. *Thomas*, 78 N. Car. 47 (1878); *Moore* v. *McDonald*, 68 Md. 321, 12 Atl. 117 (1887); *Watson* v. *Watson*, 137 Ky. 25, 121 S. W. 626 (1910). Notes of testimony should not be given to the jury. *Commonwealth* v. *Ware*, 137 Pa. St. 465 (1890); *Crisman* v. *McMurray*, 107 Tenn. 469, 64 S. W. 711 (1901). Nor documents not in evidence. *Whitney* v. *Whitman*, 5 Mass. 405 (1809); *Alger* v. *Thompson*, 83 Mass. 453 (1861); *Schappner* v. *Second Ave. R. Co.*, 55 Barb. (N. Y.) 497 (1870); *Beeks* v. *Odom*, 70 Tex. 183, 7 S. W. 702 (1888); *Rich* v. *Hayes*, 97 Maine 293, 54 Atl. 724 (1903). But if a document not in evidence is sent to the jury by mistake and has no influence on the verdict, a new trial will not be granted. *Winslow* v. *Campbell*, 46 Vt. 746 (1874); *Hix* v. *Drury*, 5 Pick. (Mass.) 296 (1827). It is most irregular for the jury to take documents out with them, without the court's consent. *Heylor* v. *Hall*, Palm. 325 (1623); *Goodman* v. *Cotherington*, Siderf. 235 (1665); *Rex* v. *Burdett*, 1 Ld. Raym. 148 (1698); *Sheaff* v. *Gray*, 2 Yeates (Pa.) 273 (1798); *Lott* v. *Macon*, 2 Strob. (S. Car.) 178 (1847), but the verdict may be allowed to stand if not influenced by the papers improperly examined. *Bersch* v. *State*, 13 Ind. 434, 74 Am. Dec. 263 (1859); *Sanderson* v. *Bowen*, 4 Thomp. & C. (N. Y.) 675 (1874); *Wilkins* v. *Maddery*, 67 Ga. 766 (1881).

ISAAC BRUNSON v. WILLIAM GRAHAM.

SUPREME COURT OF PENNSYLVANIA, 1796.

2 Yeates (Pa.) 166.

Case for nonperformance of a contract respecting the transfer of funded stock of the United States. The cause was tried at the sittings in Philadelphia, on the nineteenth of September last, and a verdict for the plaintiff.

A rule was made to show cause why the verdict should not be set aside and a new trial granted, which rule was now made absolute by consent and without argument. It was admitted that the jury retired from the bar and conferred together for some time without coming to a decision, and then broke up late at night. Next morning one of the jurors applied to a broker for information respecting the price of certificates at a particular period, and having obtained the intelligence he wanted, communicated the same to his fellow-jurors. *Metcalfe* v. *Deane,* Cro. Eliz. 189.

Venire facias de novo awarded.[64]

FALLS CITY *v.* BENNET SPERRY.

SUPREME COURT OF NEBRASKA, 1903.

68 *Nebr.* 420.[65]

LOBINGIER, C.: Defendant in error obtained a judgment against Falls City for damages alleged to have resulted from a change in the grade of the street in front of the former's premises. In support of its motion for a new trial the city filed the affidavits of several of

[64] "Jurors are sworn to try the cause according to the law and the evidence. That is not evidence to which the juror listens out of court, when there is no opportunity to meet it, and no chance for cross-examination." *Nesmith* v. *Clinton F. I. Co.,* 8 Abb. Pr. (N. Y.) 141 (1859); *Bow* v. *Parsons,* 1 Root (Conn.) 429 (1792); *Robinson* v. *Donehoo,* 97 Ga. 702, 25 S. E. 491 (1895). But a new trial will not be granted where it is made to appear that the juror's communication with a third person related purely to his private affairs. *Saltzman* v. *Sunset Tel. Co.,* 125 Cal. 501, 58 Pac. 169 (1899). Jurors should decide cases upon such evidence as is produced before them by the parties to the litigation, and not go in search of evidence privately, or act upon evidence so obtained. *Metcalfe* v. *Deane,* Cro. Eliz. 189 (1590); *Bowler* v. *Washington,* 62 Maine 305 (1873); *Winslow* v. *Morrill,* 68 Maine 362 (1878); *Harrington* v. *Worcester L. & S. St. R. Co.,* 157 Mass. 579, 32 N. E. 955 (1893); *Pierce* v. *Brennan,* 88 Minn. 50, 92 N. W. 507 (1901); *Buffalo Structural Co.* v. *Dickinson,* 98 App. Div. 355, 90 N. Y. S. 268 (1904); *Floody* v. *Great Northern R. Co.,* 102 Minn. 81, 112 N. W. 875, 1081 (1907); *Bowler* v. *Washington,* 62 Maine 302 (1873); *Stampofski* v. *Steffens,* 79 Ill. 303 (1875); *Helme* v. *Kingston,* 8 Kulp (Pa.) 221 (1896); *Deacon* v. *Shreve,* 22 N. J. L. 176 (1849); *Flanders* v. *Mullin,* 73 Vt. 276, 50 Atl. 1055 (1901); *Wooldridge* v. *White,* 105 Ky. 247, 48 S. W. 1081 (1899); *Consolidated Ice Mach. Co.* v. *Trenton Hygiene Ice Co.,* 57 Fed. 898 (1893); *Ironton Lumber Co.* v. *Wagner,* (Ky.) 119 S. W. 197 (1909); *Johnson* v. *Riter-Conley Mfg. Co.,* 149 App. Div. 543, 133 N. Y. S. 1004 (1912).

[65] Part of the opinion of the court is omitted.

the jurors, to the effect "that Joseph McCormick was one of the jurors on said case and that Joseph McCormick stated in the jury room before the members of the jury when said cause was under consideration, that he (McCormick) was well acquainted with the premises in question, that he had observed the street and premises of Bennet Sperry before the grading in question and that he knew from his own observation before and after the grading complained of in plaintiff's petition how the water took its course before said grading, along said street in front of plaintiff's premises." Affidavits of several outsiders were filed, stating that the same juror had said to them "that he (McCormick) had arrived at his verdict, or the amount Sperry was damaged by the grading in question, partly from his own knowledge of the premises gained from his observation of the street and premises in question before and after the grading complained of in plaintiff's petition." Plaintiff in error's attorneys also presented affidavits, one of which set forth that affiant "did not know that said Joseph McCormick personally knew anything about the premises at the time of the trial and the knowledge came to me after the verdict had been rendered in said case; that said Joseph McCormick upon his *voir dire* examination before being sworn to try said case stated that he knew nothing concerning the case nor the merits thereof and that he had no knowledge of the facts in the case."

There was no counter showing, and these affidavits were incorporated in a separate bill of exceptions which was served within the forty days after the overruling of the motion. The affidavits are admissible because their purpose is "to prove matters occurring during the trial or in the jury room which do not essentially inhere in the verdict itself." *Johnson* v. *Parrotte*, 34 Nebr. 26, 30; *Harris* v. *State*, 24 Nebr. 803; *Savary* v. *State*, 62 Nebr. 166, 179. Whether the facts therein recited were sufficient, therefore, to entitle plaintiff in error to a new trial, is one of the questions presented by this proceeding.

There was a time in the history of the law when a verdict arrived at by the method here complained of would have been proper. The primitive English jury, while not, as is sometimes loosely said, a mere body of witnesses, was permitted to and did base its verdict chiefly upon the prior personal knowledge of its members. 6 Encyc. Pl. & Pr. 668 et seq., where the authorities, legal and lay, are collected.

This rule was continued in force longer than it otherwise would have been, by the fact that jurors were liable to the penalties of attaint for a false verdict. 3 Blackstone's Commentaries, p. 374. And it was retained in *qui tam* actions until well into the eighteenth century. *Mattison* v. *Allanson*, 2 Strange 1238. But with the supplanting of the practice of attaint by that of new trials it came to be the rule that a juror could not use his personal knowledge of the subject matter of the controversy unless he was sworn and gave it to his fellow-jurors like any other witness. *Bennet and the Hundred of Hartford*, Style 233 (1650); *Rex* v. *Rosser*, 7 Car. & P. 648;

Manley v. *Shaw*, Car. & Mar. 361; *State* v. *Powell*, 7 N. J. L. *244; *Anschicks* v. *State*, 6 Tex. App. 524, 539. This did not necessarily prevent him from still acting as a juror (*Howser* v. *Commonwealth*, 51 Pa. St. 332, 336; *Dunbar* v. *Parks*, 2 Tyl. (Vt.) 217; 1 Wharton, Evidence, sec. 602), but it did preclude him from communicating simply as a juror, matters within his own knowledge.

The modern jury must arrive at its verdict from evidence regularly produced in the course of the trial proceedings. That evidence may be no different from such as might be acquired by the jurors unofficially, but still the latter could not be considered. Thus, the jury under the proper supervision may view the premises in controversy, and in this state such view may afford a proper basis for their verdict. *Chicago, R. I. and P. R.* v. *Farwell*, 60 Nebr. 322. But if one or more the jurors should visit unofficially the same locality during the progress of the trial and reach a conclusion as a result of such inspection, the verdict would be vitiated. *Winslow* v. *Morrill*, 68 Maine 362; *Bowler* v. *Washington*, 62 Maine 302; *Eastwood* v. *People*, 3 Parker Crim. Rep. (N. Y.) 25; *Flanderst* v. *Mullin*, 73 Vt. 276; *Consolidated Ice-Machine Co.* v. *Trenton Hygeian Ice Co.*, 57 Fed. 898. There would seem to be no difference in principle between a juror's using knowledge irregularly acquired during that trial and relying on that acquired prior thereto.

On the principle above stated, jurors are not allowed to make private experiments or investigations for the purpose of determining essential controverted points. *People* v. *Conkling*, 111 Cal. 616, 627; *Wilson* v. *United States*, 116 Fed. 484, 486.[66] In short they are not permitted to consider any fact not brought before them in the regular way. *Heffron* v. *Gallupe*, 55 Maine 563, 568; *Thompson* v. *Mallet*, 2 Bay (S. Car.) 94, and if one of their number, at any time before an agreement is reached, makes a statement to his fellow-jurors based upon his prior knowledge and having a material bearing on the subject of their deliberations, the verdict is vitiated thereby. *Sam* v. *State*, 1 Swan. (Tenn.) 60; *Ryan* v. *State*, 97 Tenn. 206; *Citizens' St. R. Co.* v. *Burke*, 98 Tenn. 650, 652; *Forsyth* v. *Central Mfg. Co.*, 103 Tenn. 497, 498; *Anschicks* v. *State*, 6 Tex. App. 524, 537. A juror is entitled, of course, to use his general knowledge and experience on a subject for the purpose of testing the credibility of the witnesses, as on a question of value. *Rex* v. *Rosser*, 7 Car. & P. 648; *Patterson* v. *City of Boston*, 20 Pick. (Mass.) 159. But if he have knowledge of any specific matter in controversy, it is his duty to so inform the court, and have it placed before his fellow-jurors, if at all, according to the established rules of trial evidence.

With a distinct and undisputed showing that this juror not only had the prior knowledge and based his own conclusions partly thereon, but that he used it to influence his fellow-jurors in arriving

[66] Accord: *Jim* v. *State*, 4 Humph. (Tenn.) 289 (1843); *Yates* v. *People*, 38 Ill. 527 (1865); *Higgins* v. *Los Angeles Gas & Electric Co.*, 159 Cal. 651, 115 Pac. 313 (1911).

at their verdict, we are unable to see how it can be permitted to stand.

Reversed and remanded.[66a]

FRY *v.* HORDY.

COURT OF KING'S BENCH, 1677.

T. Jones 83[67]

On a verdict for the plaintiff it was moved by Levins for the defendant to have a new trial, because upon an affidavit urged by him, made by the bailiff who attended the jury, the court was in-

[66a] Accord: *Wright* v. *Crump*, 7 Mod. 1 (1702); *Bradley* v. *Bradley*, 4 Dall. (Pa.) 112, 1 L. ed. 763 (1792); *Gregory* v. *Baugh*, 4 Rand. (Va.) 611 (1827); *Ottawa Gas Light Co.* v. *Graham*, 28 Ill. 73, 81 Am. Dec. 263 (1862); *Head* v. *Hargrave*, 105 U. S. 45, 26 L. ed. 1028 (1881); *Douglass* v. *Trask*, 77 Maine 35 (1885); *Griffin* v. *Harriman*, 74 Iowa 436, 38 N. W. 139 (1888); *Atchison, &c., R. Co.* v. *Bayes*, 42 Kans. 609, 22 Pac. 741 (1889); *Forsyth* v. *Central M. Co.*, 103 Tenn. 497, 53 S. W. 731 (1899); *Street R. & T. Co.* v. *Simmons*, 107 Tenn. 392, 64 S. W. 705 (1901); *De Gray* v. *N. Y. & N. J. T. Co.*, 68 N. J. L. 454, 53 Atl. 200 (1902). But, as laid down in *Patterson* v. *Boston*, 20 Pick. (Mass.) 159 (1838), jurors in arriving at a verdict may make use of the general knowledge and experience which they have in common with other men. *Schmidt* v. *Insurance Co.*, 67 Mass. 529 (1854); *State* v. *Railroad Co.*, 86 Maine 309 (1894); *Lillibridge* v. *McCann*, 117 Mich. 84, 75 N. W. 288 (1898); *Purcell* v. *Tibbles*, 101 Iowa 24, 69 N. W. 1120 (1897); *McGarrahan* v. *N. Y., N. H. & H. R. Co.*, 171 Mass. 211, 50 N. E. 610 (1898); *Karner* v. *Kansas City El. R. Co.*, 82 Kans. 842 (1910).

Where in the course of the trial the jury are permitted to view the premises involved, it has been held in some jurisdictions that the purpose of the view is to enable the jury to better understand and apply the testimony given in court, and that the jurors may not base their verdict upon the examination itself. *Close* v. *Samm*, 27 Iowa 503 (1869); *Wright* v. *Carpenter*, 49 Cal. 607 (1875); *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 59 Ind. 100 (1877); *Machader* v. *Williams*, 54 Ohio St. 344, 43 N. E. 324 (1896); *Hoffman* v. *Bloomsburg & S. R. Co.*, 143 Pa. St. 503, 22 Atl. 823 (1891); *Dady* v. *Condit*, 188 Ill. 234, 58 N. E. 900 (1900); *Northwestern Mut. Life Ins. Co.* v. *Sun Ins. Co.*, 85 Minn. 65, 88 N. W. 272 (1901). The better rule, however, would seem to be that what is observed by the jury upon view is evidence, to be considered in connection with the verbal testimony in arriving at a verdict. *Fitzgerald* v. *La Porte*, 67 Ark. 263, 54 S. W. 342 (1899); *Chicago, &c., R. Co.* v. *Parsons*, 51 Kans. 408 (1893); *Shano* v. *Fifth Avenue Bridge Co.*, 189 Pa. St. 245, 42 Atl. 128 (1899); *Groundwater* v. *Washington*, 92 Wis. 56, 65 N. W. 871 (1896); *Chicago, R. I. & P. R. Co.* v. *Farwell*, 60 Nebr. 322, 83 N. W. 71 (1900); *Norcross* v. *Vose*, 199 Mass. 81, 85 N. E. 468 (1908); *Tacoma* v. *Hansen*, 59 Wash. 594, 110 Pac. 426 (1910). In *People* v. *Milner*, 122 Cal. 171, 54 Pac. 833 (1898) it was said: "If it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the courtroom, offer and have it received in evidence, and submit it to the inspection of the jury. It would not for a moment be doubted, if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way?" See also II Wigmore on Evidence, § 1168.

[67] *Foy* v. *Harder*, 3 Keb. 805; *Foster* v. *Hawden*, 2 Lev. 205.

formed, that the jury being a long time in debate on their verdict, it was at length agreed amongst them that they would try the matter by the event of the falling of a sixpence, if pile for the plaintiff, if cross for the defendant; and the chance being for the plaintiff, they unanimously gave their verdict for him, and (as was said) against the direction of the judge who tried the cause: but that matter was not regarded, for no certificate of the judge was produced. But for the ill behavior of the jury, who put their consciences in the power of chance, a rule was given that the verdict should be quashed, and the jurors being of the county of Northumberland should attend the court the next term, unless cause this term shown.[68]

WILLIAM S. PARHAM *v.* THOMAS HARNEY.

HIGH COURT OF ERRORS AND APPEALS OF MISSISSIPPI, 1846.

14 *Miss.* 55.

In error from the Circuit Court of Hinds county. Action by Thomas Harney against William S. Parham for assault and battery. On the trial there was a verdict for plaintiff for $3,602.50. A new trial was refused and the defendant appealed.[69]

CLAYTON, J.: The principal ground of error assigned in this cause is the misconduct of the jury upon the trial in the court below. Without consultation or deliberation about their verdict, they agreed, immediately upon entering their room, that each should put down a sum which should be divided by twelve, and that the result should give the amount of damages to be found by their verdict. This rule was adopted and acted on. The several amounts put down by the jurors ranged from thirty dollars to ten thousand dollars. This mode of making up a verdict has been repeatedly condemned by the courts of the country.[70] It substitutes the fluctuating and uncertain hazards of a lottery for the deliberate conclusions of their reflections and interchange of views.

This misconduct was established by the testimony of three witnesses, who were not of the jury; deputy sheriffs who saw the proceeding, and the tickets upon which the figures were written, placed in a hat and drawn out to form the basis of their finding. Such a course can not meet with judicial sanction.

The judgment will be reversed and a new trial awarded.[71]

---

[68] Accord: *Rex* v. *Fitzwalter*, 3 Keb. 555 (1676); *Rex* v. *Fitzwalter*, 2 Lev. 139; *Hale* v. *Cove*, 1 Stra. 642 (1726); *Philips* v. *Fowler*, Comyns 525 (1736); *Aylett* v. *Jewel*, 2 W. Bl. 1299 (1779); *Vaise* v. *Delaval*, 1 D. & E. 11 (1785); *Levy* v. *Brannan*, 39 Cal. 485 (1870); *Merseve* v. *Shine*, 37 Iowa 253 (1873); *Obear* v. *Gray*, 68 Ga. 182 (1881); *Wright* v. *Abbott*, 160 Mass. 395, 36 N. E. 62 (1894).

[69] The statement of facts is abridged.

[70] *Mitchell* v. *Ehle*, 10 Wend. (N. Y.) 595 (1833); *Elledge* v. *Todd*, 1 Humph. (Tenn.) 43, 34 Am. Dec. 616 (1839); *Roberts* v. *Failis*, 1 Cow. (N. Y.) 238 (1823); *Harvey* v. *Rickett*, 15 Johns. (N. Y.) 87 (1818).

[71] Accord: *Warner* v. *Robinson*, 1 Root (Conn.) 194, 1 Am. Dec. 38 (1790); *St. Martin* v. *Desnoyer*, 1 Minn. 156, 61 Am. Dec. 494 (1854);

McDONALD AND UNITED STATES FIDELITY AND GUARANTY CO. *v.* PLESS.

SUPREME COURT OF THE UNITED STATES, 1915.

238 U. S. 264.

LAMAR, J.: Pless & Winbourne, attorneys at law, brought suit in the Superior Court of McDowell County, North Carolina, against McDonald to recover $4,000 alleged to be due them for legal services. The case was removed to the then Circuit Court of the United States for the Western District of North Carolina. There was a trial in which the jury returned a verdict for $2,916 in favor of Pless & Winbourne. The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of those amounts should be divided by twelve and that the quotient should be the verdict to be returned to the court. To this all assented.

The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $500 to $4,000, and three put down $5,000. A part of the jury objected to using $5,000 as one of the factors inasmuch as the plaintiffs were only suing for $4,000. But the three insisted that they had as much right to name a sum above $4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by twelve. But by reason of including the three items of $5,000 the quotient was so much larger than has been expected that much dissatisfaction with the result was expressed by some of the jury. Others, however, insisted on standing by the bargain, and the

---

Birchard v. *Booth*, 4 Wis. 67 (1856); *Forbes* v. *Howard*, 4 R. I. 364 (1856); *Boynton* v. *Trumbull*, 45 N. H. 408 (1864); *Sharp* v. *Kansas City Cable R. Co.*, 114 Mo. 94, 20 S. W. 93 (1892); *Dixon* v. *Pluns*, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. 180 (1893); *Long* v. *Collins*, 12 S. Dak. 621, 82 N. W. 95 (1900); *Ottawa* v. *Gilliland*, 63 Kans. 165, 65 Pac. 252, 88 Am. St. 232 (1901); *Birmingham R., &c., Co.* v. *Clemons*, 142 Ala. 160, 37 So. 925 (1904); *Williams* v. *Dean*, 134 Iowa 216, 111 N. W. 931 (1907); *International Agr. Corp.* v. *Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A. (N. S.) 415 (1913). Contra: *Cowperthwaite* v. *Jones*, 2 Dall. (Pa.) 55, 1 L. ed. 287 (1790); *Cleland* v. *Carlisle*, 186 Pa. St. 110, 40 Atl. 288 (1898), and see *Bell* v. *Butler*, 34 Wash. 131, 75 Pac. 130 (1904). The impropriety consists in the *agreement* in advance to be *bound* by the result. There is no impropriety in taking a ballot to arrive at an average, not to control the minds of the jury or forestall their ultimate conclusion, but merely as a basis from which to work in an effort to reach a verdict. *Dorr* v. *Fenno*, 29 Mass. 520 (1832); *White* v. *White*, 5 Rawle (Pa.) 61 (1835); *Kennedy* v. *Kennedy*, 18 N. J. L. 450 (1842); *Dodge* v. *Carroll*, 59 N. H. 237 (1879); *Luft* v. *Lingane*, 17 R. I. 420, 22 Atl. 942 (1891); *McDonnell* v. *Pescadero, &c., Stage Co.*, 120 Cal. 476, 52 Pac. 725 (1898); *Groves & S. R. R. Co.* v. *Herman*, 206 Ill. 34, 69 N. E. 36 (1903); *McElhone* v. *Wilkinson*, 121 Iowa 429, 96 N. W. 868 (1903); *Hagan* v. *Gibson Min. Co.*, 131 Mo. App. 386, 111 S. W. 608 (1908); *Rambo* v. *Empire Dist. Elec. Co.*, 90 Kans. 390, 133 Pac. 553 (1913); *Loy* v. *Northern Pac. R. Co.*, 77 Wash. 25, 137 Pac. 446 (1913); *Pushcart* v. *New York Shipbuilding Co.*, 85 N. J. L. 525, 89 Atl. 980 (1914).

protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

The defendant further alleged in his motion that the jurors refused to file an affidavit, but stated that they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. The ruling was affirmed by the Court of Appeals. 206 Fed. 263. The case was then brought here by writ of error.[72]

Though Rev. Stat., par. 914, does not make North Carolina decisions controlling in the federal court held in that state, we recognize the same public policy which has been declared by that court, by those in England and most of the American states. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror can not impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received though always with great caution. In that year Lord Mansfield, in *Vaise* v. *Delaval*, 1 T. R. 11, refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost

---

[72] A portion of the opinion holding that the federal court was not controlled by the North Carolina decisions is omitted.

universally followed in England and in this country. Subsequently, by statute in some states, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislation generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors." "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." *Cluggage* v. *Swan*, 4 Binn. (Pa.) 155; *Straker* v. *Graham*, 4 M. & W. 721.

There are only three instances in which the subject has been before this court. In *United States* v. *Reid*, 12 How. (U. S.) 361, 366, the question, though raised, was not decided because not necessary for the determination of the case. In *Clyde Mattox* v. *United States*, 146 U. S. 140, 148, such evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party can not, in order to secure a new trial, use the testimony of jurors to impeach their verdict. The principle was recognized and applied in *Hyde* v. *United States*, 225 U. S. 347, which, notwithstanding an alleged difference in the facts, is applicable here.[73]

---

[73]Accord: *Price* v. *Warren*, 1 H. & M. (Va.) 385 (1807); *Dana* v. *Tucker*, 4 Johns. (N. Y.) 487 (1809); *Cluggage* v. *Swan*, 4 Binn. (Pa.) 150, 5 Am. Dec. 400 (1811); *Hindle* v. *Birch*, 8 Taunt. 26 (1817); *Straker* v. *Graham*, 4 M. & W. 721 (1839); *Cain* v. *Cain*, 1 B. Mon. (Ky.) 213 (1841); *Burgess* v. *Langley*, 5 Man. & G. 721 (1843); *Clum* v. *Smith*, 5 Hill (N. Y.) 560 (1843); *Cook* v. *Castner*, 63 Mass. 266 (1852); *Smith* v. *Culbertson*, 9 Rich L. (S. Car.) 106 (1855); *Pleasants* v. *Heard*, 15 Ark. 403 (1855); *Hester* v. *State*, 17 Ga. 130 (1855); *Green* v. *Bliss*, 12 How. Pr. (N. Y.) 428 (1856); *Tucker* v. *South Kingston*, 5 R. I. 558 (1859); *McCray* v. *Stewart*, 16 Ind. 377 (1861); *Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372 (1896); *Purcell* v. *Southern R. Co.*, 119 N. Car. 728, 26 S. E. 161 (1896); *Stull* v. *Stull*, 197 Pa. 243, 47 Atl. 240 (1900); *Eversole* v. *White*, 112 Ky. 193, 65 S. W. 442, 23 Ky. L. 1435 (1901); *Chicago* v. *Saldman*, 225 Ill. 625, 80 N. E. 349 (1907); *Soens* v. *Chicago, &c., Coal Co.*, 160 Ill. App. 467 (1911); *Redfern* v. *Thompson*, 10 Ga. App. 550, 73 S. E. 949 (1911); *Pullman Co.* v. *Finley*, 20 Wyo. 456, 125 Pac. 380 (1912); *Blodgett* v. *Park*, 76 N. H. 435, 84 Atl. 42 (1912); *Romans* v. *McGinnis*, 156 Ky. 205, 160 S. W. 928 (1913); *Baxter* v. *Beckwith*, 25 Colo. App 322, 137 Pac. 901 (1914); *Glockner* v. *Jacobs*, 40 Okla. 641, 140 Pac. 142 (1914); *Hurlburt* v. *Leachman*, 126 Minn. 180, 148 N. W. 51 (1914). Contra: *Crawford* v. *State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceeding brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Judgment affirmed.

ROBERTS *v.* HUGHES.

COURT OF EXCHEQUER, 1841.

7 M. & W. 399.

This was an action tried before the under-sheriff of Merionethshire, in which the plaintiff had a verdict for 15*l* 6s. Jervis had obtained a rule *nisi* to enter a verdict for the defendant, or for a new trial, on the ground that the verdict had been entered for the plaintiff by a mistake of the under-sheriff.

R. F. Richards, in showing cause, proposed to read an affidavit of one of the jurors, as to what had passed on the delivery of their verdict. Jervis objected.

PER CURIAM. The rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room, or the grounds on which they found their verdict.

The affidavit was accordingly read and ultimately the rule was made absolute for a new trial.[74]

(1821); *Wright* v. *Illinois & M. Tel. Co.*, 20 Iowa 195 (1866); *Perry* v. *Bailey*, 12 Kans. 539 (1874). The majority view is severely criticized in 4 Wigmore on Evidence, § 2346 et seq. For statutory modifications see 2 Thompson on Trials (2 ed.), § 2627. Affidavits of jurors may be received in support of their verdict. *Dana* v. *Tucker*, 4 Johns. (N. Y.) 487 (1809); *Hix* v. *Drury*, 5 Pick. (Mass.) 296 (1827); *Smith* v. *Eames*, 4 Ill. 76 (1841); *Hutchinson* v. *Consumers Coal Co.*, 36 N. J. L. 24 (1872); *Davis* v. *Huber Mfg. Co.*, 119 Iowa 56, 93 N. W. 78 (1903); *Birmingham, &c., Co.* v. *Clemmons*, 142 Ala. 160, 37 So. 925 (1904); *McGlone* v. *Hauger*, 56 Ind. App. 243, 104 N. E. 116 (1914).

"Accord: *Cogan* v. *Ebden*, 1 Burr. 383 (1757); *Jackson* v. *Dickenson*, 15 Johns. (N. Y.) 309 (1818); *Prussel* v. *Knowles*, 4 How. (Miss.) 90 (1839); *Dalrymple* v. *Williams*, 63 N. Y. 361, 20 Am. Rep. 544 (1875); *Dayton* v. *Church*, 7 Abb. N. Cas. (N. Y.) 367 (1879); *Burlinghame* v. *Central R. of Minn.*, 23 Fed. 706 (1885); *Mattox* v. *United States*, 146 U. S. 149, 36 L. ed. 921 (1892); *Wertz* v. *Cincinnati, H. & D. R. Co.*, 11 Ohio Dec. 872 (1893); *Peters* v. *Fogarty*, 55 N. J. L. 386, 26 Atl. 855 (1893); *Rush* v. *St. Paul City R. Co.*, 70 Minn. 5, 72 N. W. 733 (1897); *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596 (1901); *Hary* v. *Speer*, 120 Mo. App. 556, 97 S. W. 228 (1906); *Alabama Fuel & Iron Co.* v. *Rice*, 187 Ala. 458, 65 So. 402 (1914). In *Randall* v. *Peerless Motor Car Co.*, 212 Mass. 352, 99 N. E. 221 (1912) it is said per Rugg, C. J.: "The affidavits of all the jurors agreeing to the same points were admissible for the purpose of showing the clerical error occurring after the deliberations of the jury had ceased and the verdict had been agreed upon, and of enabling the court to correct it. A clerical error in the statement of the conclusions of a jury established by uncontroverted evidence may be corrected."

ANONYMOUS.

COURT OF COMMON BENCH, 1310.

Year Book, Mich. Term 4 Ed. II No. 74[75]

In a writ of entry *sur* disseisin an inquest was joined. And after the inquest was sworn, they could not agree.

STANTON, J.:[76] Good people, you can not agree?

STANTON, J., to John Allen:[77] Go and put them in a house until Monday, and let them not eat or drink.

On that commandment John put them in a house without, etc. At length, on the same day, about vesper-time, they agreed. And John went to Sir Hervey and told him that they were agreed. Then Stanton, J., gave them leave to eat. Then on Monday the inquest came and wanted to give a verdict in gross. And Stanton, J., said that he wanted the story told. So the inquest told the story, etc.[78]

---

[75] Selden Society, Year Book series, vol. IV, p. 188.

[76] Hervey of Stanton.

[77] Apparently the marshal of the court.

[78] "The jury after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed." 3 Blackstone's Commentaries, 375; *Wright* v. *Crump*, 7 Mod. 1 (1702). St. Germain opposed this practice. Doc. & Stud. Dialogue II, ch. 53. And, by the juries act of 33 and 34 Vict., ch. 77 (1870), § 23, "Jurors after having been sworn, may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court and be allowed reasonable refreshment, such refreshment to be procured at their own expense." See notes to *King* v. *Woolf*, 1 Chitty, 401 (1819); *Smith* v. *Thompson*, 1 Cow. (N. Y.) 221 (1823), and see *Reg* v. *Newton*, 3 C. & K. 85 (1850).

In America, while the furnishing of refreshments and other necessaries to the jury is under the strict control of the court, in the exercise of a sound discretion, *O'Barr* v. *Alexander*, 37 Ga. 195 (1867); *Gaither* v. *Hascall-Richards Steam Generator Co.*, 121 N. Car. 384, 28 S. E. 546 (1897), it is highly improper for the court to coerce the jury into finding a verdict by subjecting them to severe physical or moral pressure. *Hancock* v. *Elam*, 3 Baxt. (Tenn.) 33 (1873); *Physioc* v. *Shea*, 75 Ga. 466 (1885); *Henderson* v. *Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327 (1889); *Miller* v. *Miller*, 187 Pa. 572, 41 Atl. 277 (1898); *Fairbanks* v. *Weeber*, 15 Colo. App. 268, 62 Pac. 368 (1900).

"And it has been held, that if the jurors do not agree in their verdict before the justices are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them around the circuit from town to town in a cart." III Blackstone's Commentaries, 376. Accord: *King* v. *Ledingham*, Vent. 97 (1671); Y. B. 19 Edw. III, Trin. No. 22, Rolls ed. p. 184; Y. B. 19 Lib. Ass. 6; Y. B. 41 Lib. Ass. 11; 2 Hale's Pleas of ths Crown, 297. In *Spearman* v. *Wilson*, 44 Ga. 473 (1871), it was held error for the court to state to the jury that if they did not bring in a verdict soon he would make arrangements to carry them to another county. Accord: *Gholston* v. *Gholston*, 31 Ga. 625 (1860) and see *Texas Midland R. Co.* v. *Byrd*, 102 Tex. 263, 115 S. W. 1163 (1908), where such an alleged threat was not regarded as intended or taken seriously.

In civil cases, if the jurors can not agree after being kept together for such a time as is deemed reasonable by the court, the court may discharge

BUNTIN AND WIFE *v.* CITY OF DANVILLE.

SUPREME COURT OF APPEALS OF VIRGINIA, 1896.

93 *Va.* 200.

Error to a judgment of the corporation court of the city of Danville, rendered July 15, 1893, in an action of ejectment wherein the plaintiffs in error were the plaintiffs, and the defendant in error was the defendant.[79]

RIELY, J.: The fourth bill of exceptions is in regard to certain remarks made by the court to the jury, which, it is claimed, were in the nature of a threat, and calculated to coerce the jury into rendering a verdict. After the jury had been considering of their verdict for a day and a half, they were brought into court preparatory to an adjournment at the close of the second day, and the usual inquiry being made of them as to whether or not they had agreed upon a verdict, they replied in the negative; whereupon the court remarked to them that "he wished them to decide the case; that they were as competent to do it as any other jury; that this was the second trial of the case, and that they would be kept together until the end of the term unless they did; that the case was a perfectly plain one, and ought to be decided in five minutes after reading the instructions and applying them to the facts." It thereupon discharged them until the next morning with the usual injunction not to converse with any one on the subject. The record is silent as to the time that thereafter elapsed before the verdict was rendered.

The trial by jury is a sacred right, and should be sedulously guarded. The jury should not only be kept from all extraneous influences in reaching their verdict, but the court itself should be careful not to trench upon their province. A verdict resulting from coercion could not be allowed to stand.[80] It must be the untrammeled "expression of the concurrence of individual judgments."

---

them. *Richards* v. *Page*, 81 Maine 563, 18 Atl. 289 (1888); N. Y. Code Civ. Proc., § 1181; *Ingersoll* v. *Lansing*, 51 Hun 101, 5 N. Y. S. 288, 24 N. Y. St. 163 (1889).

As to criminal cases compare *People* v. *Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168 (1801); *People* v. *Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203 (1820) with *Commonwealth* v. *Cook*, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465 (1822); *Ned* v. *State*, 7 Porter (Ala.) 187 (1838); *Commonwealth* v. *Fitzpatrick*, 121 Pa. St. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. 757 (1888), and see note to *State* v. *Harris*, 119 La. 298, 11 L. R. A. (N. S.) 178 (1907); *People* v. *Warden*, 202 N. Y. 138, 95 N. E. 729 (1911).

[79] Only so much of the case as relates to the question of coercion of the jury is printed.

[80] *Green* v. *Telfair*, 11 How. Pr. (N. Y.) 260 (1853); *Cranston* v. *New York Central & H. R. Co.*, 103 N. Y. 614, 9 N. E. 500 (1886); *Southern Ins. Co* v. *White*, 58 Ark. 277, 24 S. W. 425 (1893); *Mahoney* v. *San Francisco & S. M. R. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518 (1895); *Miller* v. *Miller*, 187 Pa. St. 572, 41 Atl. 277 (1898); *Twiss* v. *Lehigh Val. R. Co.*, 61 App. Div. 286, 70 N. Y. S. 241 (1901); *Hodges* v. *O'Brien*, 113 Wis. 97, 88 N. W. 901 (1902); *Highland Foundry Co.* v. *N. Y., N. H. & H. R. Co.*, 199 Mass. 403, 85 N. E. 437 (1908).

But while this is true, it is a maxim of the law that there should be an end of litigation, and jurors should always agree, if possible. It is particularly desirable that they should agree, if they can conscientiously do so, where there has been one or more mistrials, as was the case here. They should honestly endeavor to reconcile their differences of opinion, though not to the extent of surrendering their convictions. All who are familiar with jury trials know that jurors are prone to report to the court their inability to agree, but not being discharged, often render, in a reasonable time thereafter, a verdict whose justice demonstrates, as was the case here, the propriety of the action of the court in keeping them together longer. It is the duty of the court to keep them together until it is satisfied that they have made an honest effort to agree, and that their inability to do so is due to a conscientious difference of judgment. Where their differences render it necessary, a reasonable time must be taken for the performance of the important duty submitted to the jury. What is reasonable time must depend upon the circumstances of each case, and be left in a very great measure to the discretion of the trial court. And unless it is a clear case of an abuse of such discretion, the verdict, for the cause we have been considering, should not be disturbed.[81] And while we are of opinion that the remarks of the court, which are excepted to, do not justify the construction put upon them by the counsel, or the claim that the large discretion necessarily reposed in the trial court was abused in this instance, yet it is proper to add that it is better and safer to refrain from any expression of opinion, which may be claimed to savor of threat or coercion, as to the time the jury will be kept together[82] unless a verdict is sooner rendered.

Affirmed.[83]

---

[81] *Chesapeake & O. R. Co.* v. *Cowherd*, 96 Ky. 113, 27 S. W. 990, 16 Ky. L. 373 (1894); *Chicago City R. Co.* v. *Shreve*, 128 Ill. App. 462 (1906); *Scarlotta* v. *Ash*, 95 Minn. 240, 103 N. W. 1025 (1905); *Dover* v. *Lockhart Mills*, 86 S. Car. 229, 68 S. E. 525 (1910); *Covey* v. *Rogers*, 85 Vt. 308, 81 Atl. 1130 (1912).

[82] *Slater* v. *Mead*, 53 How. Pr. (N. Y.) 57 (1876); *Terre Haute R. Co.* v. *Jackson*, 81 Ind. 19 (1881); *Phoenix Ins. Co.* v. *Moog*, 81 Ala. 335, 1 So. 108 (1886); *Chesapeake & O. R. Co.* v. *Barlow*, 86 Tenn. 537 (1888); *Knapp* v. *Chicago & W. M. R. Co.*, 114 Mich. 199 (1897); *De Jarnette* v. *Cox*, 128 Ala. 518, 29 So. 618 (1900). Compare *Osborne* v. *Wilkes*, 108 N. Car. 651, 13 S. E. 285 (1891).

[83] *Pierce* v. *Rehfuss*, 35 Mich. 53 (1876); *St. Louis & S. F. R. Co.* v. *Bishard*, 147 Fed. 496 (1906); *Karner* v. *Kansas City El. R. Co.*, 82 Kans. 842, 109 Pac. 676 (1910); *St. Louis, I. M. & S. R. Co.* v. *Devaney*, 98 Ark. 83, 135 S. W. 802 (1911).

SECTION 11. VERDICT.

BUNN *v.* HOYT.

SUPREME COURT OF NEW YORK, 1808.

3 *Johns.* (*N. Y.*) 255.[83a]

Riker moved to set aside the verdict in this cause for irregularity.

This was an action of assumpsit against the defendant, as the agent of Graham in the sale of a ship. The cause was tried at the last sittings in New York, before Mr. Chief Justice Kent.

After the charge of the judge, the jury retired from the bar to consider their verdict, and after being together several hours, they separated, and the next morning delivered to the court a verdict sealed up for the plaintiff. When the verdict was read, the counsel for the defendant requested that the verdict might be taken by the polls, and one of the jurors, on being asked whether he agreed to the verdict as read, said that he could not agree to it; that he had signed the sealed verdict as a matter of accommodation, but he thought it unconscientious, and could not assent to it. The judge then directed the jury to retire and reconsider their verdict, to which the defendant's counsel objected; but the jury were sent out and after being absent for some time, they gave information to the court that they could not agree on their verdict, upon which they were informed by the direction of the judge, that they must agree. After having been out several hours, they returned with a verdict for the plaintiff for the same damages as before.

To show that the verdict was irregularly taken the counsel cited *Trials per pais*, 249, 310; 2 Salk. 645; 2 Tidd 817.

Hopkins and J. Radcliff, contra, were stopped by the court.

PER CURIAM: There has been no irregularity shown to render it proper to set aside the verdict.

Rule refused.[84]

[83a] A second point in the case upon newly discovered evidence is omitted.

[84] The practice of allowing the jury to seal a verdict and then separate is very general, having superseded the privy verdict of the common law described by Blackstone, 3 Bl. Comm. 377; *Dornick* v. *Reichenback*, 10 Serg. & R. (Pa.) 84 (1823); *High* v. *Johnson*, 28 Wis. 72 (1871); *Chicago* v. *Langlass*, 66 Ill. 361 (1872), and in the absence of a statutory prohibition, the practice is permissible in civil cases, in the discretion of the judge without regard to the consent of the parties. *Bunker Hill, &c., Min. Co.* v. *Schmeling*, 79 Fed. 263, 24 C. C. A. 564 (1897); *Bunker Hill, &c., Min. Co.* v. *Oberder*, 79 Fed. 726 (1897); *Green* v. *Bliss*, 12 How. Pr. (N. Y.) 428 (1856); *Anonymous*, 63 Maine 590 (1874); *Kramer* v. *Kister*, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432 (1898). The only true verdict is that which the jury announce orally in open court and which is received and recorded. *Saunders* v. *Freeman*, Plowd. (1562); *Lawrence* v. *Stearns*, 28 Mass. 501 (1831); *Withee* v. *Rowe*, 45 Maine 571 (1858); *Crotty* v. *Wyatt*, 3 Ill. App. 388 (1879); *Sutliff* v. *Gilbert*, 8 Ohio 405 (1838); *Root* v. *Sherwood*, 6 Johns. 68, 5 Am. Dec. 191 (1810); *Scott* v. *Scott*, 110 Pa. 387, 2 Atl. 531 1885; *Ostrander* v. *Lansing*,

111 Mich. 693, 70 N. W. 332 (1897); *Roth* v. *East Connellsville Coke Co.*, 242 Pa. 23, 88 Atl. 781 (1913); *Nelson* v. *Wood*, 210 Fed. 18 (1913). The parties may, however, consent that the verdict be received by the clerk in the absence of the judge. *Dubuc* v. *Lasell*, 182 N. Y. 482 (1905); *Ferrell* v. *Hales*, 119 N. Car. 199 (1896); *Owens* v. *Southern R. Co.*, 123 N. Car. 183, 31 S. E. 383, 68 Am. St. 821 (1898); *Bedal* v. *Spurr*, 33 Minn. 207, 22 N. W. 390 (1885); *Rigg* v. *Bias*, 44 Kans. 148, 24 Pac. 56 (1890); *Union Pac. R. Co.* v. *Connolly*, 77 Nebr. 254 (1906). In civil cases there is a conflict of opinion as to whether a party may demand a poll of the jury. Some jurisdictions have declared this right absolute. *Hubble* v. *Patterson*, 1 Mo. 392 (1823); *Fox* v. *Smith*, 3 Cow. (N. Y.) 23 (1824); *Jackson* v. *Hawks*, 2 Wend. (N. Y.) 620 (1829); *Johnson* v. *Howe*, 7 Ill. 342 (1845); *Labar* v. *Koplin*, 4 N. Y. 547 (1851); *Hancock* v. *Winans*, 20 Tex. 320 (1857); *White* v. *Archbald School Dist.*, 2 Pa. County Ct. 1 (1886); *Smith* v. *Paul*, 133 N. Car. 66, 45 S. E. 348 (1903). Elsewhere a poll is discretionary with the judge. *Ropps* v. *Barker*, 21 Mass. 239 (1826); *School Dist.* v. *Bragdon*, 23 N. H. 507 (1851); *Rutland* v. *Hawthorn*, 36 Ga. 380 (1867); *Whitner* v. *Hamlin*, 12 Fla. 18 (1867); *Dunlop* v. *Munroe*, 1 Cr. (C. C.) 536, Fed. Cas. No. 4167 (1809), and see *Humphries* v. *District of Columbia*, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. 637 (1898). In Iowa the code dispenses with a poll in the case of a sealed verdict. *Dunbauld* v. *Thompson*, 109 Iowa 199, 80 N. W. 324 (1899).

A verdict defective in form merely may be recommitted to the jury for correction whether sealed or not. *Tyrrell* v. *Lockhart*, 3 Blackf. (Ind.) 136 (1832); *Wolfran* v. *Eyster*, 7 Watts. (Pa.) 38 (1838); *Sutliff* v. *Gilbert*, 8 Ohio 405 (1838); *Pritchard* v. *Hennessey*, 1 Gray (Mass.) 294 (1854); *Clark* v. *Sidway*, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. 327 (1891); *Clark* v. *Lude*, 63 Hun 363, 18 N. Y. S. 271, 43 N. Y. St. 607 (1892); *Childs* v. *Carpenter*, 87 Maine 114, 32 Atl. 780 (1895); *Lyon* v. *Brown*, 34 App. Div. 323, 54 N. Y. S. 315 (1898); *Saxon* v. *Foster*, 69 Ark. 626, 65 S. W. 425 (1901); *Wright* v. *Wright*, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261 (1910); *Hary* v. *Speer*, 120 Mo. App. 566, 97 S. W. 228 (1906); *Blake* v. *Husnberger*, 46 Pa. Super. Ct. 32 (1911); *Beecher* v. *Newcomer*, 46 Pa. Super. Ct. 44 (1911); *Bronstein* v. *American Ice Co.*, 119 Md. 132, 86 Atl. 131 (1912).

Where the jury have separated after agreeing to a sealed verdict, and on coming into court one of the jurors dissents, it is generally held, as in the principal case, that the judge may send the jury out to deliberate further. *Blackley* v. *Sheldon*, 7 Johns. (N. Y.) 32 (1810); *Douglass* v. *Tousey*, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616 (1829); *Perry* v. *Mays*, 2 Bailey (S. Car.) 354 (1831); *Warner* v. *New York Cent. R. Co.*, 52 N. Y. 437, 11 Am. Rep. 724 (1873); *Campbell* v. *Murray*, 62 Ga. 86 (1878); *Devereux* v. *Champion Cotton Press Co.*, 14 S. Car. 396 (1880); *Weeks* v. *Hart*, 24 Hun (N. Y.) 181 (1881); *Morgan* v. *Bell*, 41 Kans. 345 (1889); *Lagrone* v. *Timmerman*, 46 S. Car. 372, 24 S. E. 290 (1895); *Frick* v. *Reynolds*, 6 Okla. 638, 52 Pac. 391 (1898); *Rice Fisheries Co.* v. *Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839 (1904); *Coughlin* v. *Weeks*, 75 Wash. 568, 135 Pac. 649 (1913). Contra: *Kramer* v. *Kister*, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432 (1898), where it was said the proceeding must be treated as a mistrial and the jury discharged. In the words of Mitchell, J.: "When a juror dissents from a sealed verdict there is a necessary choice of evils, a mistrial or a verdict finally delivered under circumstances that justly subject it to suspicion of coercion or improper influence. We are of opinion that the former is the lesser evil. If one juror can dissent so may all change their view and render a new verdict exactly opposite to the one they first agreed upon and sealed." If after the separation of the jury the plaintiff's attorney has a conversation with one or more of the jury, following which the jurors dissent from the sealed verdict and afterwards find a larger verdict, the second verdict will be set aside. *Martin* v. *Morelock*, 32 Ill. 485 (1863).

DIEHL *v.* EVANS.

SUPREME COURT OF PENNSYLVANIA, 1815.

1 *Serg. & R. (Pa.)* 367

The jury empaneled in this cause, which was an action for freight and demurrage, found a verdict in these words: "We find for the plaintiff, and are of opinion, that the plaintiff has already received out of property of the defendant, payment in full for the amount of freight to which he is entitled."

A motion for a new trial was now made by Ingersoll, on behalf of the plaintiff, on the ground that the finding was too uncertain to admit of a judgment being entered upon it. He observed that the jury had found for the plaintiff, but had assessed no damages. They had expressed an opinion that the freight had been received by the plaintiff out of the defendant' property, but had said nothing about demurrage; and this opinion relates to a set-off, of which no notice was given by the defendant's plea. If the jury meant to find for the defendant, they ought to have said so. He cited 1 Ld. Raym. 324; 7 Bac. Ab. 37, Verd. R.

Levy, for the defendant, said that if the court could collect the meaning of the jury from the whole verdict it was sufficient. 1 Dall. 462; Hob. 54; 1 Salk. 328; 2 Burr. 700; Cro. Eliz. 854, pl. 16.

In this case, the jury having found (for an opinion of a jury is a finding) that the plaintiff had received payment in full for the freight, out of the property of the defendant, their assessing no damages is a plain indication that they meant it is a finding for the defendant.

TILGHMAN, C. J.: The plaintiff's declaration sets forth a claim for freight and demurrage. The jury, after being long out, and having declared to the court that they found great difficulty in coming to an agreement, at length brought in a verdict as follows: "We find for the plaintiff, and are of opinion that the plaintiff has already received, out of the property of the defendant, payment in full for the amount of freight to which he is entitled." This is certainly an extraordinary verdict and not easily understood. I agree that if there be substance, it is sufficient; the court will mould it into form. But what did the jury intend? Did they mean to find for the plaintiff generally, both as to freight and demurrage? If so, the verdict is imperfect, because they have found no particular sum, nor have they said that the demurrage has been paid.[85] Perhaps they intended

[85] A verdict must be responsive to all the issues made by the pleadings. *Miller* v. *Trets*, 1 Ld. Raym. 324 (1697); *Smith* v. *Raymond*, 1 Day (Conn.) 189 (1804); *Middleton* v. *Quigley*, 12 N. J. L. 352 (1831); *Crouch* v. *Martin*, 3 Blackf. (Ind.) 256 (1833); *McCoy* v. *Rives*, 9 Miss. 592 (1844); *Moore* v. *Moore*, 67 Tex. 293, 3 S. W. 284 (1887); *Hackett* v. *Jones*, 34 Ill. App. 562 (1889); *Phoenix I. Co.* v. *Maryland G. M. Co.*, 146 Fed. 501 (1906); *Spinapont* v. *Vogel Co.*, 81 Misc. (N. Y.) 127, 142 N. Y. S. 177 (1913); *Waco Cement Stone Works* v. *Smith* (Tex. Civ. App.), 162 S. W. 1158 (1913); *Smith* v. *Smith*, 141 Ga. 629, 81 S. E. 895 (1914).

Where a money judgment is sought, a verdict that fails to find a sum with sufficient definiteness to permit the entry of judgment is bad. *Miller* v.

to find for the defendant as to the demurrage, and I think it most probable they did. But then why not find generally for the defendant? For if the plaintiff was entitled to freight only, and had received full payment for that freight, the verdict ought to have been for the defendant. There seems then to be some mystery in the business. The jury could not agree, and appear to have come to a compromise among themselves. When I consider this, and perceive that they have only given their opinion that the plaintiff has received payment for his freight, I am not satisfied that they unanimously intended to find absolutely for the defendant. An opinion is not a legal verdict. The finding must be positive.[86] With all the inclination, therefore, which I feel to give effect to a verdict, after a full trial on the merits, I can not say that the intention of the jury is expressed with sufficient certainty to authorize the court to enter judgment for the defendant. I am, therefore, of opinion that there should be a new trial.

YEATES, J.: It is the duty of a court to mould a verdict into legal form, where the intention of the jury is plain and clear. But this can not be done in the present instance.

The finding here is not only imperfect, but contradictory. The jury have found for the plaintiffs, but have ascertained no sum in damages. They declare merely their opinion that the plaintiffs have received the amount of the freight, but are wholly silent as to the demurrage, which was one of the grounds of action. It is absolutely impossible to render judgment on this verdict. It must, therefore, be set aside and a new trial awarded.

Brackenridge, J., concurred.

New trial awarded.[87]

Hower, 2 Rawle (Pa.) 53 (1829); *Neville* v. *Northcutt*, 7 Coldw. (Tenn.) 294 (1869); *Watson* v. *Damon*, 54 Cal. 278 (1880). But where the amount is not in issue a verdict in favor of a party without assessing damages has been held sufficient. *Bell* v. *Old*, 88 Ark. 99, 113 S. W. 1023 (1908); *Hall* v. *Bank of Emporia*, 133 Ill. 234 (1890).

[86] *Heyward* v. *Bennett*, 3 Brev. (S. Car.) 113 (1813); *Jewett* v. *Davis*, 6 N. H. 518 (1834); *Knox* v. *Breed*, 12 Ill. 61 (1850); *Day* v. *Webb*, 28 Conn. 140 (1859); *Bruck* v. *Mausbury*, 102 Pa. St. 35 (1882); *Conrey* v. *Metropolitan St. R. Co.*, 73 App. Div. 518, 77 N. Y. S. 222 (1902); *Gray's Harbor Boom Co.* v. *Lytle Logging, &c., Co.*, 38 Wash. 88, 80 Pac. 271 (1905); *Stevens* v. *Walker*, 99 Maine 43, 58 Atl. 53 (1904); *Nicholson* v. *Maine Cent. R. Co.*, 100 Maine 342, 61 Atl. 834 (1905), accord.

[87] In *Patterson* v. *United States*, 2 Wheaton 221, 4 L. ed. 224 (1817), it is said, per Washington, J.: "A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confirmed to a part only of the matter in issue, no judgment can be rendered upon the verdict. It is true that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage; but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue." Where the issue is correctly found surplusage may be disregarded by the court. *Cavene* v. *Michael*, 8 Serg. & R. (Pa.) 441 (1822); *Fisher* v.

PECK *v.* SNYDER.

SUPREME COURT OF MICHIGAN, 1864.

13 *Mich.* 21.

Assumpsit to recover damages for not building a house and barn according to contract. After the charge to the jury, defendant's counsel asked the court to direct the jury to find specially and return such finding with their verdict upon these two questions: 1st. Whether when plaintiff paid defendant the balance of the contract price and took possession he had not full knowledge that the house and barn were not constructed according to contract. 2nd. Whether the defendant was guilty of any fraud by concealing the facts respecting said building. The court refused so to direct the jury. Defendant excepted.[88]

MARTIN, C. J.: I can see but one exception taken below, to which our attention can be directed, and that is to the refusal of the judge to direct the jury to find specially upon certain questions, in case they found a general verdict. This is a novel request. A jury may find a general or a special verdict, according to the exigencies of the case; but a judge can not direct or compel them to do either and more particularly, not to give reasons for a general finding.[89]

Affirmed.

Kean, 1 Watts (Pa.) 259 (1832); *Neely* v. *Sensenig*, 150 Pa. St. 520, 24 Atl. 748 (1892).

A verdict is not final until recorded. *Rottmund* v. *Pennsylvania R. Co.*, 225 Pa. 410, 74 Atl. 341 (1910), hence the jury may amend their verdict so as to put it in form before they separate. *Warner* v. *Railroad Co.*, 52 N. Y. 437, 11 Am. Rep. 724 (1873); *Griffin* v. *Larned*, 111 Ill. 432 (1884); *Pepper* v. *Philadelphia*, 114 Pa. St. 96, 6 Atl. 899 (1886). And the court may recommit the verdict to the jury to be reformed. *Crocker* v. *Hoffman*, 48 Ind. 207 (1874); *Produce Exchange* v. *Bieberbach*, 176 Mass. 577, 58 N. E. 162 (1900); *Black* v. *Griggs*, 74 Conn. 582, 51 Atl. 523 (1902); *Cohen* v. *Traction Co.*, 141 Iowa 469, 119 N. W. 964 (1909); *Bronstein* v. *American Ice Co.*, 119 Md. 132, 86 Atl. 131 (1912); *Seaboard A. L. R.* v. *Howe*, 139 Ga. 429, 77 S. E. 387 (1913); *Harris* v. *Hipsley*, 122 Md. 418, 89 Atl. 852 (1914); *Grand Rapids & Indiana R. Co.* v. *Oliver*, 181 Ind. 145, 103 N. E. 1066 (1914). And so the court itself, if the intention of the jury can be clearly ascertained, may carry into effect its findings by amending the verdict so as to make it conform to such intention. *Richardson* v. *Mellish*, 3 Bingh. 334 (1825); *Parks* v. *Turner*, 12 How. (U. S.) 39, 13 L. ed. 883 (1851); *Koon* v. *Insurance Co.*, 104 U. S. 106, 26 L. ed. 670 (1881); *Erie City Iron Works* v. *Barber*, 106 Pa. St. 125, 51 Am. Rep. 508 (1884), and see act of March 14, 1872, Pub. L. 25; *Humphreys* v. *Woodstown*, 48 N. J. L. 588, 7 Atl. 301 (1886); *Hodgkins* v. *Mead*, 119 N. Y. 166, 23 N. E. 559 (1890); *Italian-Swiss Agricultural Colony* v. *Pease*, 194 Ill. 98, 62 N. E. 317 (1901); *Minot* v. *Boston*, 201 Mass. 10, 86 N. E. 783 (1909); *Wirt* v. *Reid*, 138 App. Div. 760, 123 N. Y. S. 706 (1910); *Parkin* v. *Safe Deposit Bank*, 54 Pa. Super. Ct. 54 (1913); *Kilgas* v. *Wayne Co.*, 85 N. J. L. 351, 88 Atl. 1056 (1913). But a verdict will not be altered unless it clearly appears that the alteration will be in accordance with the intention of the jury. *Spencer* v. *Goter*, 1 H. Bl. 79 (1788); *Edwards* v. *McCaddon*, 20 Iowa 520 (1866).

[88] The statement of facts is abridged and part of the opinion omitted.

[89] A verdict is general if, in a criminal case, the jury find the defendant guilty or not guilty, or if in a civil case, they find for the plaintiff and state

HAMBLETON *v.* DEMPSEY.

SUPREME COURT OF OHIO, 1851.

20 Ohio 168.

Assumpsit by Dempsey and Co. to recover money paid by them to Hambleton as treasurer of Lawrence county, upon a tax demanded by him and denied by them to be legal. The money was paid over to the treasurer under protest.

The cause was submitted to a jury at the May term, 1851, who returned into court their verdict, as follows:

"We, the jury, find that in case the court, upon the foregoing statement of facts, should be of opinion that the law of the case was with the plaintiffs, that then we find for the plaintiffs, and that the said defendant did assume and promise, etc., and we assess the damages of the said plaintiffs at $185.65. But in case that the court, upon the foregoing statement of facts, should be of opinion that the law of the case is with the defendant, then we, the jury, find for the defendant; and that the said defendant did not assume and

---

the damages, if any, or find for the defendant. For form see *Morrissey v. Schindler,* 8 Nebr. 672, 26 N. W. 476 (1886).

A special verdict states the facts as found by the jury and prays the advice of the court thereon, concluding conditionally, that if upon the whole matter the court shall be of opinion that the issue ought to be found for the plaintiff, then they find for the plaintiff and assess the damages accordingly, and if otherwise, then they find for the defendant. Co. Litt. 228, III Bl. Comm. 377; Viner's Abr. Trial, U. f.; *Wallingford* v. *Dunlap,* 14 Pa. St. 31 (1850); *Mumford* v. *Wardwell,* 73 U. S. 423, 18 L. ed. 756 (1867).

At common law the jury was liable to be attainted for a false verdict (the writ was not abolished until 1825, Statute 6 Geo. IV, ch. 50, § 60). To relieve jurors from this difficulty it was enacted by the statute of Westminster, II (13 Edw. I, ch. 30, § 2), that "the justices assigned to take assizes shall not compel jurors to say precisely whether it be disseisin, or not, so that they do show the truth of the deed, and require aid of the justices. But if they of their own head will say that it is disseisin, their verdict shall be admitted at their own peril." Upon this statute rests the practice of finding special verdicts. Tidd's Practice, 897. But while the court could request or advise the jury to find specific facts, it could not direct a special verdict, the jury being at liberty to judge for themselves whether they would find a general or a special verdict. Cooley's Constitutional Limitations (7th ed.) 461; *Mayor of Devises* v. *Clark,* 3 Ad. & El. 506 (1835); *Jameson Trial,* 6 Yale Law J. 32 (1896); *Chambers* v. *Davis,* 3 Whart. (Pa.) 40 (1837); *Fuller* v. *Kennebec Mut. Ins. Co.,* 31 Maine 325 (1850); *Underwood* v. *People,* 32 Mich. 1, 20 Am. Rep. 633 (1875); *Foster* v. *Johnson,* 70 Ala. 249 (1881); *Baltimore & O. R. Co.* v. *Sulphur Springs, S. D.,* 96 Pa. 65, 42 Am. Rep. 529 (1882). The form of verdict and the practice of submitting specific questions of fact to the jury is now generally regulated by statute. See Clementson on Special Verdicts, 38 Cyc. 1909; *Childress* v. *Lake Erie & W. R. Co.,* 182 Ind. 251, 105 N. E. 467 (1914). Since the decision of the principal case it has been provided by statute in Michigan that the jury in addition to their general verdict may be required to answer five specific questions, put to them by the court on request of counsel. Comp. L. Mich. (1897) vol. 3, § 10237; *Hendrickson* v. *Walker,* 32 Mich. 68 (1875); *Zucker* v. *Karpeles,* 88 Mich. 413, 50 N. W. 373 (1891); *Rathbun* v. *Parker,* 113 Mich 594, 72 N. W. 31 (1897); *Beaudin* v. *Bay City,* 136 Mich. 333, 99 N. W. 285 (1904).

promise, in manner and form, as the said plaintiffs hath above thereof alleged against him." And thereupon the court took the matter under advisement to the term of September, 1851, and then declared its opinion that the said plaintiffs were entitled to recover, and rendered judgment upon said special finding of facts, in favor of said plaintiffs and against said defendant below, for the sum of $185.65, and interest from the first day of last term. To which opinion of the court rendering said judgment, etc., the defendant excepted.

The foregoing "statement of facts," referred to by the jury, seems to have been the items of testimony, written and oral, produced on the trial of the parties respectively, but the facts are not embodied in the verdict and are only found in the bill of exceptions.

The writ of error is prosecuted to reverse the judgment of the common pleas, and errors are duly assigned.[90]

SPALDING, J.: We have no hesitation in reversing the judgment of the court of common pleas.

The verdict neither finds the issue nor the facts upon which the court may pronounce the finding as a conclusion of law. The statute provides that "no jury shall, in any case, be compelled to give in a general verdict, so that they find a special verdict and show the truth of the fact, and require the aid of the court."

Here they found no one fact to be true, but have simply referred the court to the evidence, and told them if upon that evidence they are of opinion the law of the case is with the plaintiffs, then the jury find for the plaintiffs, etc. It is the game of "hide and go seek" between the court and jury. The evidence is laid before the jury and they are told to find the facts. The jury lay the same evidence before the court and tell them to find the facts and law together. Such practice as this we can not sanction. The parties are disposed to treat this as a special verdict. One of the best special pleaders in this or any other country, has laid down the rule governing this subject, in this wise: "If in a special verdict, the jury find only the evidence of a material fact, instead of the fact itself, or otherwise omit to find, upon such a fact, either way, no judgment can be rendered upon the finding for either party, since a matter of fact, essential to the determination of the cause, is left unascertained by the verdict." Gould's Pleading, chapter 10, section 62.

Reversed.[91]

---

[90]The statement of facts is abridged and the arguments of counsel and part of the opinion of the court omitted.

[91]Accord: *Holland* v. *Fisher*, O. Bridgman 188 (1662); *Rex.* v. *Huggins*, Ld. Raym. 1574 (1730); *Fen* v. *Blanchard*, 2 Yeates (Pa.) 543 (1800); *Tunnell* v. *Watson*, 2 Munf. (Va.) 283 (1811); *Butts* v. *Bilke*, 4 Price 240 (1817); *Barnes* v. *Williams*, 11 Wheat. (U. S.) 415, 6 L. ed. 508 (1826); *Seward* v. *Jackson*, 8 Cow. (N. Y.) 406 (1826); *Hill* v. *Covell*, 1 N. Y. 522 (1848); *Thayer* v. *United Brethren*, 20 Pa. St. 60 (1852); *Williams* v. *Willis*, 7 Abb. Pr. (N. Y.) 90 (1858); *Garfield* v. *Knight's Ferry, &c., Water Co.*, 17 Cal. 511 (1861); *Dixon* v. *Duke*, 85 Ind. 434 (1882); *Hodges* v. *Easton*, 106 U. S. 408, 1 S. Ct. 307 (1882); *Boyer* v. *Robertson*, 144 Ind. 604, 43 N. E. 879 (1895); *Standard S. M. Co.* v. *Royal Ins. Co.*, 201 Pa. 645, 51 Atl. 354 (1902); *Nicholson* v. *Maine Cent. R. Co.*, 100 Maine 342, 61 Atl. 834 (1905); *Reffke* v. *Paper Co.*, 136 Wis. 535, 117 N. W. 1004 (1908); *Elliott* v. *Miller*, 158 Fed. 868 (1908); *Collins* v. *Whiteside*, 75 N. J. L. 865, 69 Atl. 174 (1908).

CHICAGO AND NORTHWESTERN RAILWAY CO. *v.* ANNIE DUNLEAVY, ADMX.

SUPREME COURT OF ILLINOIS. 1889.

129 Ill. 132.

Action on the case by Annie Dunleavy, administratrix of the estate of John Dunleavy, deceased, against the Chicago and Northwestern Railway Company, to recover damages under the statute for the death of plaintiff's intestate. On the trial a verdict for $1,800 was found for plaintiff, upon which judgment was entered; this judgment was affirmed by the appellate court and a further appeal taken to the supreme court.[92]

BAILEY, J.: The next questions to be considered are those which relate to the special findings of the jury. Upon this branch of the case it is urged, first, that the court improperly refused to submit certain questions of fact to the jury; second, that certain of the questions of fact submitted were not properly answered; third, that the special findings of fact are inconsistent with the general verdict. The statute under which special findings may be required is but recent, and the rules of practice thereby established have never before been presented to this court for its considration. We must, therefore, look mainly to the statute itself for our guide in determining the propositions now raised. The statute is as follows:

Section 1. "That in all trials by jury in civil proceedings in this state in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury."

Section 2. "Submitting or refusing to submit a question of fact to the jury when requested by the party, as provided by the first section hereof, may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law."

Section 3. "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly."[93]

---

[92]The arguments of counsel and part of the opinion of the court are omitted.

[93]Hurd's Ill. Rev. Stat. (1916), p. 2001, § 79. In the absence of any statute, it has been held in a number of states that it is within the reasonable discretion of the presiding judge to require or refuse to require the jury to answer pertinent interrogatories in addition to a general verdict. *Pierce* v. *Woodward*, 6 Pick. (Mass.) 206 (1828); *Smith* v. *Putney*, 18 Maine 87 (1841); *McMasters* v. *Westchester*, 25 Wend. (N. Y.) 379 (1841); *Green* v. *Clay*, 10 Allen (Mass.) 90, 87 Am. Dec. 622 (1865); *Mair* v. *Bassett*, 117 Mass. 356 (1875); *Germond* v. *Railroad Co.*, 65 Vt. 126, 26 Atl. 401 (1893);

It is manifest, of course, that a special finding by a jury upon material questions of fact submitted to them under the provisions of the statute is not a special verdict, but an essentially different proceeding. A special verdict can not be found where there is a general verdict, but the special findings of fact provided for by the statute can be required only in case a general verdict is rendered. But while this is so, much light in relation to special findings upon the questions of fact, and their office and objects, may be derived from the rules applicable to special verdicts. Both forms of verdict are provided for by the same statute, and they must therefore be construed as being *in pari materia.*

In giving construction to the statute, the first, and perhaps the most important question, relates to the scope and meaning of the phrase, "material question or questions of fact." May such questions relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter. Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render. Doubtless, a probative fact from which the ultimate fact necessarily results would be material, for there the court could infer such ultimate fact as a matter of law. But where the probative fact is merely *prima facie* evidence of the fact to be proved, the proper deductions to be drawn from the probative fact present a question of fact and not of law, requiring further action by the jury, and it can not, therefore, be made the basis of any action by the court. Requiring the jury to find such probative fact is merely requiring them to find the evidence and not the facts, and results in nothing which can be of the slightest assistance to the parties or the court in arriving at the proper determination of the suit.

The view we take is strongly fortified by the provision of the third section of the statute, that, when a special finding of fact is inconsistent with the general verdict, the former shall control. This necessarily implies that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. A fact which merely tends to

---

Walker v. *New Mexico S. R. Co.,* 165 U. S. 593, 41 L. ed. 837 (1897); *Ellis* v. *Block,* 187 Mass. 408, 73 N. E. 475 (1904); *Freedman* v. *N. Y., N. H. & H. R. Co.,* 81 Conn. 601, 71 Atl. 901 (1909); *Duffy* v. *York Haven Water & Power Co.,* 242 Pa. 146, 88 Atl. 935 (1913); *Victor-American Fuel Co.* v. *Peccarich,* 209 Fed. 568 (1913). The New York Code of 1848 provided that the court might instruct the jury, if they rendered a general verdict, to find upon particular questions of fact to be submitted in writing. *Williams* v. *Wells,* 7 Abb. Pr. 90 (1858); *Barkley* v. *N. Y. Cent. R. Co.,* 35 App. Div. 228, 54 N. Y. S. 766 (1898). This practice has been adopted in many states, by statute or code. Some leave it to the discretion of the court as to whether questions may be propounded. Others require the court to submit interrogatories to the jury on request of a party. See Clementson on Special Verdicts, p. 30, and statutes in appendix; N. Y. Code Civ. Proc., § 1187; 1 Burns' Ind. Ann. Stat. (1914), §§ 572-3; Cal. Code Civ. Proc. (1915), § 625; Thompson on Trials (2d ed.), § 2668.

prove a fact in issue without actually proving it, can not be said to be, in any legal sense, inconsistent with a general verdict, whatever that verdict may be. Such inconsistency can arise only where the fact found is an ultimate fact, or one from which the existence or non-existence of such ultimate fact necessarily follows, and that is never the case with that which is only *prima facie* evidence of the fact sought to be proved.

The common law requires that verdicts shall be the declaration of the unanimous judgment of the twelve jurors. Upon all matter which they are required to find they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. To require unanimity not only in their conclusions, but in the mode by which those conclusions are arrived at, would in most cases involve an impossibility. To require unanimity, therefore, not only in the result, but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. To illustrate, suppose a plaintiff trying his suit before twelve jurors, should seek to prove a fact alleged in his declaration by giving evidence of twelve other facts, each having an independent tendency to prove the fact alleged. The evidence of each probative fact, or the conclusions to be drawn from it, might appeal with peculiar force to the belief or judgment of some one of the jurors, but less so to his fellows. The cumulative effect of all the evidence might be such as to leave no doubt in the mind of any member of the panel as to the truth of the fact alleged, still, if the jury are required to find specially as to each probative fact, no one of the whole twelve facts would be at all likely to meet with the unanimous concurrence of the entire jury. As to each they would be compelled to confess their inability to agree, or what would be its equivalent, say they did not know or could not tell; which, if we apply the rules governing special verdicts, would be tantamount to a finding that the fact was not proved or did not exist. If such finding should be required, and should be given the effect of controlling the general verdict, the result would be, that under such system of trial, general verdicts could but seldom stand.

However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right, under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case. Such practice would subserve no useful purpose, and would only tend to embarrass and obstruct the administration of justice; and we may further say that such practice finds no warrant in our statute.

We are referred to one case in another state, where, in a suit for personal injuries against a railroad company, the defendant was permitted, under a statute somewhat similar to ours, to put to the jury no less than one hundred and thirty-six interrogatories as to the facts covering, apparently, every possible phase of the evidence. The judgment against the railroad company was reversed for an erroneous instruction to the jury as to the form of their answer to

questions where the evidence was not sufficient, but no suggestion seems to have been made that any portion of the questions put to the jury were improper. Whatever may be the view of such practice taken by the courts of other states, we are unwilling to give our countenance to its adoption here.[94]

In the present case the defendant's counsel prepared and submitted fifteen questions of fact upon which the court was asked to require the jury to make special findings. Of these the eleventh and twelfth were refused. The first was modified and submitted to the jury in its modified form. The residue of the questions were submitted as asked. We do not understand that the defendant is now complaining of the action of the court in relation to its eleventh and twelfth questions of fact. The first, as prepared by the defendant's counsel, was as follows:

1. "What precaution did the deceased take to inform himself of the approach of the train which caused the injury?"

This was modified by the court so as to read as follows:

1. "Was the deceased exercising reasonable care for his own safety at the time he was killed?"

The ultimate fact which it was incumbent upon the plaintiff to prove, and which the defendant sought to disprove, was, that the deceased, at the time he was killed, was in the exercise of due care. That was one of the issues made by the pleadings, and it was one of the ultimate facts upon which the plaintiff's right to recover necessarily depended. What the deceased did to inform himself of the approach of the train was material only as tending to show reasonable care on his part or the want of it. His acts in that behalf, then, whatever they may have been, were facts which were merely evidential in their nature, and while they doubtless would have had a tendency to prove reasonable care or the contrary, there were none of them, so far as the evidence shows, which would have been conclusive of that question. The question, then, as submitted by the defendant's counsel, sought to obtain a finding as to mere probative facts, and the court, therefore, properly refused to require the jury to answer it. The question substituted by the court submitted to the jury a material and controlling fact, and one which could be properly made the subject of a special finding.[95]

[94] *Ward* v. *Busack*, 46 Wis. 407, 1 N. W. 107 (1879); *Haney Co.* v. *Association*, 119 Iowa 188, 93 N. W. 297 (1903); *Evans* v. *Moseley*, 84 Kans. 322, 114 Pac. 374 (1911); *Rogers* v. *Kansas Co-Operative R. Co.*, 91 Kans. 351, 137 Pac. 991 (1914). The Michigan statute limits the number of questions to five. Mich.: Howell's Ann. Stats. (1913), § 12943.

[95] "Each question submitted should be limited to a single direct and material controverted issue of fact, and in such a way that the answer will necessarily be positive, direct and intelligible." *Jewell* v. *Railroad*, 54 Wis. 610, 12 N. W. 83, 41 Am. Rep. 63 (1882); *Morse* v. *Morse*, 25 Ind. 156 (1865); *Germaine* v. *Muskegon*, 105 Mich. 213, 63 N. W. 78 (1895); *Morbey* v. *Chicago, &c., R. Co.*, 116 Iowa 84, 89 N. W. 105 (1902); *Drum-Flato Co.* v. *Edmisson*, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. ed. 606 (1907); *Springfield C. M. Co.* v. *Gedutis*, 227 Ill. 9, 81 N. E. 9 (1907); *People* v. *Commercial Ins. Co.*, 247 Ill. 92 (1910); *Kuchler* v. *Stafford*, 185 Ill. App. 199 (1914). But questions may be allowed the answers to which will establish probative facts from which an ultimate material fact may be inferred as a matter of law. *Gale* v. *Priddy*, 66 Ohio St. 400, 64 N. E. 437 (1902).

Complaint is made to the answers given by the jury to the fourth and fifth questions. Those questions were as follows:

4. "Did the deceased look to ascertain if said train in question was approaching?"

5. "Did the deceased listen to ascertain if said train was approaching?"

To both of these questions the jury answered: "Don't know."

It is, perhaps, questionable whether the defendant, in order to avail itself of the objection that no proper answer was made to these questions, should not have made it at the time the verdict was returned and before the jury was discharged, for then the jury might have been required to complete their verdict by making proper answers. *Moss* v. *Priest,* 19 Abb. Prac. (N. Y.) 314.[96] But, however that may be, it is manifest that the error, if it be one, can not have been prejudicial to the defendant unless it can be seen that answers to said questions most favorable to the defendant, which of course would have been answers in the negative, would have constituted a finding inconsistent with the general verdict.

If, then, we treat said questions as having been answered in the negative, would such answers, either alone or in connection with the answers to the other questions, have constituted a finding necessarily inconsistent with the general verdict? To the second question, viz., "If the deceased had looked before the accident, could he have discovered the approach of the train in time to have avoided the accident?" the jury answered, "Yes," and to the third question, viz., "If the deceased had listened before the approach of said train, could he have discovered the approach of the train in time to have avoided the accident?" they answered, "If he had concentrated his attention in that particular direction, yes." The first question, viz., "Was the deceased exercising reasonable care for his safety at the time he was killed?" was also answered, "Yes."

The question then presents itself, whether, if it be admitted that the deceased neither looked nor listened for the train, and also that if he had looked he could have seen it, and if he had listened with his attention concentrated in that direction, he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of the deceased as would have barred a recovery. Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or

---

[96] *Buntin* v. *Rose,* 16 Ind. 209 (1861); *Summers* v. *Greathouse,* 87 Ind. 205 (1882); *Dyer* v. *Taylor,* 50 Ark. 314, 7 S. W. 258 (1887); *Fisk* v. *Chicago, &c., R. Co.,* 74 Iowa 424, 38 N. W. 132 (1888); *Chicago, &c., R. Co.* v. *Goyette,* 133 Ill. 21, 24 N. E. 549 (1890).

listening, and that being the case, a mere failure to look or listen can not, as a legal conclusion, be pronounced negligence *per se*.[97]

In determining whether the special findings are inconsistent with the general verdict so that the latter must be held to be controlled by the former, this court can not look at the evidence. All reasonable presumptions will be entertained in favor of the verdict, while nothing will be presumed in aid of the special findings of fact. The inconsistency must be irreconcilable, so as to be incapable of being removed by any evidence admissible under the issues. *Pennsylvania Co.* v. *Smith*, 98 Ind. 42; *McComas* v. *Haas*, 107 Ind. 512; *Redelsheimer* v. *Miller*, 107 Ind. 485. Under these principles it must be held that there is no necessary or irreconcilable inconsistency between the special finding and the general verdict, especially in view of the fact that the jury, notwithstanding their finding that the deceased did not look or listen, also found that he was in the exercise of reasonable care.

Affirmed.[98]

SECTION 12. MOTIONS AFTER VERDICT.

SMITH *v.* BIESIADA.

SUPREME COURT OF INDIANA, 1909.

174 *Ind.* 134.

Biesiada and others petitioned for the construction of a public drain under section 2 of the Act of March 11, 1907. Acts, 1907, p. 508, section 6141, Burns, 1908. The matter was referred to commis-

---

[97] *Terre Haute & T. R. Co.* v. *Voelker*, 129 Ill. 540, 22 N. E. 20 (1889); *Toledo, &c., R. Co.* v. *Cline*, 135 Ill. 41, 25 N. E. 846 (1890); *Lewis* v. *Long Island R. Co.*, 162 N. Y. 52, 56 N. E. 548 (1900). Compare *North Penn. R. Co.* v. *Heileman*, 49 Pa. St. 60, 88 Am. Dec. 482 (1865); *Pennsylvania R. Co.* v. *Beale*, 73 Pa. St. 504, 13 Am. Rep. 753 (1873), and see Patterson's Railway Accident Law, §§ 173-183.

[98] Special findings are to be reconciled with the general verdict if they reasonably can be. But where the special findings are inconsistent with and antagonistic to the general verdict, the former control and judgment must be entered in accordance with the special findings. *Indianapolis, &c., R. Co.* v. *Stout*, 53 Ind. 143 (1876); *Trevor* v. *Hawley*, 99 Mich. 504, 58 N. W. 466 (1894); *Kennedy* v. *Ball*, 91 Hun (N. Y.) 197, 36 N. Y. S. 325 (1895); *Troy* v. *Brady*, 67 Ohio St. 65, 65 N. E. 616 (1902); *Awde* v. *Cole*, 99 Minn. 357, 109 N. W. 812 (1906); *Hawley* v. *Bond*, 20 S. Dak. 215, 105 N. W. 464 (1905); *Connell* v. *Electric Co.*, 131 Iowa 622, 109 N. W. 177 (1906); *Court of Honor* v. *Dinger*, 221 Ill. 176, 77 N. E. 557 (1906); *Pittsburgh, &c., R. Co.* v. *Lightheiser*, 168 Ind. 438, 78 N. E. 1033 (1906); *Plyer* v. *Pacific P. C. Co.*, 152 Cal. 125, 92 Pac. 56 (1907); *Osburn* v. *Railway Co.*, 75 Kans. 746, 90 Pac. 289 (1907); *Ft. Wayne C. Co.* v. *Page*, 170 Ind. 585, 84 N. E. 145 (1908); *Havlik* v. *St. Paul F. & M. Co.*, 87 Nebr. 427, 127 N. W. 248 (1910); *Morrow* v. *Bonebrake*, 84 Kans. 724, 115 Pac. 585 (1911); *Caledonia County Grammar School* v. *Kent*, 86 Vt. 151, 84 Atl. 26 (1912); *Ellison* v. *Greenville & S. R. Co.*, 94 S. Car. 425, 77 S. E. 123, 78 S. E. 231 (1913); *Sare* v. *Hoadley Stone Co.*, 57 Ind. App. 464, 105 N. E. 582 (1914); *Duckworth* v. *Stalnaker*, 78 W. Va. 247, 81 S. E. 989 (1914).

sioners who made a report, to which William Smith filed a remonstrance. A trial by the court resulted in findings for Smith on certain grounds and other findings in favor of the petitioner. Judgment was rendered modifying the commissioners' report. Smith appealed, assigning as error the overruling of his motions (a) for a new trial, (b) to dismiss the proceeding, (c) for a *venire de novo*, (d) in arrest of judgment.[99]

MONTGOMERY, J.: The motions to dismiss, for a *venire de novo*, in arrest of judgment, were all made after the judgment establishing the drain had been rendered, and the motion for a new trial overruled. It is very clear that the court could not then entertain a motion to dismiss the cause.[1]

A motion for a *venire de novo* must be made before judgment is rendered on the verdict or finding.[2]

A motion in arrest of judgment must be made before rendition of the judgment sought to be arrested.[3]

It follows that the court did not err in overruling these motions. Judgment affirmed.[4]

---

[99]A part only of the case is printed.

[1]Burns' Annotated Statutes of Indiana (1914), § 340. See *Tooker* v. *Arnoux*, 76 N. Y. 397, 20 Alb. Law J. (1879); Ames' Cases on Pleading (2d ed.) 269 and notes.

[2]Citing 2 Elliott, Gen. Prac., § 985; *Shaw* v. *Merchants' Bank*, 60 Ind. 83 (1877); *McClintock* v. *Theiss*, 74 Ind. 200 (1881); *Deatty* v. *Shirley*, 83 Ind. 218 (1882); *Potter* v. *McCormack*, 127 Ind. 439, 26 N. E. 883 (1891); *Bennett* v. *Simon*, 152 Ind. 490, 53 N. E. 649 (1899); *Sloan* v. *Lick Creek Co.*, 6 Ind. App. 584, 33 N. E. 997 (1893); *Cannon* v. *Castleman*, 24 Ind. App. 188, 55 N. E. 111 (1900); *McCaslin* v. *State*, 38 Ind. App. 184, 75 N. E. 844 (1906). For the distinction between a *venire de novo* and a new trial see *Witham* v. *Lewis*, 1 Wils. 48, 53 (1744); Tidd's Practice (2 Am. ed.) 953, and *Butcher* v. *Metts*, 1 Miles (Pa.) 233 (1836) *infra*.

[3]Citing *Train* v. *Gridley*, 36 Ind. 241 (1871); *Hilligos* v. *Pittsburgh R. Co.*, 40 Ind. 112 (1872); *Brownlee* v. *Hare*, 64 Ind. 311 (1878); *Eastes* v. *Eastes*, 79 Ind. 363 (1881); *Potter* v. *McCormack*, 127 Ind. 439, 26 N. E. 883 (1891); *Smith* v. *State*, 140 Ind. 343, 39 N. E. 1060 (1894); *Bayless* v. *Jones*, 10 Ind. App. 102, 37 N. E. 421 (1894).

[4]III Blackstone's Commentaries 386; Tidd's Practice, 934 et seq.; 1 Troubat & Haly's Practice (Wharton's ed.), 525. The party who has obtained a verdict is, in theory, immediately entitled to judgment. *Van Riper* v. *Van Riper*, 4 N. J. L. 156, 7 Am. Dec. 576 (1818); *Hutchinson* v. *Bours*, 13 Cal. 50 (1859), but, by the practice in the Court of King's Bench, it was incumbent upon the prevailing party to enter a rule for judgment *nisi causa*, which rule expired in four days, and if at the end of four days no sufficient cause was shown to the contrary, judgment could be signed. *Rex* v. *Elkins*, 4 Burr. 2129 (1767); *Roberts* v. *Stacey*, 13 East. 21 (1810); *Willis* v. *Bennett*, Barnes 443 (1737); *Reynolds* v. *Simonds*, Barnes 446 (1739). Under the modern English rules an application for a new trial is by fourteen days' notice of motion, served within ten days after the trial, order XXXIX, rule 4.

In the United States, statutes and rules of court usually fix the time for entry of judgment on verdicts and the time within which motions for new trial, for judgment *non obstante veredicto* and in arrest of judgment should be made. 1 Black on Judgments (2d ed.) 121; *Goodrum* v. *Grimes*, 185 Mass. 80, 69 N. E. 1053 (1904); N. Y. Code Civ. Proc., §§ 999-1000; *Thayer Mfg. Co.* v. *Steinau*, 58 How. Pr. (N. Y.) 315 (1880); *Dillon* v. *O'Neal*, 26 R. I. 87, 58 Atl. 455 (1904); 13 P. & L. Dig. of Pa. Dec. 23079. Pending the disposition of such a motion the entry of judgment is generally held irregular. *Stevenson* v. *Sherwood*, 22 Ill. 238, 74 Am. Dec. 140 (1859); *Louisville Chemical Works* v. *Commonwealth*, 8 Bush. (K. Y.) 179 (1871);

(a) New Trial.

California Code of Civil Procedure, § 657.

The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.[5]

Moravian Seminary v. *Bethlehem*, 153 Pa. St. 583, 26 Atl. 237 (1893); *Louisville* v. *Muldoon*, 19 Ky. L. 1386, 43 S. W. 867 (1897); *Schmidt* v. *Terry*, 111 Fed. 290 (1901). But, with rare exceptions, a motion for new trial made after the prescribed time has elapsed and judgment has been entered will be denied. *Ewing* v. *Tees*, 1 Binn. (Pa.) 450, 2 Am. Dec. 455 (1808); *Syracuse &c. Oil Co.* v. *Carothers*, 63 Pa. St. 379 (1869); *State* v. *McGowan*, 62 Mo. App. 625 (1895); *Nelson* v. *Farmland Security Co.*, 58 Nebr. 604, 79 N. W. 161 (1899); *Hill* v. *Harder*, 3 Pa. Super. Ct. 473 (1897); *Hannum* v. *Belchertown*, 19 Pick. (Mass.) 311 (1837); *Allen* v. *Adams*, 150 Ind. 409, 50 N. E. 387 (1897); *Wilson* v. *Dallas*, 84 Nebr. 605, 121 N. W. 1128 (1909); *Walker* v. *Blake*, 13 Ariz. 1, 108 Pac. 221 (1910); *Mann* v. *Dempster*, 181 Fed. 76 (1910); *Rosner* v. *Cohn*, 81 N. J. L. 343, 79 Atl. 1056 (1911). Compare *Emma Silver Min. Co.* v. *Park*, 14 Blatch. (U. S.) 411 (1878); *Ellis* v. *Hearn*, 132 App. Div. 207, 116 N. Y. S. 977 (1909); *Okazaki* v. *Sussman*, 79 Wash. 622, 140 Pac. 904 (1914). Similar rules apply to motions for judgment *non obstante veredicto*, which must be made after verdict and before judgment. *Mississippi* v. *Manchester Commercial Bank*, 6 Sm. & M. (Miss.) 218 (1846); *Rohrbacker* v. *Pugh*, 10 W. N. Cas. (Pa.) 275 (1881); *Marshalltown S. Co.* v. *Des Moines B. Co.*, (Iowa) 101 N. W. 1124 (1905), and to motions in arrest of judgment. *Burrall* v. *DuBois*, 2 Dall. (U. S.) 229, 1 L. ed. 360 (1795); *State* v. *Leathers*, 61 Mo. 381 (1875); *Keller* v. *Stevens*, 66 Md. 132, 6 Atl. 533 (1886); *Smith* v. *State*, 140 Ind. 343, 39 N. E. 1060 (1894); *Lodge* v. *O'Toole*, 20 R. I. 300 (1897); *Marshall* v. *Davis*, 122 Ky. 413 (1906). Compare *Sullivan* v. *New Bedford Sav. Inst.*, 140 Mass. 260, 6 N. E. 83 (1885); *Fiscle* v. *Kissinger*, 53 Pa. Super. Ct. 453 (1913).

[5] In many of the practice acts of the various states the grounds for new trials are, as in the California Code, expressly enumerated; in others this enumeration is omitted and it is provided that new trials may be granted for

WOOD *v.* GUNSTON.

UPPER BENCH, 1655.

Style's Reports 466[6]

Wood brought an action upon the case against Gunston for speaking of scandalous words of him; and amongst other words for calling him traytor, and obteyns a verdict against him at the bar, wherein the jury gave 1500*l.* dammages. Upon the supposition that the dammages were excessive, and that the jury did favour the plaintiff, the defendant moved for a new tryal. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the jury ought not to be questioned, nor is there any presidents for it in our books of law, and it would be of dangerous consequence if it should be suffered, and the greatness of the dammages given can be no cause for a new tryal, but if it were, the dammages are not here excessive, if the words spoken be well considered, for they tend to take away the plaintiff's estate and his life. Windham on the other side pressed for a new tryal, and said it was a packed business, else there could not have been so great dammages, and the court hath power in extraordinary cases, such as this is, to grant a new tryal.

GLYN, Chief Justice: It is in the discretion of the court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new tryals upon them, and it is for the people's benefit that it should be so for a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it can not be so intended of the court; wherefore let there be a new tryal the next term, and the defendant shall pay full costs, and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict.[7]

---

the reasons usual at common law. Compare Ohio Gen. Code (1910), § 11576; Burns' Ind. Ann. Stat. (1914), § 585; Oklahoma Rev. Laws (1910), § 5033; Lord's Ore. Laws (1909), § 174; Minn. Rev. Laws (1914), § 4198; Howell's Mich. Stat. (2d ed.), § 15134; Mass. Rev. Laws (1902), ch. 173, § 112; R. I. Gen. Laws (1909), ch. 298, § 12; Ga. Code (1911), §§ 6078-6093; N. Y. Code Civ. Proc. §§ 999-1006. As to whether the courts in granting new trials are confined to the enumerated grounds, compare *People* v. *Fair*, 43 Cal. 137 (1872); *McMahon* v. *State*, 17 Tex. App. 321 (1879); *Swartout* v. *Willingham*, 6 Misc. 179, 26 N. Y. S. 769, 31 Abb. N. Cas. 66 (1893), with *Zaleski* v. *Clark*, 45 Conn. 397 (1877); *Bartling* v. *Jamison*, 44 Mo. 141 (1869); *Donnelly* v. *McArdle*, 14 App. Div. 217, 43 N. Y. S. 560 (1897). See, also, 14 Enc. Pl. & Pr. 707; 20 Cyc. 707. As to England, see Rules of the Supreme Court, order XXXIX, rr. 1-8.

[6] Style 462 where the chief justice is reported as saying "if the court do believe that the jury gave their verdict against their direction given unto them, the court may grant a new trial."

[7] "There are instances, in the year-books of the reigns of Edward III, Henry IV and Henry VII of judgments being stayed (even after a trial at bar) and new venires awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice, Glynn,

in 1655 grounded the first precedent that is reported in our books for granting a new trial upon account of excessive damages given by the jury: apprehending, with reason, that notorious partiality in the jurors was a principal species of misbehavior. A few years before a practice took rise in the common pleas, of granting new trials upon the mere certificate of the judge (unfortified by any report of the evidence) that the verdict had passed against his opinion; though Chief Justice Rolle (who allowed new trials in case of misbehavior, surprise or fraud, or if the verdict was notoriously contrary to the evidence) refused to adopt that practice in the court of kings bench. And at that time it was clearly held for law, that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court; lest posterity should wonder why a new venire was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon affidavits; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another." III Blackstone's Commentaries 387; Y. B. 24 Edw. III, 24; Y. B. 11 Hen. IV 18; Y. B. 14 Hen. VII 1; *Slade's Case*, Style 138 (1648); *Graves* v. *Short*, Cro. Eliz. 616 (1598); *Goodman* v. *Cotherington*, Sid. 235 (1664); *Rex* v. *Fitz-Water*, 2 Lev. 139 (1675); *Queen* v. *Helston*, 10 Mod. 202 (1713); *Bright* v. *Eynon*, 1 Burr. 390 (1757); Com. Dig. Pleader R. 17; Viner's Abr., Trial M. g.; Thayer on Evidence 170; Hilliard on New Trials 2; Graham and Waterman on New Trials 2; Odger's Pleading and Practice (7th ed.) 331.

Where the damages claimed are unliquidated the court will not ordinarily grant a new trial on the ground of excessive damages alone, unless the damages are so large that no jury could reasonably have given them. *Praed* v. *Graham*, 24 Q. B. Div. 53 (1889); *Kuhn* v. *North*, 10 Serg. & R. (Pa.) 399 (1823); *Allen* v. *Craig*, 13 N. J. L. 294 (1833); *Worster* v. *Proprietors*, 16 Pick. (Mass.) 541 (1835); *Collins* v. *Albany & S. R. Co.*, 12 Barb. (N. Y.) 492 (1852); *Billings* v. *Observer*, 150 N. Car. 540, 64 S. E. 435 (1909); *Wirsing* v. *Smith*, 222 Pa. 8, 70 Atl. 906 (1908); or unless, as frequently required, the verdict is the result of passion or prejudice. *Howley* v. *Kramer*, 36 Misc. 190, 73 N. Y. S. 142 (1901); *Chlanda* v. *Transit Co.*, 213 Mo. 244, 112 S. W. 249 (1908); *Felt* v. *Puget Sound Electric R. Co.*, 175 Fed. 477 (1909); *Pinkerton* v. *Wisconsin Steel Co.*, 109 Minn. 117, 123 N. W. 60 (1909); *Hawkins* v. *Nuttallburg Co.*, 66 W. Va. 415, 66 S. E. 520 (1909); *De Celles* v. *Casey*, 48 Mont. 568, 139 Pac. 586 (1914); *Waterman* v. *Minneapolis &c. R. Co.*, 26 N. Dak. 540, 145 N. W. 19 (1914). But a new trial will be granted if the court concludes that the jury applied the wrong measure of damages or took into consideration matters that they ought not to have considered. *Johnston* v. *Great Western R. Co.*, L. R. (1904), 2 K. B. 250. The same rules apply where the damages are inadequate, but the power to grant a new trial is more sparingly exercised. *Forsdike* v. *Stone*, L. R. 3 C. P. 607 (1868); *Palmer* v. *The Leader Publishing Co.*, 7 Super. Ct. (Pa.) 509 (1898); *Toledo R. &c. Co.* v. *Mason*, 81 Ohio St. 463, 91 N. E. 292 (1910); *Schmid* v. *Chicago, M. & St. P. R. Co.*, 108 Minn. 329, 122 N. W. 9 (1909); *Leavitt* v. *Dow*, 105 Maine 50, 72 Atl. 735 (1908); *Jackson* v. *Humbolt*, 84 Kans. 445, 113 Pac. 1047 (1911); *Fulmele* v. *Forrest*, 27 Del. 155, 86 Atl. 733 (1913); *Montgomery Light, &c., Co.* v. *King*, 187 Ala. 619, 65 So. 998 (1914); *Doody* v. *Boston & M. R. Co.*, 77 N. H. 161, 89 Atl. 487 (1914). Where, however, the law prescribes the measure of damages, the disregard of the law and the award of a sum not warranted by the rule furnishes grounds for a new trial. *Walker* v. *Smith*, 4 Dallas 389, 1. L. ed. 878, 1 Wash. (C. C.) 152, Fed. Cas. No. 17086 (1804); *Commonwealth* v. *Sessions for Norfolk County*, 5 Mass. 435 (1809); *McDonald* v. *Walter*, 40 N. Y. 551 (1869); *Ellsworth* v. *Central Railroad Co.*, 34 N. J. L. 93 (1869). A verdict in excess of the sum demanded will be set aside. *McIntire* v. *Clark*, 7 Wend. (N. Y.) 330 (1831); *Garlick* v. *Bower*, 62 Cal. 65 (1882).

GIACHINO QUAGLIANA *v.* JERSEY CITY, H. & P. STREET RAILWAY COMPANY.

SUPREME COURT OF NEW JERSEY, 1908.

77 N. J. L. Reports 101

Action for personal injuries. The trial resulted in a verdict for defendant and plaintiff obtained a rule to show cause why the verdict should not be set aside on account of surprise.[a]

TRENCHARD, J.: The contention of the plaintiff is that one Bagley, a material witness for the plaintiff, was influenced by the defendant to absent himself from the trial, and that his absence justifies this court in granting a new trial.

Misconduct of the prevailing party or his attorney, in inducing a witness to absent himself from the trial, is ground for a new trial. *Carey* v. *King*, 5 Ga. 75; *Barron* v. *Jackson*, 40 N. H. 365; *Crafts* v. *Union Mutual Fire Insurance Co.*, 36 N. H. 44.

But the misconduct must be clearly established. *Marsh v. Mockton*, 1 Tryw. & G. 34.

The affidavits in this case, taken in pursuance of the rule, do not disclose misconduct upon the part of the defendant or its attorney. It appears that both sides desired to use Bagley as a witness. He was subpoenaed by the defendant, but not by the plaintiff. When he appeared at the office of the attorney of the defendant at about ten o'clock in the morning of the day of the trial he was intoxicated, and because of his condition was informed that he was not needed that day, but was requested to be in court the next morning. The plaintiff voluntarily moved his case notwithstanding the absence of the witness. The action upon the part of the defendant's attorney was, we think, in good faith and evinces no misconduct on his part. The controlling reason why the plaintiff did not have the benefit of Bagley's testimony was that he had neglected to subpoena him. A new trial will not be granted because of the absence of a witness due to the negligence of the applicant. *Sherrerd* v. *Olden*, 1 Halst. 344; 29 Cyc. 872.

Let the rule to show cause be discharged with costs.[b]

---

[a] Part of the opinion of the court is omitted.

[b] A new trial may be granted, on the ground of surprise, if a witness is unexpectedly absent under circumstances not due to any negligence on the part of the applicant who must use reasonable diligence and prudence to guard against such accidents. Compare *Dickenson* v. *Fisher*, 3 Times L. R. 459 (1887); *Ellis* v. *Hearn*, 132 App. Div. 207, 116 N. Y. S. 977 (1909) with *Washer* v. *White*, 16 Ind. 136 (1861); *Atlantic & B. R. Co.* v. *Johnson*, 127 Ga. 392, 56 S. E. 482 (1906); *North Michigan Land &c. Co.* v. *Kneeland*, 149 Mich. 495, 112 N. W. 1114 (1907). Generally, a new trial will not be granted on the ground of surprise, accident or mistake unless the occurrence could not have been anticipated by ordinary diligence, a matter peculiarly within the discretion of the trial court. *Ellis* v. *Ginsburg*, 163 Mass. 143, 39 N. E. 800 (1895). "Many matters transpire in the conduct of a case in the courtroom

YOUNG *v.* KERSHAW; BURTON *v.* KERSHAW.

COURT OF APPEAL, 1899.

81 *Law Times Reports* 531

This was an application by the defendant in both actions for judgment or for a new trial upon appeal from the verdict and judgment at the trial. The plaintiff in each action sued the defendant to recover damages for a libel which accused the plaintiff of adultery. The defendant pleaded a justification of the libel. The actions were tried together at York, before Mr. Commissioner Bosanquet with a jury, and the trial lasted for four days. The jury found a verdict for the plaintiff Young with 100*l.* damages, and for the plaintiff Burton with 1000*l.* damages. The defendant applied for a new trial, upon the ground that he had, since the trial, obtained fresh evidence which could not have been obtained by reasonable diligence before the trial. This evidence was that of two youths, and was to the effect that they had seen adultery committed by the plaintiffs upon an occasion which was alleged to be a different occasion from any sought to be proved at the trial. This evidence was communicated after the trial, to a man who was the co-respondent in a pending divorce suit brought by the plaintiff Young against his wife, and was referred by him to the defendant's solicitors.[10]

SMITH, L. J.: This is an application by the defendant for a new trial. The trial took place at York with a special jury, and lasted for four days. The action was for a libel published by the defendant

---

which it is almost impossible to present in detail to another tribunal, and of all of which the trial judge is necessarily observant. Further, the trial judge becomes better acquainted with the accustomed acts and habits of the various attorneys in constant practice before him, and therefore can more accurately judge whether a complaint of such surprise, as is here charged (absence from courtroom) is of such a character as to demand relief." Per Horton, C. J., in *Green* v. *Bulkley*, 23 Kans. 130 (1879). Motions for new trials on the ground of surprise present a great variety of circumstances. See *De Giou* v. *Dover*, 2 Anst. 517 (1795); *Richardson* v. *Fisher*, 1 Bingh. 145 (1823); *Ainsworth* v. *Sessions*, 1 Root (Conn.) 175 (1790); *McQueen* v. *Stewart*, 7 Ind. 535 (1856); *Archer* v. *Heidt*, 55 Ga. 200 (1875), mistake of witness; *Iseley* v. *Lovejoy*, 8 Blackf. (Ind.) 462 (1847); *Land* v. *Miller*, 7 Tex. 463 (1852); *Helwig* v. *Railroad Co.*, 9 Misc. 61, 29 N. Y. S. 9, 59 N. Y. St. 540 (1894), intoxication or insanity of witness; *Cutler* v. *Rice*, 14 Pick. (Mass.) 494 (1833); *Greene* v. *Farlow*, 138 Mass. 146 (1884), oversight of counsel; *Jackson* v. *Warford*, 7 Wend. (N. Y.) 62 (1831); *Schellons* v. *Ball*, 29 Cal. 605 (1866); *Holbrook* v. *Nichol*, 36 Ill. 161 (1864); *Croner* v. *Insurance Co.*, 18 App. Div. 263, 46 N. Y. S. 108 (1897); *Peterson* v. *Barry*, 4 Binn. (Pa.) 481 (1812); *Martin* v. *Marvine*, 1 Phila. (Pa.) 280, 9 Leg. Int. 2 (Pa.) (1852); *Green* v. *Wilmington Trust Co.*, 87 Atl. 885, 27 Del. 232 (1912); *Lusepool I. L. G. T. Co.* v. *Wright*, 158 Ky. 290, 164 S. W. 952 (1914), unexpected character of evidence; *Rogers* v. *Niagara Ins. Co.*, 2 Hall (N. Y.) 559 (1829); *Chinn* v. *Taylor*, 64 Tex. 385 (1885); *Hapgoods* v. *Lusch*, No. 2, 123 App. Div. 27, 107 N. Y. S. 334 (1907), unexpected ruling; *Miller* v. *Layne*, 84 Minn. 221, 87 N. W. 605 (1901), unavoidable absence of party.

[10] The arguments of counsel and concurring opinion of Williams, L. J., are omitted.

accusing the plaintiffs of adultery. The jury found verdicts for the plaintiffs. The defendant now applies for a new trial, and the only ground upon which that application is really made is that new evidence has been discovered which could not have been adduced at the trial. It is stated that two witnesses have since been found. Now, what is the rule as to granting a new trial in order to enable a party to adduce new evidence after an action has once been decided by a jury? It seems to me that the cases which have been referred to show that a new trial may be granted if new evidence, which could not have been obtained before, has been discovered, which if it had been adduced at the trial, would have been conclusive, so that the verdict must have been found otherwise than it was. I think that is the rule, apart from all the authorities, which I will not discuss. That being so, what is the new evidence in this case which the defendant has discovered? Would that evidence have been conclusive of this case if it had been adduced at the trial? In my opinion it is evidence obtained under suspicious circumstances, and for that reason alone I think that it can not be considered as conclusive.[11] Further, it would only amount to oath against oath, and that is not enough, as was pointed out in *Anderson* v. *Titmas*, 36 L. T. 711, by Huddleston, B. How can it be said that this evidence, if adduced, would be conclusive? Therefore this case does not come within the rule as to granting a new trial upon the ground that new evidence has been discovered since the trial. The appeals must therefore be dismissed.

COLLINS, L. J.: I am of the same opinion. The only question which has been argued is whether or not the defendant is entitled to a new trial for the purpose of adducing new evidence which he has discovered since the trial. It is a matter of the greatest importance, and has always been so treated by the courts, that all material evidence, which could with reasonable skill and diligence be produced at the trial, shall be the only evidence which can be considered, and must be adduced at the trial. It is obviously in the public interests that parties, who have gone through the ordeal of litigation and have had their rights settled at the trial, should not afterwards be allowed to patch up the weak parts and fill up the omissions in their case by means of fresh evidence. That is a rule of great importance. It is true that in special and exceptional circumstances a new trial has been granted because new evidence has been discovered. But the rule which permits that to be done is fenced around with many limitations. The party asking for the new trial must show that there was not remissness on his part in adducing all possible evidence at

---

[11] A new trial will not be granted where the new evidence is untrustworthy or suspicious. *McDonald* v. *People*, 123 Ill. App. 346 (1905); *Boiakosky* v. *Phila. & R. Co.*, 126 Fed. 230 (1903); *Parker* v. *Hardy*, 41 Mass. 246 (1837); *Greenleaf* v. *Grounder*, 84 Maine 50, 24 Atl. 461 (1891); *Hueser* v. *Transportation Co.*, 143 App. Div. 494, 128 N. Y. S. 415 (1911). Compare *Peyser* v. *Coney Island R. Co.*, 81 Hun 70, 30 N. Y. S. 610, 62 N. Y. St. 543 (1894); *Green* v. *Peoples T. Co.*, 5 Pa. Dist. R. 284 (1896); *Laird* v. *Ahl*, 140 App. Div. 659, 125 N. Y. S. 527 (1910); *Goldstein* v. *East Fallowfield Tp.*, 43 Pa. Super. Ct. 158 (1910).

the trial. Then again, as to the class of new evidence the rule is that the new evidence must be such that, if adduced, it would be practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different. In some of the cases which have been cited the new evidence came in to corroborate evidence which was, although not contradicted, weak at the trial, and that corroboration made the previous weak, but uncontradicted, evidence practically conclusive. The other cases were cases in which the new evidence consisted of documents which were not impeached and were conclusive. The case which was most relied upon by the appellant—*Anderson* v. *Titmas*, 36 L. T. 711—does not support his contention at all, but is really against him, and is nearly on all fours with the present case. In that case the new evidence was evidence to support the evidence of the defendant at the trial which was contradicted by the plaintiff, and it was held that such evidence was no ground for granting a new trial. There is nothing more than that in the new evidence in this case. It is simply new evidence to contradict evidence given at the trial. Looking at this new evidence, how can it be said that, if adduced, it would be conclusive or even render it probable that the verdict would be different? This case, therefore, falls far short of any principle upon which the courts have ever granted a new trial upon the ground of the discovery of fresh evidence. I agree that the appeal must be dismissed.[12]

Appeal dismissed.

---

[12]Before granting a new trial the court will consider the weight and probable effect of the new evidence. There are many authorities which declare, as in the principal case, that the new evidence must be such as to render a different result reasonably certain. *Mechanics' Ins. Co.* v. *Nichols*, 16 N. J. L. 410 (1838); *Comm.* v. *Flanagan*, 7 Watts. & S. (Pa.) 415 (1844); *Finelite* v. *Finelite*, 68 Hun (N. Y.) 82, 22 N. Y. S. 729, 52 N. Y. St. 243 (1893); *State* v. *Stain*, 82 Maine 472 (1890); *Larsen* v. *Onesite*, 21 Utah, 38, 59 Pac. 234 (1900); *People* v. *McCullough*, 210 Ill 488, 71 N. E. 602 (1904); *L. & N. R. Co.* v. *Ueltsch*, 31 Ky. L. 931, 104 S. W. 320 (1907), or, at least probable, *Hoban* v. *Sandford*, 64 N. J. L. 426, 45 Atl. 819 (1900); *Watson* v. *Roth*, 191 Ill. 382 (1901); *Parsons* v. *Lewiston, B. & B. S. R. Co.*, 96 Maine 503 (1902); *Romaine* v. *Spring Valley*, 120 App. Div. 501, 105 N. Y. S. 256 (1907); *Grafton* v. *Ball*, 164 App. Div. 70, 149 N. Y. S. 447 (1914); *Vansant* v. *Kowalewski* (Del.), 90 Atl. 421 (1914); *Weichman* v. *Kast*, 157 Wis. 316, 147 N. W. 369 (1914). "It is not necessary that the newly discovered evidence should be such as to require a different verdict, but there must be a probability that the verdict would be different upon a new trial." *Cobb* v. *Cogswell*, 111 Maine 336, 89 Atl. 137 (1913).

KILBY *v.* ERWIN.

SUPREME COURT OF VERMONT, 1911.

84 *Vt.* 266

Action on the case for damage to plaintiff's sugar maple trees caused by fires claimed to have spread from defendant's land. At the trial the defendant's motion for a continuance, to enable him to procure a plan showing the course of the fires, was refused. Verdict and judgment for plaintiff. Defendant excepted and also petitioned for a new trial. In addition to reversing judgment, the court disposed of the petition for a new trial as follows:[13]

MUNSON, J.: The matter of costs makes it necessary to dispose of the petition for a new trial. We think the case discloses evidence which would have an important bearing upon the main issue on a retrial, and certainly would be likely materially to change the result as regards the amount of damage sustained. The desired proof was something which the petitioner believed to exist, and knew where to look for, but was unable to get at. He seasonably moved for a continuance which would enable him to procure it, but was required to go to trial without it.[14] He now produces evidence of conditions which he was then unable to establish. This evidence is newly discovered within the spirit of the rule, if not within the letter of it.

It appears that the writ was served December third, that counsel was employed the next day, and that on the day following there came a heavy fall of snow, which remained on the ground until after the term at which the case was tried. The plaintiff had prepared for the suit by having a plan made and the premises examined by persons who were afterwards called as witnesses. The petitioner knew of the plaintiff's claim, but due diligence did not require that he incur the expense of preparation until the suit was commenced. After the snow fell no adequate examination was possible.

The petition characterizes the refusal of the court to grant a

---

[13]Only so much of the case as relates to the motion for a new trial is printed. The statement of facts is supplemented from the syllabus.

[14]*Jackson* v. *Malin*, 15 Johns. (N. Y.) 293 (1818); *Hanly* v. *Blanton*, 1 Mo. 49 (1821); *Smith* v. *Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183 (1897). The court is not required to grant a new trial on the ground of new evidence unless the evidence could not have been discovered and produced at the trial by the exercise of reasonable diligence. *Leedom* v. *Pancake*, 4 Yeates (Pa.) 183 (1805); *People* v. *Superior Ct.*, 5 Wend. (N. Y.) 115 (1830); *Thomas* v. *Consolidated Traction Co.*, 62 N. J. L. 36, 42 Atl. 1061 (1898); *Damon* v. *Carrol*, 167 Mass. 198, 45 N. E. 85 (1896); *Edwards* v. *Foote*, 129 Mich. 121, 88 N W. 404 (1901); *Zimmerman* v. *Weigel*, 158 Ind. 370, 63 N. E. 566 (1901); *Chicago* v. *McNalley*, 227 Ill. 14, 81 N. E. 23 (1907); *Cameron* v. *Russell*, 40 Pa. Super. Ct. 405 (1909); *Rockwell* v. *Italian Swiss Co.*, 10 Cal. App. 633, 103 Pac. 162 (1909); *Green* v. *Wilmington Trust Co.*, 27 Del. 232, 187 Atl. 885 (1912); *Cobb* v. *Cogswell*, 111 Maine 336, 89 Atl. 137 (1913); *Adam Roth G. Co.* v. *Hotel Monticello Co.*, 183 Mo. App. 429, 166 S. W. 1125 (1914); *Hubbard-Zemurray Steamship Co.* v. *Crescio*, 179 Ill. App. 56 (1914); *Daly* v. *Gregg*, 91 Kans. 506, 138 Pac. 614 (1914); *Robinson* v. *Smith*, 112 Law Times 929 (1915).

continuance as an abuse of its discretion, and makes this the basis of the application; but the substance of the complaint is the petitioner's inability to have certain evidence which a continuance would enable him to procure; and the question has been argued as one of newly discovered evidence. The petitionee contends that the new evidence is merely corroborative of that given on the trial by the petitioner in describing an examination he made soon after the fire, and that it does not appear but that the same facts might have been shown by some of those who fought or watched the fire at different stages of its progress. It is evident that an accurate plan, showing completely and in detail the course and spreading of the several fires, produced in connection with the testimony of witnesses who had made a particular examination of the premises for the purpose of testifying fully as to the source and extent of the injury, would be something quite different from any evidence which the petitioner could possibly produce in the circumstances in which the case was tried.[15]

Petition sustained.

---

[15]Newly discovered evidence that is cumulative merely, will not warrant a new trial. *Pike* v. *Evans*, 15 Johns. (N. Y.) 210 (1818); *Kirk* v. *Rickerson*, 46 N. J. L. 13 (1884); *Troeder* v. *Hyams*, 153 Mass. 536, 27 N. E. 775 (1891); *Slattery* v. *Supreme Tent*, 19 Pa. Super. Ct. 108 (1902); *Northwestern El. & Grain Co.* v. *Smiley*, 154 Ill. App. 351 (1910); *Lindstrom* v. *Fitzpatrick*, 105 Minn. 331, 117 N. W. 441 (1908); *Harrell* v. *Southern S. P. Co.*, 6 Ga. App. 535, 65 S. E. 305 (1909); *Mellinger* v. *Penna. R. Co.*, 229 Pa. 122, 78 Atl. 66 (1910); *Purcell Envelope Co.* v. *United States*, 48 Ct. of Cl. (U. S.) 66 (1913); *In re Walden*, 166 Cal. 446, 137 Pac. 35 (1913); *Mark* v. *Fink*, 125 Minn. 401, 147 N. W. 279 (1914). "Evidence is cumulative which merely multiplies witnesses to any one or more of the facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule." *Waller* v. *Graves*, 20 Conn. 305 (1850); *Broadhead* v. *Marshall*, 2 Wm. Bl. 955 (1774); *Smith* v. *Atkins*, 18 Vt. 461 (1846); *People* v. *Superior Court*, 10 Wend. (N. Y.) 286 (1833); *McCreery Co.* v. *Equitable B.*, 54 Misc. 508, 104 N. Y. S. 959 (1907); *Parker Washington Co.* v. *St. Louis Transit Co.*, 131 Mo. App. 508, 109 S. W. 1073 (1908), where it was discovered after trial that plaintiff did not own the property damaged. *Union Cent. Life Ins. Co.* v. *Loughmiller*, 33 Ind. App. 309, 69 N. E. 264 (1904); *Robinson* v. *Smith*, 112 Law Times 929 (1915). Direct and circumstantial evidence are not cumulative of each other. *Guyot* v. *Butts*, 4 Wend. (N. Y.) 579 (1830); *Dundee Mfg. Co.* v. *Van Riper*, 33 N. J. L. 152 (1868); *Dierloff* v. *Winterfield*, 26 Wis. 175 (1870); *Dent* v. *Simpson*, 81 Kans. 217, 105 Pac. 542 (1909); *Tucker* v. *Wyoming Coal M. Co.*, 18 Wyo. 97, 104 Pac. 529 (1909). So, also, direct and opinion evidence are not cumulative. *Humphries* v. *Marshall*, 12 Ind. 609 (1859); *Cole* v. *Cole*, 50 How. Pr. (N. Y.) 59 (1875). Thus, the testimony of a surgeon that upon operating he found certain conditions is not merely cumulative to that of a physician that upon an external examination he concluded such conditions existed. *Bousman* v. *Stafford*, 71 Kans. 648, 81 Pac. 184 (1905). Where the contents of a lost instrument has been established by secondary evidence, the original, if found, will be merely cumulative, *Wisconsin R. Co.* v. *Ross*, 142 Ill. 9, 31 N. E. 412 (1892); *Ray* v. *Baker*, 165 Ind. 74, 74 N. E. 619 (1905), unless the evidence as to the contents of the original was conflicting and the applicant suffered for want of the original, *Platt* v. *Munroe*, 34 Barb. (N. Y.) 291 (1861); *Protection L. I. Co.* v. *Dill*, 91 Ill. 174 (1878); *Winfield Building & Loan Assn.* v. *McMullen*, 59 Kans. 493, 53 Pac. 481 (1898).

FERRAND *v.* BINGLEY TOWNSHIP DISTRICT LOCAL BOARD.

COURT OF APPEAL, 1891.

8 *Times Law Reports* 70

This was an action of trespass. The defendants had pulled down an obstruction erected by the plaintiff upon what the defendants alleged to be a public footway. The right of way claimed was over the plaintiff's land. The action was tried before Mr. Justice Day and a special jury at Leeds, when the jury found a verdict for the defendants—that is, in favor of the right of way claimed. The plaintiff moved for a new trial upon the ground that the verdict was against the weight of the evidence.

Mr. Gainsford Bruce, Q. C., and Mr. Whitaker Thompson appeared for the plaintiff; Mr. Tindal Atkinson, Q. C., and Mr. L. A. Kershaw appeared for the defendants.

LORD ESHER, the Master of the Rolls, said that it was necessary again to deal with the rule as to granting new trials which had been laid down by the court of appeal and recognized by the House of Lords. There was always a preliminary question to be determined—namely, whether there was any evidence to go to the jury; and it has been laid down that, if the evidence was such that no reasonable man acting carefully could find for the party upon whom the burden of proof rested, then there was no evidence to go to the jury. The old doctrine of a scintilla of evidence had disappeared. If there was some evidence to go to the jury, then the question arose whether the court could interfere with the verdict upon the ground that it was against the weight of the evidence.[16] This court and the House of Lords had laid down the rule applicable to such a case, and the rule so laid down was nearly as strong as the rule laid down upon the first point.[17] But if that rule was pressed too far, it would become the same as the rule on the first point. If it were so pressed, then the result would be that the court could never grant a new trial

[16]Because the court was not justified, upon the evidence presented, in entering a nonsuit or directing a verdict, it does not follow that, upon a review of the jury's action upon such evidence, the verdict may not be set aside, as against the weight of the evidence. *Kinsman* v. *New York Mut. Ins. Co.*, 5 Bosw. (N. Y.) 160 (1859); *Lockwood* v. *Atlantic Mut. Ins. Co.*, 47 Mo. 50 (1870); *Denver Tramway Co.* v. *Owens*, 20 Colo. 107, 36 Pac. 848 (1894); *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. 1334 (1887); *Clark* v. *Jenkins*, 162 Mass. 397, 38 N. E. 974 (1894); *Mt. Adams & E. P., &c., R. Co.* v. *Lowery*, 74 Fed. 463 (1896); *Voge* v. *Penney*, 74 Minn. 525, 77 N. W. 422 (1898); *Serles* v. *Serles*, 35 Ore. 289, 57 Pac. 634 (1899); *Larkin* v. *United Traction Co.*, 76 App. Div. 238, 78 N. Y. S. 538 (1902). Contra: *Hensley* v. *Davidson*, 135 Iowa 106, 112 N. W. 227 (1907).

[17]*Ryder* v. *Wombwell*, L. R. 4 Exch. 32 (1868); *Dublin, Wicklow & Wexford R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1155 (1878); *Solomon* v. *Bitton*, L. R. 8 Q. B. Div. 176 (1878); *Webster* v. *Friedberg*, L. R. 172, Q. B. Div. 736 (1886); *Metropolitan R. Co.* v. *Wright*, L. R. 11 App. Cas. 152 (1886); *Brisbane* v. *Martin*, L. R. App. Cas. 249 (1894); *Toronto R. Co.* v. *King*, L. R. App. Cas. 260 (1908).

on the ground of the verdict being against the weight of evidence. This court had never said so, but it had said that it would not interfere unless for the strongest reasons possible. But it had not said that it would never interfere. The court would not interfere merely upon the ground that the case upon one side was stronger than the case upon the other. The court must say in the present case whether the difficulties in the way of the defendants' case were not so great that the jury must have dealt with the evidence wrongly. (His lordship then went through the evidence, and said that the weight of the evidence so greatly preponderated in favor of the plaintiff that the verdict was unsatisfactory, and the case must be tried again.)

LORD JUSTICE LOPES concurred. It had been laid down that the verdict of a jury ought not to be disturbed unless it was one which a jury, viewing the evidence reasonably, could not properly find. That did not say that a new trial ought not to be granted if the evidence strongly preponderated on one side, as it would be tantamount to saying that a verdict ought not to be disturbed no matter how strongly against the weight of the evidence it might be.

LORD JUSTICE KAY agreed. The verdict must be very strongly against the evidence to induce the court to grant a new trial.

New trial granted.[18]

---

[18]It is within the discretion of the court to grant a new trial where the verdict is contrary to the evidence or against the weight of the evidence, and because it is a matter of discretion it is difficult to lay down rules as to the limits of this power. In Illinois it has been said: "If a verdict is manifestly against the weight of the evidence, it is not necessary that it should further appear that it was not the result of the impartial and honest judgment of the jury, nor that it resulted from prejudice, passion or some improper motive or condition. To permit a verdict which is clearly and manifestly against the weight of the evidence to stand, upon the supposition that the jury were impartial and honest, would be as unjust and injurious to the defeated party as though it proceeded from passion, prejudice or some improper motive." *Donelson* v. *East St. Louis R. Co.*, 235 Ill. 625 (1908); *Frick* v. *Aurora, &c. R. Co.*, 154 Ill. App. 277 (1910). On the other hand, in Connecticut, it has been said: "To justify the setting aside of a verdict, such verdict should in the opinion of the court be manifestly and palpably erroneous; should be so manifestly against the evidence as to indicate that the minds of the jurymen were not open to reason and conviction, or that an improper influence was brought to bear. A new trial should be granted only when manifest injustice has been done, and when the wrong is so plain and palpable as to exclude all reasonable doubt of its existence, and clearly to denote that some mistake has been made by the jury in the application of legal principles, or to justify the suspicion of corruption, prejudice, or partiality of the jury." *Atwood* v. *Ricker*, 83 Conn. 171, 76 Atl. 306 (1910); *Read* v. *Atlas Co.*, 83 Conn. 167, 76 Atl. 465 (1910); *Berkowitz* v. *Gas Co.*, 134 App. Div. 389, 119 N. Y. S. 100 (1909); *Gottlieb* v. *Constant*, 70 Misc. 380, 127 N. Y. S. 250 (1911); *Louisville I. T. R. Co.* v. *Roemmele*, 157 Ky. 84, 162 S. W. 547 (1914); *Carrier* v. *Donovan*, 88 Conn. 37, 89 Atl. 894 (1914); *Edwards* v. *Willey*, 218 Mass. 363, 105 N. E. 986 (1914). The disposition of each case will depend upon its particular facts, but if the verdict is clearly and decidedly against the weight of the evidence, there is ground for a new trial. See *Kohne* v. *Ins. Co. of N. America*, 1 Wash. (C. C.) 123, Fed. Cas. No. 7921 (1804); *Swearingen* v. *Birch*, 4 Yeates (Pa.) 322 (1806); *Aitken* v. *McMeckan*, L. R. (1895) A. C. 310; *Metz* v. *Clark*, 19 Pa. C. C. 286 (1897); *Lee* v. *Chicago M. & O. R. Co.*, 101 Wis. 352, 77 N. W. 714 (1898); *Gunn* v. *Union R. Co.*, 22 R. I. 579, 48 Atl. 1045 (1901); *Howe* v. *Raymond*, 74 Conn. 68, 49 Atl. 854 (1901); *Spoke* v. *Thomas*, 114 Tenn. 458 (1904); *Phillips* v. *Laughlin*, 99 Maine 26

SAMUEL S. DUNNING, TRUSTEE, *v.* FREDERICK B. CROFUTT.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1908.

81 *Conn.* 101

Replevin for one gray mare, three colts and a quantity of hay, corn and tobacco, attached by the defendant officer as the property of William W. Foote in an action in favor of Edward E. Harrison and replevied by the plaintiff, Samuel S. Dunning, as trustee under the will of Sherman Foote, who had devised his farm to the plaintiff in trust, with a direction that his son William W. Foote should be allowed to live on the farm. The verdict was for the plaintiff for all the property except the gray mare, which was by the verdict directed to be returned to the defendant. The defendant having moved for a new trial, the court ordered that the verdict should be set aside unless the plaintiff surrendered the three colts to the defendant. The plaintiff having failed to do so, the verdict was set aside and plaintiff appealed.[19]

HALL, J.: Without repeating here the evidence before us regarding the purchase of the gray mare and the payment of the expense of getting her colts, it is sufficient to say of it, that we deem it ample to sustain the conclusion manifestly reached by the jury in ordering the gray mare returned to the defendant, that she was not purchased by the plaintiff; that he had no interest whatever in her, but that she was bought and placed upon the farm by William W. Foote; and that the question of the title to the mare having been thus settled by the verdict, and, evidently, in the only manner thought

---

(1904); *Coalmer* v. *Barrett*, 61 W. Va. 237, 56 S. E. 385 (1907); *Bond* v. *Penna. R. Co.*, 218 Pa. 34, 66 Atl. 983 (1907); *Black* v. *Virginia P. C. Co.*, 106 Va. 121, 55 S. E. 587 (1906); *Scannell* v. *Boston E. R. Co.*, 208 Mass. 513, 94 N. E. 696 (1911); *Bauer* v. *Montague M. Co.*, 163 App. Div. (N. Y.) 589, 148 N. Y. S. 990 (1914); *Maynard* v. *Des Moines*, 159 Iowa 126, 140 N. W. 208 (1913). Where, however, there is a conflict of evidence, a verdict against the bare preponderance of evidence will not be disturbed on that ground alone. *Camden* v. *Cowley*, 1 Wm. Bl. 417 (1763); *Swain* v. *Hall*, 3 Wils. C. P. 45 (1770); *Peters* v. *Phoenix Ins. Co.*, 3 Serg. & R. (Pa.) 25 (1817); *Rice* v. *Welling*, 5 Wend. (N. Y.) 595 (1830); *Bloom* v. *Crane*, 24 Ill. 48 (1860); *Commissioner for Railways* v. *Brown*, L. R. 13 App. Cas. 133 (1887); *Shepherd* v. *Camden*, 82 Maine 535, 20 Atl. 91 (1890); *Pringle* v. *Guild*, 119 Fed. 962 (1903); *Lewis* v. *Roby*, 79 Vt. 487, 65 Atl. 524 (1907); *Boyd* v. *Bangor R. &c. Co.*, 111 Maine 332, 89 Atl. 139 (1913); *Cardwell* v. *Norfolk & W. R. Co.*, 114 Va. 500, 77 S. E. 612 (1913); *Florida East Coast R. Co.* v. *Hayes*, 66 Fla. 589, 64 So. 274 (1914).

Under codes authorizing new trials where the verdict is "contrary" to the evidence, a new trial may be granted where the verdict is not sustained by sufficient evidence. "Both forms of expression mean when the weight of the evidence, as a whole, is not sufficient to justify the verdict." *Knote* v. *De Shirley*, 84 Kans. 738, 115 Pac. 539 (1911); *Ferguson* v. *Gill*, 74 Hun 566, 26 N. Y. S. 596, 57 N. Y. St. 213 (1893); *Krakower* v. *Davis*, 20 Misc. 350, 45 N. Y. S. 780 (1897).

[19] The statement of facts is abridged from the opinion of the court, a part only of which is printed.

by the trial judge to be justifiable upon the evidence, it followed, in the absence of evidence showing that any other than the general rule should be applied, that the ownership of the dam carried the title to the three colts which were conceded to be her offspring. 2 A. & E. Encyc. of Law (2d ed.), 348. The trial court, therefore, committed no error in holding that the verdict awarding the three colts to the plaintiff was against the evidence.[20]

But the plaintiff has no good ground to complain because he must retry the question of ownership of property which the jury has properly found belonged to him. He could have avoided such retrial if he had surrendered that which the jury unlawfully awarded to him. To secure a further opportunity of contesting the question of ownership of the colts he was willing to risk the expense and uncertain result of a new trial of the entire case.

There is no error.

SAVERY *v.* BUSICK.

SUPREME COURT OF IOWA, 1861.

11 *Iowa* 487.

On the twelfth of October, 1857, defendant confessed a judgment before the clerk of the district court for the sum of three hundred and nine dollars and fifty cents, being the supposed balance due the plaintiff on a fifteen hundred dollar note, dated the twenty-first of July and payable in six months. It was afterwards ascertained that a mistake had been made in the computation of interest

---

[20] In setting aside a verdict as "contrary to law," the phrase "means that the verdict is one which the law does not authorize the jury to render upon the evidence presented to them. The phrase refers to the act of the jury in drawing from the evidence a conclusion which is not justified by it, and for that reason may be said to be contrary to the law. It does not refer to any act of the court in giving to the jury directions upon which their verdict is to be based, for, although such verdict may be contrary to the law in the sense that it is not authorized by the law, yet, it is not an error for which the jury are responsible, but it is an error for which the court is responsible, but to be pointed out by an exception." *Swartout* v. *Willingham*, 31 Abb. N. Cas. 66, 6 Misc. 179, 26 N. Y. S. 769 (1893); *Bryant* v. *Comm. Ins. Co.*, 30 Mass. 543 (1833); *Farrant* v. *Olminus*, 3 B. & Ald. 692 (1820); *Gregory* v. *Tuffs*, 2 Dowl. P. C. 711 (1834); *Welsh* v. *Dusar*, 3 Binn. (Pa.) 329 (1811); *State* v. *Layton*, 3 Harr. (Del.) 469 (1842); *Doe* v. *McDonald*, 2 U. C. Q. B. 267 (1845); *Blake* v. *Shaw*, 10 U. C. Q. B. 180 (1852); *Hoffman* v. *Bosch*, 18 Nev. 360, 4 Pac. 703 (1884); *Wilson* v. *Whittaker*, 5 Phila. (Pa.) 358 (1864); *Lehr* v. *Brodbeck*, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. 828 (1899); *Irwin* v. *Thompson*, 27 Kans. 643 (1882); *Perdue* v. *Bailey*, 53 Ga. 333 (1874); *Merrill* v. *Bassett*, 97 Maine 501, 54 Atl. 1102 (1903); *Cary Mfg. Co.* v. *Malone*, 131 App. Div. 287, 115 N. Y. S. 632 (1909); *Massillon Sign & Poster Co.* v. *Buffalo Lick Springs Co.*, 81 S. Car. 114, 61 S. E. 1098 (1908); *Wilson* v. *Tuttle*, 6 Ga. App. 83, 64 S. E. 290 (1909); *Fritz* v. *Sayre*, 77 N. J. L. 236, 72 Atl. 425 (1909); *Morgan* v. *Los Angeles Pac. Co.*, 13 Cal. App. 12, 108 Pac. 735 (1910); *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399 (1910); *Buck* v. *Buck*, 122 Minn. 463, 142 N. W. 729 (1913); *Smyth* v. *Tennison*, 24 Cal. App. 519, 141 Pac. 1059 (1914).

on said note, and that the true balance due was $384.50, being seventy-five dollars more than the amount for which the judgment was confessed. This last named sum plaintiff alleges that the defendant afterwards made a parol promise to pay. Failing to do so, a suit was brought upon said promise to recover the seventy-five dollars before a magistrate. A trial being had, a judgment was rendered in favor of plaintiff for the amount of his claim. The cause was taken by appeal to the district court, and on a second trial there, the plaintiff claimed to have shown the mistake of seventy-five dollars in the confession of the judgment aforesaid, and the defendant's promise to pay the same, and asked the court to say to the jury that upon this state of facts the plaintiff was entitled to recover, that a moral consideration is sufficient to support a promise in cases where there was originally a sufficient valuable consideration upon which action could have been sustained, notwithstanding some positive rule of law might exempt the party from liability.

The court refused such instruction, and at the instance of the defendant told the jury in substance that a mistake in the confession of the judgment spoken of was no sufficient consideration in law to support a promise to pay the amount of the mistake; that such mistake could only be rectified by appeal to the Supreme Court, or motion to the court rendering the judgment, or by proceeding in equity; and that if the jury should find from the evidence that a judgment had been rendered in the district court upon a note which constituted any part of the claim or promise sued upon, they should find for the defendant.

The jury in their retirement gave a verdict for plaintiff directly against the instructions of the court, which, upon motion, was set aside, and a new trial granted. From this ruling of the court the appeal comes.

LOWE, C. J.: Whatever may be our view of the law of this case, it is impossible for us to express it, or consider the questions presented, without going behind the action of the jury in trampling upon the authority of the court, and thereby giving some countenance to their assumption. This we are unwilling to do even by the slightest implication.

It is no more competent for the jury to usurp the powers of the court, than it is for the court to interfere with their province in the ascertainment of facts. And when the jury, in this case, arrogated to themselves the right to determine the law in direct opposition to the instructions given them by the court, they were guilty of a flagrant abuse of their duties and obligations; and we will not review this case until it is tried upon the law as it shall be expounded by the court and not by the jury.

Affirmed.[21]

---

[21]Accord: *Flemming* v. *Marine Ins. Co.*, 4 Whart. (Pa.) 59 (1839); *Wood* v. *Cox*, 17 C. B. 280 (1855); *Rogers* v. *Murray*, 3 Bosw. (N. Y.) 357 (1858); *Bunten* v. *Orient Ins. Co.*, 4 Bosw. (N. Y.) 254 (1859); *Moffatt* v. *Thompson*, 17 N. B. 516 (1877), *semble*; *Paul* v. *Casselberry*, 12 Phila. (Pa.) 313 (1878); *Dent* v. *Bryce*, 16 S. Car. 1 (1881); *Crane* v. *Chicago & N. W. R. Co.*, 74 Iowa 330, 37 N. W. 397, 7 Am. St. 479 (1887); *Standiford*

(b) Judgment Non Obstante Verdicto.[22]

W. H. SHIVES *v.* ENO COTTON MILLS.

SUPREME COURT OF NORTH CAROLINA, 1909.

151 *N. Car.* 290.

Civil action for personal injuries. The plaintiff, a "boss dyer," fell through a hole in the dyeing department of defendant's mill, made by the removal of two planks by workmen who were making repairs. On the trial the defendant moved for a nonsuit on the ground (1) of want of knowledge of the defect on the part of the defendant, (2) that the injury was caused by a fellow servant and (3) that the plaintiff was guilty of contributory negligence. The motion was denied, but the trial judge stated that he was doubtful as to the plaintiff's right to recover, upon the whole evidence, and would reserve that question to be passed upon after verdict. The jury having found the issues submitted to them in favor of the plaintiff and assessed his damages at $3,000, the court rendered judgment, "being of opinion, upon the whole record, that plaintiff is not entitled to recover, *non obstante veredicto*, the action is dismissed." Whereupon the plaintiff appealed.[23]

BROWN, J.: In entering a judgment *non obstante veredicto* for the defendant we think the learned judge below misconceived the usages and practice of the courts in respect to such judgments. At common law they were never rendered for a defendant.

The usual definition of a judgment *non obstante* is "a judgment entered by order of the court for the plaintiff in an action at law, notwithstanding a verdict for the defendant." 2 Tidd. Pr. 922; Rap. & L. Law Dict.; Black Law Dict.

---

v. *Green*, 54 Nebr. 10, 74 N. W. 263 (1898); *Murray* v. *Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714 (1895); *McAllister* v. *Rocky Fork C. Co.*, 31 Mont. 359, 78 Pac. 595 (1904); *Fleming* v. *L. & N. R. R. Co.*, 148 Ala. 527, 41 So. 683 (1906); *Kaplan* v. *Shapiro*, 53 Misc. 606, 103 N. Y. S. 922 (1907); *Lynch* v. *Snead Architectural Works*, 132 Ky. 241, 116 S. W. 693 (1909); *Webber* v. *Jonesville*, 94 S. Car. 189, 77 S. E. 857 (1913); *Wallace* v. *Weaver*, 47 Mont. 437, 133 Pac. 1099 (1913). Contra: *Van Vacter* v. *Brewster*, 9 Miss. 400 (1843); *Peck* v. *Land*, 2 Ga. 1, 46 Am. Dec. 368 (1847); *Cochrane* v. *Winburn*, 13 Tex. 143 (1854); *Wellborn* v. *Weaver*, 17 Ga. 267, 63 Am. Dec. 235 (1855); *Todd* v. *Liverpool Ins. Co.*, 18 U. C. C. P. 192 (1868); *Pittsburgh C. C. R. Co.* v. *Ives*, 12 Ind. App. 602, 40 N. E. 923 (1895); *Watts* v. *Norfolk & W. R. Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. 894 (1894); *Galligan* v. *Woonsocket S. R. Co.*, 27 R. I. 363, 62 Atl. 376 (1905); *St. Louis & M. R. Co.* v. *Dooley*, 77 Ark. 561, 92 S. W. 789 (1906) *semble; Luken* v. *Lakeshore & M. R. Co.*, 248 Ill. 337, 94 N. E. 175 (1911); *Tousley* v. *Pacific E. Co.*, 166 Cal. 457, 137 Pac. 31 (1913).

[22] See the cases and notes in Ames's Cases on Pleading (1st ed.) 275; (2d ed.) 264; 1 Chitty on Pleading (16 Am. ed.) 688; Stephen on Pleading (9th Am. ed.) 97; Gould on Pleading (Will's ed.) 171; 14 Am. Law Rev. 494.

[23] The statement of facts is derived, in part, from the opinion of the court, a part only of which is printed.

At common law a judgment *non obstante veredicto* could be entered only when the plea confessed the cause of action and set matters in avoidance which were insufficient, although found true, to constitute either a defense or a bar to the action. In such case the plaintiff was entitled to a judgment in his favor, notwithstanding a verdict for the defendant. *Cotton Mills* v. *Abernathy*, 115 N. Car. 403; *Walker* v. *Scott*, 106 N. Car. 57; *Riddle* v. *Germanton*, 117 N. Car. 387.[24]

The practice was adopted, says Judge Pearson, to discourage sham pleas by the defendant. *Moye* v. *Petway*, 76 N. Car. 329.

Hence it follows that at common law a judgment *non obstante* could only be granted upon motion of the plaintiff—never for a defendant—and that its use was consequently very restricted.

This rule, however, has been relaxed in many jurisdictions, especially where counterclaims are pleaded, and where the code system prevails, and it is held that such judgment may be rendered on the pleadings for either party entitled to it, irrespective of the verdict. 11 Encyc. Pl. & Pr. 914.[25]

In no case, however, can such judgment be rendered for any party, except when the pleadings entitle the party against whom the verdict was rendered to a judgment. *Grant* v. *Insurance Co.*, 76 Ga. 575; *Willoughby* v. *Willoughby*, 51 E. C. L. 722; *Gregory* v. *Brunswick*, 54 E. C. L. 481; *McFerran* v. *McFerran*, 69 Ind. 29; 11 Encyc. Pl. & Pr. 914, and cases cited.[26]

---

[24] 2 Tidd's Pr. (9th ed.) 920; *Broadbent* v. *Wilks*, — Wiles 360, 364 (1742); *Burdick* v. *Green*, 18 Johns. (N. Y.) 14 (1820); *Dewey* v. *Humphrey*, 5 Pick. (Mass.) 187 (1827); *Smith* v. *Smith*, 4 Wend. (N. Y.) 468 (1830); *Roberts* v. *Dame*, 11 N. H. 226 (1840); *Shreve* v. *Whittlesey*, 7 Mo. 473 (1842); *Bellows* v. *Shannon*, 2 Hill (N. Y.) 86 (1841); *Berry* v. *Borden*, 7 Blackf. (Ind.) 384 (1845); *Mallory* v. *Lamphear*, 8 How. Pr. (N. Y.) 491 (1853); *Williams* v. *Anderson*, 9 Minn. 50 (1864); *Lough* v. *Thornton*, 17 Minn. 253 (1871); *Hyer* v. *Vaughn*, 18 Fla. 647 (1882); *Burnham* v. *New York, P. & B. R. Co.*, 17 R. I. 544, 23 Atl. 638 (1891); *Tillinghast* v. *McLeod*, 17 R. I. 208, 21 Atl. 345 (1891); *German Ins. Co.* v. *Frederick*, 58 Fed. 144 (1893); *Virgin Cotton Mills* v. *Abernathy*, 115 N. Car. 402, 20 S. E. 522 (1894); *Stoddard* v. *Cambridge Mut. Fire Ins. Co.*, 75 Vt. 253 (1903); *Fishburne* v. *Robinson*, 49 Wash. 271, 95 Pac. 80 (1908); *Shearer* v. *Guardian Trust Co.*, 136 Mo. App. 229, 116 S. W. 456 (1908); *Ivanhoe Furnace Corp.* v. *Crowder*, 110 Va. 387, 66 S. E. 63 (1909); *Dalenz* v. *Fitzsimmons*, 78 N. J. L. 618, 75 Atl. 924 (1910); *Audit Co.* v. *Taylor*, 152 N. Car. 272, 67 S. E. 582 (1910); *Strong* v. *Gunning*, 153 Ill. App. 182 (1910).

[25] *Brown* v. *Searle*, 104 Ind. 218, 3 N. E. 871 (1885); *Carl* v. *Granger Coal Co.*, 69 Iowa 519, 29 N. W. 437 (1886); *Stewart* v. *American Exch. Nat. Bank*, 54 Nebr. 461, 74 N. W. 865 (1898); *Piano M. Co.* v. *Richards*, 86 Minn. 94 (1902); *Plunkett* v. *Detroit E. R. Co.*, 140 Mich. 299, 103 N. W. 620 (1905); *Whitaker* v. *Crowder S. Bank*, 26 Okla. 786, 110 Pac. 776 (1910).

[26] Since judgment *non obstante veredicto* is entered where it appears from the record that the verdict can not be supported, the evidence can not be looked to in support of such a motion. *Pittsburgh R. Co.* v. *Martin*, 82 Ind. 476 (1882); *Slivitski* v. *Wien*, 93 Wis. 460, 67 N. W. 730 (1896); *Lewis* v. *Foard*, 112 N. Car. 402, 17 S. E. 9 (1893); *Manning* v. *Orleans*, 42 Nebr. 712, 60 N. W. 953 (1894); *Plunkett* v. *Detroit E. R. Co.*, 140 Mich. 299, 103 N. W. 620 (1905); *Baxter* v. *Irvin*, 158 N. Car. 277, 73 S. E. 882 (1912); *Streitweiser* v. *Lightbourn*, 87 Conn. 527, 89 Atl. 186 (1913). But the practice in some jurisdictions permits such a judgment where all the evidence attainable has been produced and is conclusive, as a matter of law, on the merits

It is manifest that this is not a case where, upon the pleadings, judgment can be appropriately rendered for the defendant, notwithstanding the verdict.

The cause is remanded with directions to enter judgment upon the verdict.

Reversed.

(c) Arrest of Judgment.[27]

NOYES, FRENCH & FRICKETT *v.* EDWARD J. PARKER.

SUPREME COURT OF VERMONT, 1892.

64 *Vt.* 379.

Assumpsit to recover $285, the amount of an overdraft paid by the plaintiffs upon the defendant's draft for $1,900, the price of two hundred tubs of butter. The plaintiffs claimed that the defendant never delivered thirty of said tubs. On the trial, the court charged that to entitle the plaintiff to recover, the weight of the evidence must support their claim that the butter was not delivered. Verdict and judgment for plaintiffs. The defendant excepts.[28]

THOMPSON, J.: After verdict the defendant filed a motion in arrest of judgment, which was overruled, and to this ruling he excepted. At common law, "judgment can never be arrested but for that which appears upon the record itself." *Pechy* v. *Harrison,* 1 Ld. Raym. 232, 1 Salk. 77; *Sutton* v. *Bishop,* 4 Burr. 2284, 2287. "Such a motion can only be made 'on account of some intrinsic defect apparent on the face of the record, which would render the judgment in the case erroneous.'" *State* v. *Carver,* 49 Maine 588 77 Am. Dec. 275; *State* v. *Creight,* 1 Brev. (S. Car.) 169, 2 Am. Dec. 656; *State* v. *John,* 8 Ired. (N. Car.) 330, 49 Am. Dec. 396; 1 Bouv. Law Dict. (14th ed.) Article, Arrest of Judgment; 1 Rap. & Law. Law Dict. Article, Arrest of Judgment 2; 1 Blacks. Comm. (Cooley's ed.) Book III, star p. 394.[29] In *Walker* v. *Sargeant,* 11 Vt. 329, the

---

in favor of the party against whom the verdict is rendered. *Baxter* v. *Covenant M. L. A.,* 81 Minn. 1, 83 N. W. 459 (1900); *Cruikshank* v. *St. Paul F. I. Co.,* 75 Minn. 266, 77 N. W. 958 (1899); *Richmire* v. *Elevator Co.,* 11 *N. Dak.* 453, 92 N. W. 819 (1902); *Nelson* v. *Grondahl,* 12 N. Dak. 130, 96 N. W. 299 (1903); *Dalmas* v. *Kemble,* 215 Pa. 410, 64 Atl. 559 (1906); *Bennett* v. *Great N. R. Co.,* 115 Minn. 128, 131 N. W. 1066 (1911); *Duffy* v. *York Haven W. P. Co.,* 233 Pa. 107, 81 Atl. 908 (1911); *Mixon* v. *Wallis* (Tex. Civ. App.), 161 S. W. 907 (1913); N. Y. Code Civ. Proc., § 1185. For the Federal procedure see *Young* v. *Central R. of N. J.,* 232 U. S. 602, 58 L. ed. 750 (1914), *supra,* and notes.

[27] Gould on Pleading (Wills' ed.) 151; Stephen on Pleading (9 Am. ed.) 96; III Blackstone's Commentaries, 393; Archbold's Pr. (8th ed.), 1353; Ames' Cases on Pleading (1st ed.), 265; (2d. ed.), 264 and notes; 23 Cyc. 824; 5 Enc. L. & P. 501; 2 Standard Proc. 979.

[28] Only so much of the case as relates to the motion in arrest of judgment is printed.

[29] *Lee* v. *Brown,* 5 Wend. (N. Y.) 221 (1830); *Wentworth* v. *Wentworth,* 2 Minn. 277, 72 Am. Dec. 97 (1858); *Aronson* v. *Cleveland & P. R. Co.,* 70

court say: "A motion in arrest can be sustained only for matter apparent of record, and such things as take place on trial must be placed on record by a bill of exceptions, allowed by the court, before notice can be taken thereof for reversing a judgment, for they would never be proper for a motion in arrest." In Blacks. Comm., above cited, it is said: "And this is an invariable rule with regard to arrests of judgments upon matter of law, 'that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea.' * * * But the rule will not hold *e converso*, that everything that may be alleged as cause of demurrer will be good in arrest of judgment," for certain omissions and errors are aided by a verdict. 1 Rap. & Law. Law Dict. *supra*. The rule as to the defects that shall be cured by verdict is thus stated in note (1) to *Stennel* v. *Hogg*, 1 Saund. 228, (6th ed. with notes by John Williams, Patterson and Edward Vaughn Williams): "Where there is any defect, imperfection, or omission in any pleading whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law; or, in the phrase often used upon the occasion, such defect is not any *jeofail* after verdict."[80] Gould's Pl. chapter 10, section 13; 1 Chit. Pl. (14th Am. ed.) 673 and note (1). "But where no cause of action is stated, the omission is not cured by verdict. For as no right of recovery was necessary to be proved, or could have been legally proved under such a declaration; there can be no ground for presuming that it was proved at the

---

Pa. St. 68 (1871); *Quick* v. *Miller*, 103 Pa. St. 67 (1883); *Bond* v. *Dustin*, 112 U. S. 604, 28 L. ed. 835, 5 Sup. Ct. 296 (1884); *Gray* v. *Commonwealth*, 92 Va. 772, 22 S. E. 858 (1895); *Hughes* v. *Frum*, 41 W. Va. 445, 23 S. E. 604 (1895); *Burrows* v. *Niblack*, 84 Fed. 111 (1898); *Ward* v. *Lakeside R. Co.*, 20 Pa. C. C. 494 (1898); *Washington* v. *Calhoun*, 103 Ga. 675 (1898); *Vanderhorst Brew. Co.* v. *Amrhine*, 98 Md. 406, 56 Atl. 833 (1904); *Danley* v. *Hibbard*, 222 Ill. 88, 78 N. E. 39 (1906); *Stid* v. *Missouri Pac. R. Co.*, 211 Mo. 411, 109 S. W. 663 (1907); *Hubbard* v. *Rutland R. Co.*, 80 Vt. 462, 68 Atl. 647 (1908); *Pelican Assur. Co.* v. *American Feed, &c., Co.*, 122 Tenn. 652, 126 S. W. 1085 (1909).

[80] *Roe* v. *Gatehouse*, 2 Salk. 663 (1695); *Hall* v. *Douglas*, Barnes, 452 (1744); *Daley* v. *Atwood*, 7 Cow. (N. Y.) 483 (1827); *Morey* v. *Homan*, 10 Vt. 565 (1838); *Bequette* v. *Losselle*, 5 Blackf. (Ind.) 443 (1840); *Higgins* v. *Bogan*, 4 Harr. (Del.) 330 (1845); *Sewalls Falls Bridge Co.* v. *Fisk*, 23 N. H. 171 (1851); *Brown* v. *Harmon*, 21 Barb. (N. Y.) 508 (1856); *Boilridge* v. *Herst*, 6 Phila. (Pa.) 391 (1867); *Harley* v. *Lebanon Mut. Ins. Co.*, 120 Pa. St. 182, 13 Atl. 833 (1888); *Johnson* v. *Johnson*, 30 Colo. 402, 70 Pac. 692 (1902); *Bowen* v. *White*, 26 R. I. 68, 58 Atl. 252 (1904); *Enright* v. *Gibson*, 119 Ill. App. 411 (1905); *Danley* v. *Hibbard*, 222 Ill. 88, 78 N. E. 39 (1906); *Pittsburgh C. C. & S. R. Co.* v. *Chicago*, 144 Ill. App. 293 (1908); *Fiscle* v. *Kissinger*, 53 Pa. Super. Ct. 453 (1913); *Kansas City Masonic Temple Co.* v. *Young*, 179 Mo. App. 278, 166 S. W. 838 (1914); *Rudd* v. *Buxton*, 41 App. Dist. C. 353 (1914). In Massachusetts, by statute, a judgment may not be arrested for a cause existing before verdict unless such cause affects the jurisdiction of the court. *McManus* v. *Thing*, 208 Mass. 55, 94 N. E. 293 (1911).

trial." [81] Gould's Pl. chapter 10, section 13. The defendant has not pointed out any "intrinsic defect" apparent on the face of the record, which under the rules of law as above stated, would render the judgment of the court below erroneous, and therefore this exception can not avail him.

Judgment affirmed.[82]

WILLIAM ELLIS, ADMINISTRATOR OF RACHEL PRITCHARD, *v.* MOSES CULVER.

SUPERIOR COURT OF DELAWARE, 1836.

2 Harr. (Del.) 129.[83]

BLACK, J.: This is an action of replevin for taking and detaining a bed and furniture, a dining table, one chest, fifty bushels of corn, six hogs, four sheep, one cow, one horse colt, and one-third of four and a half stacks of fodder, of the goods and chattels of the

---

[81] *Buxendin* v. *Sharp*, 2 Salk. 662 (1695); *Copleston* v. *Piper*, 1 Ld. Raym. 191 (1697); *Barriere* v. *Nairac*, 2 Dall. (Pa.) 249, 1 L. ed. 368 (1796); *Mayfield* v. *White*, 1 Browne (Pa.) 241 (1811); *Jackson* v. *Pesked*, 1 M. & S. 234 (1813); *Sawyer* v. *Whittier*, 2 N. H. 315 (1820); *Smith* v. *Curry*, 16 Ill. 147 (1854); *Heddens* v. *Younglove*, 46 Ind. 212 (1874); *Richards* v. *Travellers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939 (1889); *Pierson* v. *School Dist.*, 106 Iowa 695 (1898); *Dean* v. *Cass*, 73 Vt. 314, 50 Atl. 1085 (1901); *Southern R. Co.* v. *Maxwell*, 113 Tenn. 464, 82 S. W. 1137 (1904); *McNulty* v. *O'Donnell*, 27 Pa. Super. Ct. 93 (1905); *Henning* v. *Sampsell*, 236 Ill. 375 86 N. E. 274 (1908); *Metropolitan S. R. Co.* v. *Adams Express Co.*, 145 Mo. App. 371, 130 S. W. 101 (1910); *Hubbard* v. *Montross Metal Shingle Co.*, 79 N. J. L. 208, 74 Atl. 254 (1909); *Warner* v. *Baker*, 36 App. (D. C.) 493 (1911); *Grover Irrigation & Land Co.* v. *Lovella Ditch Reservoir & Irr. Co.*, 21 Wyo. 204, 131 Pac. 43 (1913).

"The authorities in the book are very numerous on the subject of defects being aided after verdict. It is quite unnecessary to detail a great number of the older cases on the subject, the great majority of them having arisen upon matters which would now be considered mere form. And it would be a task of some difficulty to reconcile all the decisions upon the subject, partly because the courts have in later times become much more liberal than they were formerly in discriminating between form and substance, and partially because the distinction between the doctrine of intendment at common law and the statute of jeofails, is very often but little attended to in many of the older reports and treatises." 1 Chitty on Pleading (16 Am. ed.) 707. By intendment after verdict, is meant that the court will presume that the particular thing which appears to be defectively stated, or omitted, was duly proved at the trial. The statutes of jeofails on the other hand expressly provide that judgment after verdict shall not be stayed or reversed for specified errors, chiefly of form, that might have been objected to by demurrer.

[82] Judgment will be arrested only for errors which appear on the face of the record. *Carpenter* v. *Child*, 1 Root (Conn.) 220 (1790); *Skinner* v. *Robeson*, 4 Yeates (Pa.) 375 (1807); *Walker* v. *Sargeant*, 11 Vt. 327 (1839); *Lovell* v. *Sabin*, 15 N. H. 29 (1844); *Howard* v. *State*, 6 Ind. 444 (1855); *Kirk* v. *Litterst*, 71 Iowa 71, 32 N. W. 106 (1887); *Schubkagel* v. *Dierstein*, 131 Pa. St. 46, 18 Atl. 1059, 6 L. R. A. 481 (1889); *Harris* v. *State*, 53 Fla. 37, 43 So. 311 (1907); *Kendall* v. *Kroeger, &c., Grocery Co.*, 173 Ill. App. 504 (1912); *Boville* v. *Dalton P. Mills*, 86 Vt. 305, 85 Atl. 623 (1912); *Dempsey* v. *Poore* (W. Va.), 83 S. E. 300 (1914).

[83] A part only of the opinion is printed.

plaintiff. The defendant pleaded *non cepit* and property; and the jury have found for the plaintiff, and assesses his damages to $91.50.

A motion has been made to arrest the judgment, on the ground that one tenant in common can not maintain replevin for his undivided share of a chattel, and that the writ and declaration show that as to a part of the property in controversy (the fodder) the plaintiff make claim of only one-third part.

In our judgment a joint tenant or tenant in common can not maintain replevin for his share of an undivided chattel against a co-tenant, nor, as we conceive, against a third person who may have possession of it. The right to the possession is an entire right, and all owners must unite in the action. * * * Where, therefore, the record shows another person to be part owner of the chattel for which replevin is brought, it may be taken advantage of on a motion in arrest of judgment.

With these impressions as to the law, the court would have no difficulty as to the decision to be made, if this chattel held in common were the only one in controversy in this action. But the writ and declaration embrace various other articles, and this is the only one which, from the record of proof, appears to have been held in common—the plaintiff claims to be the sole owner of all the others. In such a case, ought the court to arrest the judgment?

The declaration contains but a single count. It may be good for part and bad for the residue. Gould, 195; 5 Bacon, 349. Where a verdict is given in an action of slander, in which there is only one count in the narr., and where some of the words are actionable and some are not, the court will intend that damages were given for the actionable words only, and render judgment on the verdict. *Brooke* v. *Clarke,* Croke Eliz. 328; Archbold's Pl. 196; 2 Saund. 171, (a); 1 Chitty 384. If several considerations be stated in one assumpsit, and one is void, and the others good, and damages be given *ratione praemissorum,* as in *Roe* v. *Gatehouse,* 1 Lord Raym. 146; or, if one of several charges be insufficiently stated, *Fontleroy* v. *Aylmer,* 1 Lord Raym. 239; or, if part of the promise set out be a *nudum pactum, Phetteplace* v. *Steere,* 2 Johns. (N. Y.) 443; or, if a count in a narr., contain a sufficient cause of action connected with matter not actionable, *Borden* v. *Fitch,* 15 Johns. (N. Y.) 121; or, if to a plea in bar to a part of the claim, and not guilty be pleaded as to the residue, the plea in bar be demurred to and sustained, and a verdict of "guilty in manner and form as plaintiff in his narr. had alleged," be rendered, as in *Eastman* v. *Chapman,* 1 Day (Conn.) 30; the court in each of these cases held that they would intend that damages were given only for the considerations that were good; or the matters that were actionable; or the charges that were well stated; and rendered judgment on the verdicts. In an action of trespass against baron and feme, *Smalley* v. *Kerfoot,* 2 Strange 1094, for entering house, taking goods, and converting them to their use, the court held that as the wife could not convert to her own use, they

would intend that damages were given only for entering the house and taking the goods, and not for the conversion.

In *Bancroft* v. *Coo,* Croke James 664, which was an action of trover *de uno risco,* anglice a trunk full of fine linen, to the value of £20; and *de una pixide,* anglice a box full of bands, cuffs and shirts, to the value of £10, and of divers parcels of other goods, in which £80 damages were given; the court refused to arrest the judgment; and held that they would intend that damages were given for the trunk only. In the case of *Steele* v. *The Western Inland Lock Navigation Company,* reported in 2 Johns. (N. Y.) 283, the same principle is recognized.

Upon the authority of these cases, and the principles they establish, we are not inclined to arrest the judgment in this suit. The court are to decide this motion from what appears on the record; from it, no objection is presented to the recovery of any part of the property claimed in the writ, excepting the fodder; from aught that appears, this action can be maintained by the plaintiffs against the defendant for all the other chattels. It was entirely within the power of the defendant to have withdrawn from the jury the consideration of damages for the fodder. It is by his own act, or by his acquiescence, that damages have been allowed for it, if they have been allowed. He might have demurred, or objected to the evidence, or called on us to instruct the jury not to give damages for the fodder; and thus confined the jury to those chattels to which there was no objection in law to a recovery by the plaintiff. As he has not adopted either of these modes, but by his acquiescence or silence, allowed the jury to take into consideration this chattel of no great amount, with the others for which his action properly lies, we are not disposed to put the plaintiff out of court or award a *venire de novo* if this could be done, but to infer that damages were given by the jury only for those articles of property enumerated in the declaration, for which this action could be brought by the plaintiff, and sustained against the defendant.

Motion to arrest judgment overruled unanimously, and judgment as of the October term, when the case was argued.[34]

---

[34]Accord: *Russell* v. *Corne,* 1 Salk. 119 (1703); *Doe* v. *Dyeball,* 8 B. & C. 70 (1828); *Ring* v. *Roxbrough,* 2 Tyrw. 468 (1832); *Steele* v. *Navigation Co.,* 2 Johns. (N. Y.) 283 (1807); *Borden* v. *Fitch,* 15 Johns. (N. Y.) 121, 8 Am. Dec. 225 (1818); *Packard* v. *Slack,* 32 Vt. 9 (1859); *Conway* v. *Jefferson,* 46 N. H. 521 (1866); otherwise in penal action, *Morse* v. *Eaton,* 23 N. H. 415 (1851); *Specht* v. *Pennsylvania R. Co.,* 7 Pa. C. C. 54 (1889); *Robbins* v. *Bosserman,* 133 Iowa 318, 110 N. W. 587 (1907); *Karnuff* v. *Kelch,* 69 N. J. L. 499, 55 Atl. 163 (1903), overruling *Farwell* v. *Smith,* 16 N. J. L. 133 (1837); *Potts* v. *Clarke,* 20 N. J. L. 536 (1845). Contra: *Stirling* v. *Garritte,* 18 Md. 468 (1862); *Peyton* v. *Rose,* 41 Mo. 257 (1867); *Flowers* v. *Smith,* 214 Mo. 98, 112 S. W. 499 (1908).

Where a declaration contains several counts, some good and others bad, the common law rule, followed in a number of states, is that if the verdict is general, judgment should be arrested. Some jurisdictions have declined to follow this rule, and in others the same result has been attained by statute, so that in the majority of the states judgment will not be arrested after a general verdict, if there be one good count to which the verdict can be applied. 5 Enc. L. & Pr. 525; 23 Cyc. 829; *Leach* v. *Thomas,* 2 M. & W. 427

BUTCHER *v.* METTS.

DISTRICT COURT OF PHILADELPHIA, 1836.

1 *Miles (Pa.)* 233.

In this case a verdict was rendered for the plaintiff, but judgment was arrested on account of the insufficiency of the verdict.[35] The plaintiff then obtained a rule to show cause why a *venire facias de novo* should not be awarded, the former trial having proved fruitless.

Meredith, who had been of counsel with the defendant, resisted the award of a new venire, and contended that upon the arrest of the judgment the action was at an end; that the defendant no longer had a day in court, and that there was no way in which he could be brought into court but by a new original.

I. Norris, contra.

JONES, J.: An arrest of judgment is in effect nothing more than superseding a verdict for some cause apparent upon the record, which shows that the plaintiff is not entitled to the benefit of the verdict. It is often followed by a judgment for the defendant, that he go without day, but it is not of itself a judgment for the defendant. The court may, after an arrest of judgment, award a repleader or a *venire de novo* without a repleader. Which of these courses is the proper one, depends upon the nature of the defect for which the judgment is arrested.[36] If it appears by the record that the plain-

(1837); Ames' Cases on Pleading (2d ed.) 260, and the cases there collected. See, also, *Ruth* v. *Kutz*, 1 Watts (Pa.) 489 (1833); *Johnson* v. *Clark*, 2 W. N. Cas. (Pa.) 454 (1874); *Langan* v. *Enos Fire Escape* Co., 233 Ill. 308, 84 N. E. 267 (1908); *Klofski* v. *Railroad S. Co.*, 235 Ill. 146, 85 N. E. 274 (1908); *Varn* v. *Pelot*, 55 Fla. 357, 45 So. 1015 (1908); *Ardison* v. *Ill. Cent. R. Co.*, 155 Ill. App. 274 (1910); and compare *Hagar* v. *Norton*, 188 Mass. 47, 73 N. E. 1073 (1905); *Massucco v. Tomassi*, 80 Vt. 186, 67 Atl. 551 (1907).

[35] *Butcher* v. *Metts*, 1 Miles (Pa.) 153 (1836).

[36] Accord: *State ex rel. Bond* v. *Fisher*, 230 Mo. 325, 130 S. W. 35 (1910). See, also, *Gibson* v. *Waterhouse*, 5 Maine 19 (1827); *Pratt* v. *Thomas*, 2 Hill (S. Car.) 654 (1835); *Kauffman* v. *Kauffman*, 2 Whart. (Pa.) 139 (1836); *Kevile* v. *Shriver*, 11 G. & J. (Md.) 405 (1841); *Raber* v. *Jones*, 40 Ind. 436 (1872); *Taylor* v. *Jones*, 52 Ala. 78 (1875); *Crawford* v. *Crockett*, 55 Ind. 220 (1876); *Sanner* v. *Sayne*, 78 Ga. 467, 3 S. E. 651 (1887); *Johnson* v. *Johnson*, 30 Colo. 402, 70 Pac. 692 (1902); *Stid* v. *Missouri P. R. Co.*, 211 Mo. 411, 109 S. W. 728 (1907). Compare *Kitchenman* v. *Skeel*, 3 Exch. 49 (1848).

As to whether error lies from an order arresting judgment compare *Bemis* v. *Faxon*, 2 Mass. 141 (1806); *Skinner* v. *Robeson*, 4 Yeates (Pa.) 375 (1807); *Benjamin* v. *Armstrong*, 2 Serg. & R. (Pa.) 392 (1816); *Adams* v. *Meredew*, 3 Y. & Jer. 419 (1829); *Favor* v. *Philbrick*, 5 N. H. 357 (1831); *Powell* v. *Kinney*, 6 Blackf. (Ind.) 359 (1842); *Bowie* v. *Kansas*, 51 Mo. 454 (1871); *Daniels* v. *Denver*, 2 Colo. 595 (1875) with *Fish* v. *Weatherwax*, 2 Johns. Cas. (N. Y.) 215 (1801); *Horne* v. *Barney*, 19 Johns. (N. Y.) 247 (1821); *People* v. *Onondaga G. S.*, 2 Wend. (N. Y.) 631 (1829); *Wallis* v. *Sparks*, Morr. (Iowa) 20 (1835); *Garesche* v. *Emerson*, 31 Mo. 258 (1860); *Morehead* v. *International R. Co.*, 46 Tex. 178 (1876); *Brazel* v. *New South Coal Co.*, 131 Ala. 416 (1901).

Where judgment is arrested for a defect in substance in pleading a new action may be brought and the former proceeding can not be pleaded as res adjudicata. *Louisville & N. R. Co.* v. *Beasley*, 123 Tenn. 629, 134 S. W. 306 (1910); *State ex rel. Bond* v. *Fisher, supra.* See *Myers* v. *Filley*, 12 Dist. (Pa.) 562 (1903).

tiff has no cause of action, the court will give judgment, after the arrest of judgment on the verdict, that the plaintiff take nothing by his writ, and that the defendant go without day. If issue be joined upon an immaterial point, there being a sufficient cause of action alleged in the declaration, the proper course is to award a repleader. If the pleadings be sufficient and the issue well joined, but the verdict is imperfectly found, it is usual to award a *venire de novo;* and this it is said may be done upon the motion of the defendant, without a motion in arrest of the judgment.

The *venire de novo* is an ancient proceeding of the common law. It was in use long before the practice of granting new trials. It follows of course upon the granting of a new trial; but as a distinct proceeding it is commonly adopted after a bill of exceptions or after a special verdict imperfectly found, but always for some cause apparent on the record, and if granted when it should not be, it is error, and the award of it may be reversed.

A new trial, on the other hand, is commonly granted after a general verdict for some cause not apparent on the record, and it is not assignable for error. *Hambleton* v. *Veere,* 2 Saund. 1716, (n. 1); *Goodtitle* v. *Jones,* 7 T. Rep. 43, 48; *Witham* v. *Lewis,* 1 Wils. 48, 56; Com. Dig. tit. Pleader, R. 18; 1 Sellon's Pr. chapter 11, section 3, (C. D.); *Miller* v. *Ralston,* 1 Serg. & R. (Pa.) 309; *Ebersol* v. *Krug,* 5 Binn. (Pa.) 53; *Lessee of Pickering* v. *Rutty,* 1 Serg. & R. (Pa.) 515.

In this case the fault was in the verdict. Of course it appears upon record. A *venire facias de novo* is therefore proper.

In regard to the objection that the defendant is no longer in court in this action, it should be observed that the judgment was arrested at this term, and no judgment has been entered for the defendant. He is therefore still in court and bound to take notice of the further proceedings in the cause. But if the term had been allowed to elapse after the arrest of judgment, and the cause had not been continued by a *curia adv. vult,* according to strict notions of practice, the action would have been discontinued, and the defendant without day in court.

Venire de novo awarded.

CHAPTER V

JUDGMENT

SECTION 1. RENDITION AND ENTRY

3 Blackst. Comm. 395

Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record;[1] and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer; secondly, where the law is admitted by the parties and the facts disputed; as in case of judgment on a verdict; thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by confession or default;[2] or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit*.[3]

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him, who hath rode over my corn I may recover damages by law; but A hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law; if the minor, it is then an issue of fact, but if both be confessed (or determined) to be right, the conclusion or judgment of the court can not but follow.[4] Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The

---

[1] *Gifford* v. *Livingston*, 2 Den. (N. Y.) 380, 391 (1845); *State* v. *Wood*, 23 N. J. L. 560 (1850); *Whitewell* v. *Emory*, 3 Mich. 84 (1853); *Deuel* v. *Hawke*, 2 Minn. 50 (1858); *Mahoning County Bank's Appeal*, 32 Pa. St. 158 (1858); *Ludlow* v. *Norfolk*, 87 Va. 319, 12 S. E. 612 (1891); *State* v. *Fleming*, 147 Mo. 1, 44 S. W. 758 (1898); *State* v. *Muench*, 217 Mo. 124, 117 S. W. 25 (1908); *McGuire* v. *Bryant & Co.*, 53 Wash. 425, 102 Pac. 237 (1909); *Consolidated G. Co.* v. *Struthers*, 41 Mont. 565, 111 Pac. 152 (1910).

[2] *Thompson* v. *Gilmore*, 50 Maine 428 (1861); *Frank* v. *Hardee*, 22 La. Ann. 184 (1870); *Cooper* v. *Kanter*, 24 Misc. 203, 52 N. Y. S. 625 (1898); *Hoegerle's Appeal*, 2 Pa. Super. Ct. 522 (1896).

[3] *Beecher's Case*, 8 Co. 115 (1608); *Harris* v. *Preston*, 10 Ark. 201 (1849); *Broward* v. *Roche*, 21 Fla. 465 (1885). "A *retraxit* differs from a nonsuit in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary reunuciation of his suit in court, and by this he forever loses his action." 3 *Bl. Comm.* 296.

[4] *New York, N. H. & H. R. Co.* v. *Hungerford*, 75 Conn. 76 (1902).

judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out; and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam,* that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.[5]

ZAHORKA AND OTHERS *v.* GEITH.

SUPREME COURT OF WISCONSIN, 1906

129 Wis. 498.

Appeal from a judgment of the Circuit Court for Milwaukee County.

In the matter of admitting to probate the last will and testament of one Carl Geith, deceased, the question arose as to whether the

---

[5]Strictly, a "judgment" is restricted to a proceeding at law, while a "decree" is the adjudication of a court of equity, but in jurisdictions that have abolished the distinction between law and equity so far as procedure is concerned, the final determination of any suit is known as a judgment. *Walker* v. *Walker,* 93 Iowa 643, 61 N. W. 930 (1895); N. Y. Code Civ. Proc., §1200; Cal. Code Civ. Proc., §577. It is necessary, also, to distinguish between an order and a final judgment. "The former is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. The latter is the determination of the court upon the issue presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit." *Loring* v. *Illsley,* 1 Cal. 24 (1850); *Davis* v. *Barr,* 5 S. & R. (Pa.) 516 (1820); *Citizens B. & L. Assn.* v. *Hoagland,* 87 Pa. St. 326 (1878); *Mercer* v. *Glass,* 89 Ky. 199 (1889); *Ex parte Chinery,* L. R. 12 Q. B. Div. 342 (1884); *Onslow* v. *Commissioners,* L. R. 25 Q. B. Div. 465 (1890); *Goldring* v. *Reid,* 60 Fla. 78, 53 So. 503 (1910). For modern English practice see Rules of Supreme Court, order xl, rules 1-10; order xli, rules 1-10.

"The dogget, or as it is commonly called, the docket or docquet, is an index to the judgment, invented by the court for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seem to have first obtained as early as the reign of King Henry the Eighth, in the Court of Common Pleas." 2 Tidd's Practice (9th ed.) 939. The keeping of the dockets was regulated by statute. 7 & 8 William III, ch. 36. Before the statute, it is said, the judgment bound the lands, and the docket was nothing more than an index. After the statute it was deemed necessary that the judgment should be docketed in order to bind the lands as to purchasers and mortgagees. 2 Tidd's Practice (9th ed.) 940; Gilbert's Practice C. P. 140 (1737); *Flower* v. *Bolingbroke,* 1 Str. 639 (1725); *Wait* v. *Garth,* Barnes, 261 (1739). But in England today, a judgment does not operate as a charge on land until a writ for the purpose of enforcing it is registered in the Land Registry under the Land Charges Registration and Searches Act of 1888 (51 and 52 Vict., ch. 51), and of 1900 (63 and 64 Vict., ch. 26).

defendant was the wife of the testator at the time of his death, and hence whether she was entitled to the rights given to her as widow by statute. The court below found that defendant was the lawful widow of decedent and from the judgment in her favor the heirs at law and legatees and devisees named in the will appealed.[6]

CASSODAY, C. J.: The important question presented is whether the defendant in this action had been divorced from her former husband, Edward Baehr, before she was married to the deceased, Carl Geith, December 8, 1894. Of course, if she had not been so divorced before such marriage, then such marriage was "absolutely void, without any judgment of divorce or other legal proceeding." Sections 2349, 2330, Stat. 1898. In obedience to such statutes this court has so declared. *Williams* v. *Williams,* 63 Wis. 58, 61. Upon full hearing of the divorce action and at the close of the trial thereof, the circuit court on September 6, 1890, declared that "judgment is ordered for plaintiff and against defendant." This is claimed to be a mere order for judgment, which did "not affect the status of the parties so as to render them capable of contracting marriage with others." In support of such claim counsel rely on *State v. Eaton,* 85 Wis. 587, where such language was used. That was a criminal action for adultery, and this court also held that "if the judgment, when entered, can for any purpose take effect from the date of the order therefor, it can not operate to make an act a crime which was not so when committed, or, if then a crime, to make it one of a higher grade." The ruling of this court in that case seems to assume that when such judgment of divorce should be entered, pursuant to such order, it might take effect for some purposes "from the date of the order therefor." It has been held that "judgment of divorce, after being signed by judge and filed with clerk, is binding upon the parties and their privies, although not entered by the clerk." *Estate of Newman,* 75 Cal. 213, 7 Am. St. 146. In a later case in that state it was held: "Judgment becomes rendered and the rights of the parties established at the time the court pronounces its decision; and it is not necessary to its validity that it should be in writing or signed by the judge . . . Judgment of divorce becomes effective at the time of its rendition, although it is not entered by the clerk until a subsequent date." *Estate of Cook,* 77 Cal. 220; *Allen* v. *Voje,* 114 Wis. 1.[7]

In ordering judgment for the plaintiff and against the defendant in the divorce action here under consideration there was no claim nor mention of alimony to be awarded as in the divorce action considered in *State* v. *Eaton, supra.* There can be no question but that the circuit court, in the language quoted above, pronounced

[6]The statement of facts is abridged from the opinion, part of which is omitted.

[7]Compare *Seaman* v. *Ward,* 1 Hilton (N. Y.) 52 (1856) where it is said, per Daly, J.: "It was admitted, on the trial, that Justice McCarthy rendered judgment, *in his mind,* within the four days, though it was not entered until afterwards. There is no such thing as a judgment rendered in the mind of the justice. Judgment is a judicial act, not a mental resolution. It is not enough that the judge concludes to render judgment; he must declare it." Accord: *Jones* v. *Walker,* 5 Yerg. (Tenn.) 427 (1827).

judgment of divorce in favor of this defendant and against Edward Baehr, then residing in Germany. *German Am. Bank* v. *Powell*, 121 Wis. 575. There was nothing further to be done except for the clerk to enter judgment in obedience to such direction of the court. The court had fully performed its judicial functions. The clerk failed to perform his duty as clerk.[8]

The question recurs whether upon the records of the court and the proofs taken in open court and the findings of the court made May 19, 1904, as to the facts as they were September 6, 1890, the trial court was justified in ordering judgment in the divorce action *nunc pro tunc* as of September 6, 1890, and whether the judgment entered May 19, 1904, pursuant to such order *nunc pro tunc* as of September 6, 1890, was binding and effectual in dissolving the marriage relation between this defendant and Edward Baehr as of September 6, 1890. After careful consideration we are constrained to hold that such judgment of divorce was binding and effectual. Thus it is said by Mr. Freeman: "The entry of judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court but the clerk has failed or neglected to copy it into the record." 1 Freeman, Judgm. (4th ed.), § 61.[9]

Judgment affirmed.

---

[8]Accord: *Huntington* v. *Charlotte*, 15 Vt. 46 (1843); *In re Cook*, 77 Cal. 220, 17 Pac. 923, 1 L. R. A. 567, 11 Am. St. 267 (1888); *Holt* v. *Holt*, 107 Cal. 258, 40 Pac. 390 (1895). "The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed." *Sieber* v. *Frink*, 7 Colo. 148, 2 Pac. 901 (1883); *Goddard* v. *Coffin*, 2 Ware (U. S.) 381, Fed. Cas. No. 5490 (1849); *Aspden's Appeal*, 24 Pa. St. 182 (1854); *Casement* v. *Ringgold*, 28 Cal. 335 (1865); *Gray* v. *Palmer*, 28 Cal. 416 (1865); *Kchoe* v. *Blethen*, 10 Nev. 445 (1876); *Los Angeles County Bank* v. *Raynor*, 61 Cal. 145 (1882); *Holtby* v. *Hodgson*, L. R. 24 Q. B. Div. 103 (1889); *Risk* v. *Uffelman*, 7 Misc. 133, 27 N. Y. S. 392, 57 N. Y. St. 102 (1844); *State* v. *Weber*, 96 Minn. 422, 105 N. W. 490, 113 Am. St. 630 (1905); *United States* v. *Stoller*, 180 Fed. 910 (1910); *Wallis* v. *First Nat. Bk.*, 155 Wis. 533, 145 N. W. 195 (1914); *Brown* v. *Cray*, 88 Conn. 141, 89 Atl. 1123 (1914). Compare, under statutes, *Callahan* v. *Votruba*, 104 Iowa 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am. St. 538 (1898); *Locke* v. *Hubbard*, 9 S. Dak. 364, 69 N. W. 588 (1896); *Maurin* v. *Carnes*, 71 Minn. 308, 74 N. W. 139 (1898); *Crouse* v. *Murphy*, 140 Pa. St. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. 232 (1891); *State* v. *Judge of Division*, 128 La. 914, 55 So. 574 (1911); *Farris* v. *Matthews*, 149 Ky. 455, 149 S. W. 896 (1912). Courts, in the absence of a statute, have provided by general rule for the entry of judgments by the clerk in certain cases, and in this respect, the act of the clerk is ministerial. *Sommerville* v. *Fiske*, 137 Mass. 91 (1884); *Boyd* v. *Insurance Patrol*, 20 W. N. Cas. (Pa.) 53 (1887); *Fountaine* v. *Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. 515 (1887); *Robostelli* v. *Railroad Co.*, 34 Fed. 507 (1888); *Crim* v. *Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. 491 (1891); *Card* v. *Meincke*, 70 Hun 382, 24 N. Y. S. 375, 54 N. Y. St. 285 (1893); *Rothschild* v. *Knight*, 176 Mass. 48, 57 N. E. 337 (1900); *Collins* v. *Davis*, 114 N. Y. S. 792 (1909); *Central Trust Co.* v. *Holmes Min. Co.*, 30 Nev. 437, 97 Pac. 390 (1908).

[9]Accord: *Reily* v. *Burton*, 71 Ind. 118 (1880); *Young* v. *Young*, 165 Mo. 624, 65 S. W. 106, 88 Am. St. 440 (1901); *Metzger* v. *Morley*, 197 Ill. 208, 64 N. E. 280, 90 Am. St. 158 (1902); *State* v. *Goodrich*, 159 Mo. App. 422, 140 S. W. 629 (1911); *Stein* v. *Meyers*, 253 Ill. 199, 97 N. E. 295 (1912); *Creed* v. *Marshall*, 160 N. Car. 394, 76 S. E. 270 (1912); *Chester* v. *Graves*,

BELL *v.* OTTS

SUPREME COURT OF ALABAMA, 1892

101 *Ala.* 186.

Appeal from the Circuit Court of Jefferson.

Tried before the Hon. James B. Head.

This was a statutory action of ejectment brought by the appellee against the appellants, and sought to recover certain described property. The judgment from which the present appeal is prosecuted is in the following language: "This day came the parties by their attorneys, and the demurrer to pleas were sustained by the court, the material facts therein averred being provable under the general issue; and issue being joined, thereupon came a jury of twelve good and lawful men, to wit: R. W. Beck and eleven others, who, being duly sworn and empanelled according to law, on their oaths say, 'We the jury find for the plaintiff for the land sued for viz., S. ½ of S. E. ¼ of Sec. 6, T. 13 S., R. 2 W., in Jefferson county, and twenty-five dollars damages for detention as against defendant, Martha Bell,' and judgment is rendered against defendants Samuel Mace and Henry Edwards for land sued for, together with all the costs in this behalf expended, for which execution may issue." The opinion renders it unnecessary to notice in detail the several rulings of the lower court.

HARALSON, J.: The verdict in this case was: "We the jury find for the plaintiff for the land sued for (describing it), and twenty-five dollars damages for detention against defendant, Martha Bell." On this verdict a judgment ought to have been entered against all the defendants for the land sued for, for twenty-five dollars against Martha Bell as damages for detention, and against all of them for the costs, Code, sections 2709-10; 67 Ala. 197. Immediately following this verdict, with a comma between, appears what purports to be a judgment in the cause, based on the verdict, namely, "And judgment is rendered against the defendants, Samuel Mace and Henry Edwards, for the land sued for, together with all the costs in this behalf, for which execution may issue."

A judgment shall be complete and certain in itself, and must appear to be the act, the adjudication of the court, and not a memorandum or certified result. *Speed* v. *Cocke*, 57 Ala. 209. Among various definitions of a judgment in the books, not differing in legal effect from each other, we have the one that it is "the final

---

159 Ky. 244, 166 S. W. 998 (1914). But intervening equities will be protected. *Leonard* v. *Broughton*, 120 Ind. 536, 22 N. E. 731, 16 Am. St. 347 (1889).

It is error to enter final judgment before all the issues are disposed of. *Meylin* v. *Woodford*, 1 Blackf. (Ind.) 286 (1823); *Paul* v. *Harden*, 9 Serg. & R. (Pa.) 23 (1822); *Dow* v. *Rattle*, 12 Ill. 373 (1851); *Williams* v. *Perkins*, 21 Ark. 18 (1860); *Gage* v. *Allen*, 84 Wis. 323, 54 N. W. 627 (1893); *Stone* v. *Perkins*, 217 Mo. 586, 117 S. W. 717 (1908); *Gross* v. *Bennington*, 52 Wash. 417, 100 Pac. 846 (1909); *Montgomery* v. *Gahagan*, 246 Mo. 310, 151 S. W. 453 (1912). See also N. Y. Code Civ. Proc., §§ 1221, 1225.

consideration and determination of a court of competent jurisdiction upon the matters submittted to it." 1 Freeman on Judgments, section 2; *Whilwell* v. *Emory*, 3 Mich. 84, 59 Am. Dec. 220. The language of a judgment is, "It is considered by the court that the plaintiff have and recover, or that the defendant go without day."[10] If ever what purports to be a judgment falls short of being a finding, an adjudication of the court, complete and certain, but is in substance a mere memorandum of the clerk which declares, as here, no more than that a judgment was rendered, without setting out what the judgment was, it can not be sustained as the final consideration and determination of the court. *Bank* v. *Godbold*, 3 Stew. (Ala.) 240; *Hinson* v. *Wall*, 20 Ala. 298.

There is here absolutely nothing in the shape of a judgment against the defendant, Martha Bell, for anything; and as for the other defendants, there is simply a declaration that judgment is rendered against them for the land and costs, but no judgment is in fact rendered. This entry is lacking in form and material averments to constitute it a judgment, and to support it as such would be to sanction an uncertainty and looseness in the record and preservation of solemn and important judicial ascertainments, such as would be pernicious.

Our conclusion is, there is no such judgment here as will support an appeal, and it is therefore dismissed.

Appeal dismissed.[11]

---

[10] *Baker* v. *State*, 3 Ark. 491 (1840); *Jasper Mercantile Co.* v. *O'Rear*, 112 Ala. 247, 20 So. 583 (1895); *Wilkinson* v. *Olin*, 136 Ill. App. 527 (1907); *Williams* v. *Connors*, 149 Ill. App. 29 (1909). In modern practice the formal language of the judgment is not regarded as material, provided that it is clearly indicated that the subject in controversy has been adjudicated. *Todd* v. *Potter*, 1 Day (Conn.) 238 (1804); *Whitaker* v. *Bramson*, 2 Paine (U. S.) 209, Fed. Cas. No. 17526 (1835); *Needham* v. *Gillaspy*, 49 Ind. 245 (1874); *Ware* v. *Pennington*, 15 Ark. 226 (1854); *Hamman* v. *Lewis*, 34 Tex. 474 (1870); *Alton* v. *Heidrick*, 248 Ill. 76, 93 N. E. 386 (1910); *Tisdale* v. *Davis*, 182 Ill. App. 31 (1913).

[11] *Conover* v. *Conover*, 17 N. J. L. 187 (1839); *Davidson* v. *Murphy*, 13 Conn. 213 (1839); *Ferguson* v. *Staver*, 40 Pa. St. 213 (1861); *Bevington* v. *Buck*, 18 Ind. 414 (1862); *Wilbur* v. *Abbot*, 58 N. H. 272 (1878); *Simmons* v. *Craig*, 137 N. Y. 550, 33 N. E. 76 (1893); *Carter* v. *Elmore*, 119 N. Car. 296, 26 S. E. 35 (1896); *Fitzsimmons* v. *Munch*, 74 Ill. App. 259 (1897); *Hall* v. *Beston*, 13 App. Div. 116, 43 N. Y. S. 304 (1897); *Birdsell Mfg. Co.* v. *Independent Fire, &c., Co.*, 87 Ill. App. 443 (1899); *Hoodless* v. *Jernigan*, 46 Fla. 213, 35 So. 656 (1903); *Good* v. *Chester*, 65 W. Va. 13, 63 S. E. 615 (1909); *Folcarelli* v. *Ward*, 132 App. Div. 316, 116 N. Y. S. 1093 (1909); *Levert* v. *Berthelot*, 127 La. 1004, 54 So. 329 (1910). In *Park* v. *Holmes*, 147 Pa. St. 497, 23 Atl. 769 (1892), an action of replevin, the verdict found rent due the defendant and goods of a certain value liable for the rent. Subsequently this entry was made: "Feb. 2, 1891. Jury fee paid (by deft.) eo die judgment." It was held that the record would not support an execution. Sterrett, J., said: "No court in this country, or elsewhere, has gone to a greater length than the courts of this state in sanctioning extreme brevity in the entry and record of judgments; but when we are asked to sustain a so-called judgment, which is silent as to the sum for which, and the person or persons against whom it was intended to be entered, it is time to draw the line." Compare *Helvete* v. *Rapp*, 7 Serg. & R. (Pa.) 306 (1821); *Sellers* v. *Burk*, 47 Pa. St. 344 (1864).

SNOW *v.* WEST

SUPREME COURT OF UTAH, 1910

37 Utah 528.

Action by A. E. Snow against E. M. West in which M. R. Brothers, as assignee, was substituted as plaintiff.

The court entered judgment allowing the defendant to set-off judgments. Brothers appeals.[12]

FRICK, J.: The first assignment of error to be noticed is that the court erred in permitting the judgment which was entered for "the sum of 242.98" to be set off, for the reason that the same is not a judgment for an amount certain and is therefore void. The case of *Carpenter* v. *Sherfy*, 71 Ill. 427, and *Avery* v. *Babcock*, 35 Ill. 175, cited by appellant in support of his contention, seem to hold as contended for.[13] We do not think, however, that those cases are based on sound legal principles. No doubt judgments should be specific and certain. Judgments should, however, be read, construed and applied as other writings are, and if in the light of the pleadings and the whole record they are certain, they should be enforced. This, we think, is the doctrine announced by the better reasoned cases, and is supported by the text writers. In referring to this subject in 1 Black on Judgments, section 118, where the author to some extent reviews the cases, he says: "An obscure or ambiguous designation of the parties, of the subject-matter involved, may be construed, as we have seen, with reference to the other parts of the record. And if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake, it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision." The foregoing text is supported by the cases of *Carr* v. *Anderson*, 24 Miss. 188, and *Gutzwiller* v. *Crowe*, 32 Minn. 70, in which the facts were similar to those in the case at bar.[14] See, also, Freeman on Judgments, section 48. Any person of ordinary intelligence who should inspect the entry

---

[12]Part of the opinion of the court is omitted.

[13]Accord: *Hopper* v. *Lucas*, 86 Ind. 43 (1882); *Peter* v. *Hill*, 13 Ill. App. 36 (1883); *Boyne* v. *Vandalia R. Co.*, 128 Ill. App. 191 (1906), and, in judgments for taxes. *Lawrence* v. *Fast*, 20 Ill. 338, 71 Am. Dec. 274 (1858); *Lane* v. *Bommelman*, 21 Ill. 143 (1859); *Baily* v. *Doolittle*, 24 Ill. 577 (1860); *Woods* v. *Freeman*, 1 Wall. (U. S.) 398, 17 L. ed. 543 (1863); *People* v. *San Francisco Savings Union*, 31 Cal. 132 (1866); *Randolph* v. *Metcalf*, 6 Coldw. (Tenn.) 400 (1869).

[14]Accord: *Therme* v. *Bethenoid*, 106 Ia. 697, 77 N. W. 497 (1898); *Gutzwiller* v. *Crowe*, 32 Minn. 70, 19 N. W. 344 (1884), distinguishes *Tidd* v. *Rines*, 26 Minn. 201, 2 N. W. 497 (1879), on the ground that in the earlier case the figures were not separated by a line or decimal mark. See also *Collins* v. *Welch*, 38 Minn. 62, 35 N. W. 566 (1887); *Dyke* v. *Bank*, 90 Cal. 397, 27 Pac. 304 (1891). The omission of the word dollars in a verdict is not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury. *Hopkins* v. *Orr*, 124 U. S. 510, 31 L. ed. 523 (1887).

of the judgment in question would, we think, not have the slightest hesitancy or doubt with respect to arriving at the amount of the judgment. Should a writing or record which would be read and understood by all ordinary men in but one sense, nevertheless, be held to be uncertain by a court of justice because certain signs, marks or words usually used are wanting? It would seem that any writing or record that is certain to all ordinary minds should likewise be sufficiently certain in a court of justice. Common sense should not be lost sight of entirely merely because a court acts in conformity to certain rules of evidence. We are satisfied that, in view of the whole record and the manner in which the figures were written and pointed off, the amount of the judgment in question was no more uncertain than if the dollar sign or mark had in fact been used, or the words "dollars" and "cents" had been written out in full after the figures. This assignment must therefore be overruled.[15]

Affirmed.

KENNON *v.* GILMER

SUPREME COURT OF THE UNITED STATES, 1888

131 U. S. 22.

Action by Kennon to recover damages for personal injuries sustained while a passenger in a stage coach operated by Gilmer and others between the towns of Deer Lodge and Helena in the Territory of Montana. At the trial the jury returned a verdict for the plaintiff for $20,000 general damages and $750 medical expenses. Judgment having been entered on the verdict, the defendants appealed to the Supreme Court of the Territory, which ordered

---

[15]There are cases which hold that a judgment expressed in figures and not in words is defective. *Cole* v. *Petty*, 2 N. J. L. 60 (1806); *Walton* v. *Vanderhoof*, 2 N. J. L. 73 (1806); *Neal* v. *Collins*, 2 N. J. L. 85 (1806); *Linder* v. *Monroe*, 33 Ill. 388 (1864); *Smith* v. *Miller*, 8 N. J. L. 175, 14 Am. Dec. 418 (1825); *Lloyd* v. *Hance*, 16 N. J. L. 127 (1837). Contra: *Tankersley* v. *Silburn*, Minor (Ala.) 185 (1824); *Moore* v. *Whitcomb*, 48 Mo. 543 (1871); *Davis* v. *McCray*, 100 Ala. 545, 13 So. 665 (1892), and in *East Orange* v. *Richardson*, 71 N. J. L. 458, 59 Atl. 897 (1904), it is held that the entry of judgment in figures is a mere defect in form, not prejudicial to the defendant, and therefore furnishing no ground for reversal. See also *Kopperl* v. *Nagy*, 37 Ill. App. 23 (1890).

If a judgment purports to be final and is given upon a money demand, the amount of the recovery must be stated with certainty and precision. *Dickinson* v. *Rahn*, 98 Ill. App. 245 (1901); *Jones* v. *Acre*, Minor, (Ala.) 5 (1820); *Berry* v. *Anderson*, 2 How. (Miss.) 649 (1837) *Brown* v. *Horless*, 22 Tex. 645 (1859); *Noyes* v. *Newmarch*, 83 Mass. 51 (1861); *Battell* v. *Lowery*, 46 Iowa 49 (1877); *Bickford* v. *Flannery*, 70 Maine 106 (1879); *People* v. *Pirfenbrinck*, 96 Ill. 68 (1879); *Park* v. *Holmes*, 147 Pa. 497, 23 Atl. 769 (1892); *Etheridge* v. *Middleton*, 1 Marv. (Del.) 139, 40 Atl. 714 (1893); *Moore* v. *Evans*, 24 Idaho 153, 132 Pac. 971 (1913). But in some cases the judgment has been supported by reference to the pleadings and verdict. *Dinsmore* v. *Austill*, Minor, (Ala.) 89 (1822); *Lewis* v. *Smith*, 2 Serg. & R.(Pa.) 142 (1815); *Sellers* v. *Burk*, 47 Pa. St. 344 (1864); *Ulshafer* v. *Stewart*, 71 Pa. St. 170 (1872); *Ladnier* v. *Ladnier*, 64 Miss. 368, 1 So. 492 (1886).

the judgment to be reduced to the sum of $10,750 and affirmed it for that amount. Writs of error to the Supreme Court of the United States were sued out by both parties.[16]

GRAY, J.: By the action of the court in entering an absolute judgment for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced; and either, therefore, is entitled to have the judgment reversed by writ of error. The plaintiff was prejudiced, because he was deprived of the election to take a new trial upon the whole case. The defendant was prejudiced because if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of error, in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record.

The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that court will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny it, to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur by the plaintiff.[17]

Judgment reversed.

---

[16]The statement of facts is abridged and part of the opinion omitted. The decision reversed is reported in 5 Mont. 257.

[17]The judgment must conform to and follow the pleadings and verdict. *Grosvenor* v. *Danforth*, 16 Mass. 74 (1819); *Baltzell* v. *Hickman*, 4 Litt. (Ky.) 265 (1823); *Hawk* v. *Anderson*, 9 N. J. L. 319 (1827); *Dennison* v. *Leech*, 9 Pa. St. 164 (1848); *Bennett* v. *Butterworth*, 11 How. (U. S.) 669, 13 L. ed. 859 (1850); *Wright* v. *Delafield*, 25 N. Y. 266 (1862); *Dawson* v. *Shirk*, 102 Ind. 184, 1 N. E. 292 (1885); *Van Etten* v. *Kosters*, 48 Nebr. 152, 66 N. W. 1106 (1896); *Shulman* v. *Maison*, 25 Misc. 765, 54 N. Y. S. 1009 (1898); *Gentry* v. *United States*, 101 Fed. 51 (1900); *Lewis* v. *Story*, 147 Ill. App. 221 (1909); *Enskew* v. *Reise*, 117 N. Y. S. 906 (1909); *Weeks* v. *New York, &c., R. Co.*, 145 App. Div. 535, 129 N. Y. S. 888 (1911); *Spears* v. *Wise*, 187 Ala. 346, 65 So. 786 (1914). If a verdict is found for a sum certain, the court can not give judgment for a greater sum. *Reid* v. *Dunklin*, 5 Ala. 205 (1843); *Buck* v. *Little*, 24 Miss. 463 (1852); *Mitchell* v. *Geisendorff*, 44 Ind. 358 (1873); *Alpers* v. *Schammel*, 75 Cal. 590, 17 Pac. 708 (1888); *Volker* v. *Bank*, 26 Nebr. 602, 42 N. W. 732 (1889); *Halberg* v. *Brosseau*, 64 Ill. App. 520 (1896); *Hanmueller* v. *Ackerman*, 130 Mo. App. 387, 109 S. W. 857 (1908); or a less sum, *Heidenheimer* v. *Schlett*, 63 Tex. 394 (1885); *Goggan* v. *Evans*, 12 Tex. Civ. App. 256, 33 S. W. 891 (1896);

WILBER *v.* WIDNER

SUPREME COURT OF NEW YORK, 1828

1 *Wend.* (*N. Y.*) 56.

Error from the Monroe Common Pleas. Daniel K. Widner brought an action of slander against Wilber in the Monroe Common Pleas. In declaring, the plaintiff in the commencement of the declaration, is named David K. Widner, and his name is not again mentioned. The defendant appeared and pleaded, issue was joined and the cause brought to trial. On the trial, the words for the speaking of which the action was brought, were proved to have been spoken of and concerning Daniel K. Widner. The capias was produced, which was in the name of Daniel K. Widner, and the pleas of the defendant were shown to be entitled Wilber ads. Daniel K. Widner. The attorney for the plaintiff testified that Daniel K. Widner was his client, and that the suit was brought for him. In the record, the name of Daniel K. Widner, as plaintiff, does not occur, except in the warrant for attorney, until after the finding of the verdict, when it is found in a continuance of *curia advisare vult*, as that of the plaintiff in the cause; then follows a judgment on demurrer, and a judgment on the verdict in favor of the said

---

if the verdict is excessive, the remedy is a new trial, unless a remittitur is entered; *Pickwood* v. *Wright*, 1 H. Bl. 642 (1791); *Atchison T., &c., R. Co.* v. *Cogswell*, 23 Okla. 181, 99 Pac. 923 (1909); *Walker* v. *Fuller*, 29 Ark. 448 (1874); *Blackwell* v. *Landreth*, 90 Va. 748, 19 S. E. 791 (1894); *Excelsior Electric Co.* v. *Sweet*, 59 N. J. L. 441, 31 Atl. 721 (1896); *Dickinson* v. *Rahn*, 98 Ill. App. 245 (1901). In England, in an action of tort, while a new trial may be granted for an excessive verdict, the court has no jurisdiction, without the defendant's consent, to make an order that unless the plaintiff consents to reduce the damages there shall be a new trial. *Watt* v. *Watt*, L. R. (1905), A. C. 115, overruling *Belt* v. *Lawes*, L. R. (1884), 12 Q. B. Div. 356. See also Rules of Supreme Court, order xl, rule 10. In Pennsylvania the Supreme Court, under the act of May 20, 1891, P. L. 101, § 2, P. & L. Dig. (2d ed.) 322, has power to reduce a judgment on a verdict to such sum as it may deem proper and just; but the power is exceptional and sparingly exercised. *Smith* v. *Times Pub. Co.*, 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819 (1896); *Begley* v. *Railroad Co.*, 201 Pa. 84, 50 Atl. 1009 (1902); *Stevenson* v. *Ebervale Coal Co.*, 201 Pa. 112, 50 Atl. 818, 88 Am. St. 805 (1902); *Dinan* v. *Supreme Council of Catholic Mut. Ben. Assn.*, 213 Pa. 489, 62 Atl. 1067 (1906); *Murtland* v. *English*, 214 Pa. 325, 63 Atl. 882, 112 Am. St. 747 (1906).

In *Coffman* v. *Brown*, 7 Colo. 147, 2 Pac. 905 (1883), the defendant's answer admitted an indebtedness to plaintiff and tendered $31.40. The jury rendered a verdict for $20.40, upon which judgment was entered. *Held*, that defendant was bound by his tender and under the pleadings, the plaintiff was entitled to $31.40 in any event; therefore judgment was reversed and the cause remanded with directions to the court below to render judgment for that sum. Accord: *Sweetland* v. *Tuthill*, 54 Ill. 215 (1870).

In an action upon a statutory right, the judgment must conform to the statute. Thus where a statute, giving a right of action for wrongful injury to the person of a child both in favor of the parent and the child, provides that separate verdicts and judgments shall be rendered, a judgment for the sum of the two separate verdicts is erroneous. *American Steel, &c., Co.* v. *Tynan*, 183 Fed. 949 (1911 Pa. Act).

Daniel K. Widner. From the bill of exceptions attached to the record, it appears various exceptions were taken to opinions pronounced by the common pleas in the progress of the trial; but as the questions arising upon these exceptions are not particularly passed upon by this court, in the opinion pronounced, it is deemed necessary to state them.

SUTHERLAND, J.: The objections arising on the face of the record appears to be unanswerable. The declaration throughout is in the name of David K. Widner, and the judgment is in favor of Daniel K. Widner. It is an action of slander, and, on the face of the record, Daniel has recovered a judgment against the defendants for a slander uttered against David. No doubt it was a mistake, and enough appears in the bill of exceptions to authorize the amendment,[18] on a proper application for that purpose; but the bill of exceptions can not be used in aid of the record, and there is nothing in the record to amend by. The case is not within the sixth section of the statute of *jeofails* (1 R. L. 120), because the true name is not rightly alleged in any part of the record.

The decisions of the court below, I am inclined to think, were correct throughout, and that, upon the bill of exceptions, the judgment ought to be affirmed; but for the error in the record it must be reversed.

Judgment reversed, *venire de novo.*[19]

---

[18] *Wolf* v. *Stepney*, Cro. Eliz. 864 (1601); *Birton* v. *Mandel*, Cro. Jac. 67 (1605); *Marsh* v. *Berry*, 7 Cow. (N. Y.) 344 (1827); *Prowattain* v. *McTier*, 1 Phila. 183 (1850); *Shelly* v. *Dobbins*, 31 La. Ann. 530 (1879); *Fay* v. *Stubenrauch*, 141 Cal. 573, 75 Pac. 174 (1904). Compare *Albers* v. *Whitney*, 1 Story (U. S.) 310, Fed. Cas. No. 137 (1840).

[19] Accord: *Scandover* v. *Warne*, 2 Camp. 270 (1809); *Sweazy* v. *Nettles*, 2 Mo. 6 (1827); *Ming* v. *Green*, 6 Rand. (Va.) 551 (1828); *Reeve* v. *Lee*, 6 Wis. 80 (1858); *Ford* v. *Doyle*, 37 Cal. 346 (1869). Compare *Cleveland R. Co.* v. *Surrells*, 115 Ill. App. 615 (1869). To support a judgment the names of the parties must appear of record with sufficient certainty to permit execution to be issued. *Joseph* v. *Joseph*, 5 Ala. 280 (1843); *Captain, &c.*, v. *Paschal*, 9 Heisk. (Tenn.) 203 (1872); *Moody* v. *Deutch*, 85 Mo. 237 (1884); *Park* v. *Holmes*, 147 Pa. St. 497, 23 Atl. 769 (1892); *Fuller Watchmans Electrical Director Co.* v. *Louis*, 50 Ill. App. 428 (1893); *Hitch* v. *Gray*, 1 Marv. (Del.) 400, 41 Atl. 91 (1895). But a judgment is operative for or against all who are actual parties, although their names be given incorrectly, if by reference to other parts of the record, the pleadings and process, the true parties can be correctly ascertained. *Wilson* v. *Nance*, 11 Humph. (Tenn.) 189 (1850); *Vangeazel* v. *Hillyard*, 1 Houst. (Del.) 515 (1858); *Laflin* v. *White*, 38 Ill. 340 (1865); *McCartey* v. *Kittrell*, 55 Miss. 253 (1877); *Preston* v. *Wright*, 60 Iowa 351, 14 N. W. 352 (1882); *Hendry* v. *Crandall*, 131 Ind. 42, 30 N. E. 789 (1891); *Roach* v. *Blakey*, 89 Va. 767, 17 S. E. 228 (1893); *Terry* v. *French*, 5 Tex. Civ. App. 120, 22 S. W. 1011 (1893); *First Nat. Bk.* v. *Garland*, 109 Mich. 515 (1896); *Ex parte Howard Harbinson Co.*, 119 Ala. 484, 24 So. 516 (1898); *Chicago Clock Co.* v. *Tobin*, 123 Cal. 377, 55 Pac. 1007 (1899). As to fictitious names, compare *Ford* v. *Doyle*, 37 Cal. 346 (1869); *Bernstein* v. *Schoenfeld*, 37 Misc. 610, 76 N. Y. S. 14 (1902), with *Campbell* v. *Adams*, 50 Cal. 203 (1875); *Alameda Co.* v. *Crocker*, 125 Cal. 101, 57 Pac. 766 (1899).

ROOT *v.* FELLOWES

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1850

60 *Mass.* 29

This was an action of debt on judgment, brought against William B. Fellowes and Newbury Day. The declaration averred that the plaintiffs, at the court of common pleas, held at Greenfield, on the second Monday of November, 1846, "recovered judgment against the said Fellowes and Day, by the name of William B. Fellowes and ——— Day," and that said judgment was unsatisfied. The defendant Fellowes was defaulted; but Day pleaded the general issue.

At the trial in the court of common pleas, before Mellen, J., the plaintiffs offered to prove "that Newbury Day, one of these defendants, was the Day referred to in said judgment." His counsel objected to the admission of parol evidence to prove that fact; but the objection was overruled, and the evidence admitted. A verdict was returned against Day, and he alleged exceptions to the admission of the evidence.

METCALF, J.: The omission of Day's Christian name in the writ on which the judgment now in suit was recovered was a matter which he might have pleaded in abatement. But as he suffered judgment to go against him without objection to the misnomer, an execution on that judgment, issued against him by the same defective name, would have been valid, and might have been legally enforced. *Smith* v. *Bowker*, 1 Mass. 76. In this suit on the judgment, however, if the writ had omitted his Christian name, he might have pleaded in abatement, as he might have done in the original action. It was proper, therefore, for the plaintiff to insert his full name in the writ, and to aver, as they have done, that they recovered judgment against him by the name of Day. So are the precedents. 2 Chit. Pl. (6th Am. ed.) 484.

How then are the plaintiffs to prove this allegation in their writ, unless by parol evidence? The counsel for Day has not informed us, and we do not know.

Exceptions overruled.[20]

---

[20] Accord: *Newcomb* v. *Peck*, 17 Vt. 302, 44 Am. Dec. 340 (1845); *Hays* v. *Varborough*, 21 Tex. 487 (1858); *Goodgion* v. *Gilbreath*, 32 S. Car. 388, 11 S. E. 207 (1889). Compare *Gardner* v. *Kraft*, 52 How. Pr. (N. Y.) 499 (1877).

One sued by the wrong name who appears and fails to plead the misnomer in abatement is concluded by the judgment. Y. B. 33 Hen. VI, 7, 19; *Crawford* v. *Satchwell*, 2 Str. 1218 (1745); *Smith* v. *Patten*, 6 Taunt. 115 (1815); *Lafayette Ins. Co.* v. *French*, 59 U. S. 404, 15 L. ed. 451 (1855); *First Nat. Bk.* v. *Jaggers*, 31 Md. 381, 100 Am. Dec. 53 (1869); *Bridges* v. *Layman*, 31 Ind. 384 (1869); *Pond* v. *Ennis*, 69 Ill. 341 (1873); *Louisville, &c., R. Co.* v. *Hall*, 12 Bush. (Ky.) 131 (1876); *Shay* v. *McNamara*, 54 Cal. 169 (1880); *L'Engle* v. *Florida C. R. Co.*, 21 Fla. 353 (1885); *Peterson* v. *Little*, 74 Iowa 223, 37 N. W. 169 (1887); *Kingen* v. *Stroh*, 136 Ind. 610, 36 N. E. 519 (1893); *Corrigan* v. *Schmidt*, 126 Mo. 304, 28 S. W. 874 (1804); *Althause* v. *Hunsberger*, 6 Pa. Super. Ct. 160 (1897). So also where plaintiff is misnamed.

O. R. OAKLEY *v.* G. H. PEGLER

SUPREME COURT OF NEBRASKA, 1890

30 *Nebr.* 628.

Error to the District Court for Lancaster County.

The action was brought on a judgment recovered in the state of New York by Pegler against O. R. Oakley. The answer of the defendant averred "that his true name is Oscar R. Oakley and not O. R. Oakley, as set forth in said action, petition and proceedings."

On the trial the defendant testified as follows on cross-examination:

Q. What do you say your name is?

A. Oscar Rodman Oakley is my name.

Q. By what name were you known in the business world?

A. Well, a business man often uses his initials, and I very frequently do that, of course.

Q. Is it not a fact you use your initials almost entirely?

A. I use my initials in signing checks. I don't know as I do entirely, but I do sometimes.

Q. Is it not a fact that your business signature to your checks is in the form of O. R. Oakley?

A. They are.

Q. I will ask you if it is not a fact that the signature you leave at bank, prepared for that purpose—the bank at which you do business—at the First National Bank, is not O. R. Oakley?

A. Yes, all business men use their initials.[21]

MAXWELL, J.: The principal error relied upon is that the plaintiff in error was sued by the initial letters of his Christian name and not by his surname. It will be seen from his own testimony that his habit has been, and is when signing checks, doing business at banks and other places, to use the initial letters of his Christian name. At common law a declaration describing a party by the initial of his Christian name is bad on special demurrer (*Turner* v. *Fitt*, 3 M. G. & S. 701; Bliss on Code Pleading, section 146a).[22] It should be made to appear, however, that the letter used is but an initial and not the

---

McGaughey v. *Woods*, 106 Ind. 380, 7 N. E. 7 (1885); and see Viner's Abr. Misnomer; Bacon's Abr. Misnomer. As to judgments by default, compare *Parry* v. *Woodson*, 33 Mo. 347, 84 Am. Dec. 51 (1863); *Edwards* v. *Warner*, 111 Ill. App. 32 (1903); *McGaughey* v. *Woods*, *supra*, with *Cole* v. *Hindson*, 6 T. R. 234 (1795); *Farnham* v. *Hildreth*, 32 Barb. (N. Y.) 277 (1860); *Schoellkopf* v. *Ohmeis*, 11 Misc. 253, 32 N. Y. S. 736 (1895).

[21] The statement of facts is abridged from the opinion of the court. The arguments of counsel and part of the opinion are omitted.

[22] *Jones* v. *Macquillin*, 5 D. & E. 195 (1793); *Nash* v. *Collier*, 5 Dowl. & L. 341 (1847); *Miller* v. *Hay*, 3 Wel., H. & G. 14 (1848); *Wilson* v. *Shannon*, 6 Ark. 196 (1845); *Knox* v. *Starks*, 4 Minn. 20 (1860); *Elberson* v. *Richards*, 42 N. J. L. 69 (1880); *Beggs* v. *Wellman*, 82 Ala. 391, 2 So. 877 (1886); *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 37 L. ed. 72 (1892).

true name (*Tweedy* v. *Jarvis*, 27 Conn. 42). Whether an apparently initial letter will be treated as a name must depend upon the manner in which the question is raised.[23]

In the absence of a motion to the contrary, or a pleading calling attention to the fact that it is not the name of the party, the court will be warranted in treating it as his name. If the defendant objects on the ground of misnomer, he must give his true name. A judgment against a party sued by the initials of his Christian name is not void. At the most it is voidable for error of the court in the proceedings. Where, before judgment, the attention of the trial court is called to the fact that the defendant has been sued by the initials of his Christian name, the court may permit an amendment *instanter* by inserting the full Christian name.[24] If no objection is made on that ground, the defendant will be concluded by the judgment.

In the case at bar the plaintiff in error did business as O. R. Oakley, and although his Christian name is Oscar R. Oakley, the name by which he does business in signing checks and at the banks and at other places is O. R. Oakley. This may be called his business name, and a judgment recovered against him by that name can not be attacked collaterally. There is no error in the record and the judgment is affirmed.[25]

---

[23] *Kinnersley* v. *Knott*, 7 C. B. 980 (1849); *Stever* v. *Brown*, 119 Mich. 196, 77 N. W. 704 (1899); *Gottlieb* v. *Alton Grain Co.*, 87 App. Div. 380, 84 N. Y. S. 413 (1903).

[24] *Davenport* v. *Kirkland*, 156 Ill. 169, 40 N. E. 304 (1895); *Burdeshaw* v. *Comer*, 108 Ala. 617, 18 So. 556 (1895); *Fay* v. *Stubenrauch*, 141 Cal. 573, 75 Pac. 174 (1904); *Blake Tobacco Co.* v. *Posluszsy*, 31 Pa. Super. Ct. 602 (1906).

[25] *Linch* v. *Hooke*, 1 Salk. 7 (1705); *Harrison* v. *Harrison*, 19 Ala. 499 (1851); *Bridges* v. *Layman*, 31 Ind. 384 (1869); *Jones' Estate*, 27 Pa. St. 336 (1856); *Fewlass* v. *Abbott*, 28 Mich. 270 (1873); *Hicks* v. *Riley*, 83 Ga. 332, 9 S. E. 771 (1889); *Perkins* v. *McDowell*, 3 Wyo. 328, 23 Pac. 71 (1890); *Grant* v. *Birdsall*, 2 N. Y. Civ. Proc. 422, 48 N. Y. Super. Ct. 427 (1882); *Hinkle* v. *Collins*, 113 Mich. 105, 71 N. W. 481 (1897); *Vicborn* v. *Pollock*, 133 Mich. 524, 95 N. W. 576 (1903). Contra: *Vincent* v. *Means*, 184 Mo. 327, 82 S. W. 96 (1904). Where a defendant is known as well by one name as another he may be sued by either, and it is immaterial by which name he was known to the plaintiff. Y. B. 44 Edw. III, 16; *Eagleston* v. *Nathan A. Son*, 5 Rob. (N. Y.) 640 (1866); *Clark* v. *Clark*, 19 Kans. 522 (1878); *Isaacs* v. *Mintz*, 11 N. Y. S. 423, 33 N. Y. St. 423 (1890), and see *Linton* v. *First Natl. Bk.*, 10 Fed. 894 (1882); *Rich* v. *Mayer*, 7 N. Y. S. 69, 26 N. Y. St. 107 (1889).

SECTION 2. JUDGMENT BY CONFESSION

KERBY *v.* JENKINS

COURT OF EXCHEQUER, 1832

2 *Tyrwhitt* 499.

A rule for setting aside an interlocutory judgment and subsequent proceedings, for irregularity, was obtained on the defendant's affidavit, that on twenty-fourth January he signed a paper, which was the *cognovit*[26] on which judgment was entered up, but that he was never served with any process.

Cause was shown on an affidavit that the defendant, on signing the *cognovit*, said he knew what a *cognovit* was, having signed one before, and thanked the plaintiff's attorney for the indulgence; and that process was sued out an hour before the *cognovit* was given.

PER CURIAM: It is not necessary that process should be served before a *cognovit* is given. It is sufficient if it has been sued out.

Rule discharged with costs.[27]

---

[26]See Lilly's Entries, 470; Clift's Entries, 421; Chitty's Forms (1847), 308; Wentworth on Pleading, 10, 428; Tidd's Practice, 559; 4 Enc. Pl. & Pr. 560. At common law where the defendant had no defense to the action, instead of proceeding to trial or allowing judgment to be taken by default, he could give the plaintiff a *cognovit actionem*, usually called a *cognovit*, or written confession of the action authorizing the plaintiff to sign judgment, frequently on condition that the defendant be allowed time for the payment of the debt or damages, the amount of which in general was first agreed upon. If given after plea pleaded it usually contained an agreement to withdraw the plea, in which case it was termed a *cognovit actionem relicta verificatione*. Chitty's Practice, 844; *Richardson* v. *Jones*, 12 Grat. (Va.) 53 (1855). By confessing the action the defendant often obtained terms, such as a stay of execution or, in an action for unliquidated damages avoided the expense of a writ of inquiry. *McClish* v. *Manning*, 3 G. Greene (Iowa) 223 (1851); *Keep* v. *Leckie*, 8 Rich. L. 164 (S. Car.) (1855); *Hirschfield* v. *Franklin*, 6 Cal. 607 (1856). In modern English practice no order to enter judgment by consent will be made where the defendant has not appeared or has appeared in person, unless the defendant attends before a judge and gives his consent in person, or unless his written consent is attested by a solicitor, except where the defendant is a barrister or solicitor. Rules of Supreme Court, order xli, rule 10; and see the act of 32-33 Vict. (1869), ch. 62, §§ 24-28.

The words "they can not deny" are sufficiently explicit to authorize the entry of judgment. *Lewis* v. *Barber*, 21 Ill. App. 638 (1886); *Burton* v. *Lawrence*, 4 Tex. 373 (1849).

[27]Accord: *Webb* v. *Aspinwall*, 7 Taunt. 700 (1817); *Wade* v. *Swift*, 8 Price 513 (1820); *Morley* v. *Hall*, 2 Dowl. 494 (1834); *Shanley* v. *Colwell*, 6 M. & W. 543 (1840); *Commercial Bank* v. *Brondgeest*, 5 U. C. Q. B. 325 (1847); *Laverty* v. *Patterson*, 5 U. C. Q. B. 641 (1848). Contra: *Keep* v. *Leckie*, 8 Rich. L. (S. Car.) 164 (1855), and see *Stein* v. *Good*, 16 Ill. App. 516 (1885); *O'Dell* v. *Reynolds*, 70 Fed. 656 (1895). It is essential to the validity of a judgment confessed, pending suit, that the defendant be served with process or that he appear in person or by attorney. *Richardson* v. *Daly*, 4 M. & W. 384 (1838); *Ferrand* v. *McClease*, 1 Ind. 87 (1848); *Craig* v. *Glass*, 1 Ind. 89 (1848); *Coonley* v. *Tracy*, 4 Ind. 137 (1853); *Philadelphia* v. *Toll*, 2 W. N. C. (Pa.) 226 (1874); *Stewart* v. *Walters*, 38 N. J. L. 274 (1876). The judgment must be entered with plaintiff's assent. *Thayer* v. *Finley*, 36 Ill. 262 (1864); *Mason* v. *Ward*, 80 Vt. 290, 67 Atl. 820 (1907).

A. B. FARQUHAR CO., LIMITED, *v.* CHARLES E. DEHAVEN, ET AL.

SUPREME COURT OF APPEALS OF WEST VIRGINIA, 1912

70 W. Va. 738.

Error to Circuit Court, Berkeley County.

Action by Arthur B. Farquhar and others, partners as A. B. Farquhar Co., Limited, against Charles E. Dehaven and others. Judgment for plaintiffs, and defendants bring error.[28]

MILLER, J.: The judgment below to which this writ of error applies, denied the motion of defendants to quash the execution on a judgment in favor of plaintiffs, entered against them, in vacation, by the clerk of the circuit court on September 12, 1910.

The entire record of the judgment as presented here is as follows:

"This day came the defendants, by Martin & Seibert, their attorneys in fact, and say that they can not gainsay the plaintiff's action against them, but that they are justly indebted to the said plaintiffs in the sum of $527.07 with interest thereon from this date and the costs of this action, on account of two certain notes, one dated August 30, 1909, due six months after date, and the other dated August 30, 1909, due twelve months after date.

"It is therefore considered that the plaintiffs, Arthur B. Farquhar, Wm. E. Farquhar and Frances Farquhar, general partners, trading and doing business as A. B. Farquhar Co., Limited, do recover of and from the said defendants, Charles E. Dehaven and H. L. Dehaven, the sum of five hundred and twenty-seven dollars and seven cents ($527.07), with interest from this date until paid, and their costs in this behalf expended. Teste: L. De W. Gerhart, Clerk Circuit Court of Berkeley County, West Virginia.

"Memo: Said notes were filed with the said clerk upon the day of the entry of the said order, and are in the words and figures following:"

The notes referred to, of which one is copied in the records, are judgment notes, in form like those in use in Pennsylvania, bearing six per cent. interest, and providing for a ten per cent. attorney's fee in addition to all other necessary expenses of collection after maturity. They also contain waiver of presentment and protest, homestead and exemption rights real and personal, and other rights, and also the following material provision: "And we do hereby empower and authorize the said A. B. Farquhar Co., Limited, or agent, or any prothonotary or attorney of any court of record to appear for us and in our name to confess judgment against us and in favor of said A. B. Farquhar Co., Limited, for the above named sum with the costs of suit and release of all errors and without stay of execution after the maturity of this note."

---

[28]Part of the opinion of the court and the dissenting opinion of Robinson, J., are omitted.

The motion to quash assigned as the only ground therefor that the judgment is void, the clerk being without authority to enter the same upon a judgment note, as was done, without suit and service of process.

As both sides agree the question presented is one of first impression in this state. We have no statute, as has Pennsylvania and many other states, regulating the subject. In the decision we are called upon to render, we must have recourse to the rules and principles of the common law, in force here, and to our statute law, applicable, and to such judicial decisions and practices in Virginia, in force at the time of the separation, as are properly binding on us. It is pertinent to remark in this connection, that after nearly fifty years of judicial history in this state no case has been brought here involving this question, strong evidence, we think, that such notes, if at all, have never been in very general use in this commonwealth. And in most states where they are current the use of them has grown up under statutes authorizing them, and regulating the practice of employing them in commercial transactions. . . .

The case we have here, on the motion to quash. is one of collateral attack, and to sustain the motion and reverse the judgment below, we must hold the judgment void upon its face. Is it so void? As already indicated, the question must be answered practically upon the common law rules and principles. We have no statute in any way governing the subject, except section 43, chapter 125, of the Code, providing for a confession by the defendant in vacation in the clerk's office. What then is the common law applicable to the case?

In 1 Black on Judgments, section 50, it is said: "All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process. 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments are well known to the common law and must be tested and sustained by rules and principles existing independently of statute, while judgments of the latter class derive all their efficacy from positive law and must conform, in order to be valid, to all the requirements and formalities set up by the legislature." In the same section this writer further says: "Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties: First, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial. In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may accept service with the same effect as if the writ had been served as it usually is); and

an agreement in writing made out of court, authorizing the clerk to enter up such a judgment, will not sustain it, where there has been no appearance by the defendant." Blackstone says, on the subject of confession of judgment at common law: "And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit* as if he puts in no plea at all to the plaintiff's declaration; by confession or *cognovit actionem,* where he acknowledges the plaintiff's demand to be just; or by *non sum informatus,* when the defendant's attorney declares he has no instruction to say anything in answer to the plaintiff, in defense of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit, cognovit actionem,* or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment when confessed, is absolute, complete and binding. . . ." 3 Blackstone, Com. 396, 397. The great Virginia commentator, Mr. Minor, says on this subject (IV Minor's Inst. 726): "The defendant was always allowed to acknowledge the plaintiff's action, and confess a judgment for the amount claimed, or for such part thereof as he and the plaintiff could agree upon, provided it was done in open court. But a confession of judgment in the clerk's office was never contemplated by the common law, and can only take place in pursuance of the authority of some statute."

So according to these authorities the warrant of attorney, in use at common law, was confined to the confession of judgments, in the three ways enumerated by Blackstone, in a pending suit; that is by answering *nihil dicit, cognovit actionem,* or *non sum informatus.* And as Mr. Black says, judgments by confession of defendant or on his warrant of attorney, without the institution of an action, derive all their efficacy from positive or statute law. And judgment in the clerk's office, as Mr. Minor says, was never contemplated at the common law. Such warrant of attorney was usually given by the defendant to the plaintiff, by way of security, on compromising an action; and it authorized the attorney to whom it was directed to appear for the defendant, and to receive a declaration in an action to be brought against him, and thereupon confess the same in the manner already indicated. Tidd's New Prac. (Ed. 1837) 275; 1 Tidd's Pract. (Ed. 1828) pp. 590, 606; 2 Chitty, Gen. Pract. 333.

In the case at bar, counsel for defendants in error say, they rely upon the fact that there is nothing in the record showing affirmatively that process was not served. The record, however, purports to be a complete transcript of all the proceedings which took place in the clerk's office in vacation, not at rules; and as no process is exhibited or referred to, we think we must necessarily say that no suit was begun by process, and that there was no action pending in

which at common law, a judgment on a warrant of attorney could have been confessed, in either of the ways authorized by the ancient practice. Mr. Freeman says, 2 Freeman on Judgments, section 547: "Judgments by confession are in no wise exempt from the rule applicable to other judgments, that to be valid they must be entered in a court having jurisdiction over the subject-matter of the action and the parties thereto. 'Though no adjudication is in fact required in entering a judgment of confession without action, yet it has all the qualities, incidents and attributes of other judgments, and can not be valid unless entered into a court which might have lawfully pronounced the same judgment in a contested action.' Where the law requires judgments to be signed by the judge, its provision extends to judgments by confession, and renders them void if not so signed." Looking to the literal terms of the power we see it authorizes appearance, but gives no specific authority to waive process, or to appear in the clerk's office, or waive the filing of the declaration; and limited by the rules and practices prevailing at common law, we must say no donee of the power had any authority to waive any of the rights of the plaintiff, to be sued and served with process, and to have a declaration filed on which judgment might lawfully be entered. Without jurisdiction thus acquired a judgment at common law on warrant of attorney would have been void. And even in those states, where it is otherwise provided by statute, the statute being in derogation of common law rights, the statutes are strictly construed.[29] 23 Cyc. 699.

Let us see how this question has been viewed in the other states than Virginia. In Vermont, the Supreme Court says: Judgments on confession without antecedent process have no basis other than the statute, and a full compliance with the statute is necessary to their validity, and the provisions authorizing them are to be strictly construed." *Mason* v. *Ward*, 80 Vt. 290. In Iowa in response to the contention that the statute there, regulating the confession of judgment, was merely cumulative of the common law remedy, the court said: "We do not think this position is correct. . . . So far as we are advised it has never been the understanding of the profession nor of the business community in this state that warrants of attorney to confess judgment had any place in our law. A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another state must do so in accordance with the laws of this state. Parties can not by contract made in another state engraft upon our procedure here remedies which our laws do not contemplate nor authorize." *Hamilton* v. *Schoenberger*, 47 Iowa 385. In New Jersey the entry of a judgment by a justice on a judgment note without process or proof was declared illegal. The court said "The defendant must be brought into court in the usual way, and the same proceeding had, as in other cases of written contracts."

---

[29] *Manufacturers' Bank* v. *St. John*, 5 Hill (N. Y.) 497 (1843); *Edgar* v. *Greer*, 7 Iowa 136 (1858); *Chapin* v. *Thompson*, 20 Cal. 681 (1862); *Henry* v. *Estes*, 127 Mass. 474 (1879); *Kahn* v. *Lesser*, 97 Wis. 217, 72 N. W. 739 (1897). Compare *Saunders* v. *Lipscomb*, 90 Va. 647, 19 S. E. 450 (1894).

Stretch v. *Hancock*, 2 N. J. L. 193.[80] In Tennessee, in *Carlin* v. *Taylor*, 75 Tenn. 666, the Supreme Court held, that no judgment could be confessed in that state by an attorney, on a judgment note like the one involved here. And in Kansas and Missouri, such notes are condemned, and the practice of employing them repudiated on principles of public policy, and as giving to the defendant no day in court, and as permitting the defendant to bargain away his right to be heard in court, contrary to public policy. *McCrairy* v. *Ware*, 6 Kans. App. 155; *First Nat. Bank* v. *White*, 220 Mo. 717. We are inclined to agree with the Missouri court in the case last cited, in which they say: "Such agreements are iniquitous to the uttermost and should be promptly condemned by the courts, until such time as they may receive express statutory recognition, as they have in some states."[81]

Of course if a debtor has been summoned into court by process, and given a day and an opportunity to be heard, no good reason could be assigned why judgment should not be pronounced against him at common law by confession on a warrant of an attorney. The fact that the Virginia court and this court have recognized the right of the defendant by personal appearance, to submit himself without process to the jurisdiction of the court, and to confess a valid judgment against him, and that a proper construction of our statute, section 43, chapter 125 of the Code, might authorize a defendant to appear in person in the clerk's office and make like confession of judgment, we do not regard any justification for the proposition, that he may by warrant of attorney authorize appearance by and confession of judgment, either in court or in the clerk's office, without process directed and regularly served upon him. It is contended, however, that the old legal maxim, *qui facit per alium, facit per se*, is as applicable here as in other cases. We do not think so. Strong reason exists as we have shown, for denying its application, when holders of contracts of this character seek the aid of the court and of their execution process to enforce them, defendant having no day in court or opportunity to be heard. We need not say in this case that a debtor may not by proper power of attorney duly executed, authorize another to appear in court and by proper endorsement upon the writ waive service of process, and confess judgment. But we do not wish to be understood as approving or intending to countenance the practice of employing in this state commercial paper of the character here involved. Such paper has heretofore had little if any currency here. If the practice is adopted into this state it ought to be, we think, by act of legislature, with all proper safeguards thrown around it, to prevent fraud and imposition. The policy of our law is, that no man shall suffer judgment

[80] But see, now, Comp. Stat. New Jersey (1910), vol. I, p. 219, title "Bonds and Warrants"; *Shelmerdine* v. *Lippincott*, 69 N. J. L. 82, 54 Atl. 237 (1903).

[81] *First Nat. Bank* v. *White*, 220 Mo. 717, 120 S. W. 36, 132 Am. St. 612 (1909). See also *Jemison* v. *Freed*, 161 Ala. 598, 50 So. 52 (1909); Kans. Gen. Stat. (1909), § 5996; Mo. Rev. Stat. (1909); §§ 2113-2116. The practice of entering judgment by warrant of attorney rests on the statutes and rules of court of the various jurisdictions. See, generally, 5 Encyclopædia of Forms, 107.

at the hands of our courts without proper process and a day to be heard. To give currency to such paper by judicial pronouncement would be to open the door to fraud and imposition, and to subject the people to wrongs and injuries not heretofore contemplated. This we are unwilling to do.

These considerations lead us to conclude that a judgment by confession in the clerk's office, on warrant of attorney, without process regularly issued and served upon or accepted by defendant is void on its face. We therefore reverse the judgment below, quash the execution and award the defendant's costs here and in the court below, incurred on said action.[32]

Robinson, J., and Brannon, J., dissent.

F. M. WHITNEY *v.* JAMES HOPKINS

SUPREME COURT OF PENNSYLVANIA, 1890

135 *Pa. St.* 246

Appeal by the defendant from the action of the Court of Common Pleas of Susquehanna County in discharging a rule to set aside a judgment in favor of the plaintiff against the defendant for $4,765.55, with interest, entered by the prothonotary upon the filing of articles of agreement referred to in the opinion of the court.[33]

WILLIAMS, J.: The learned counsel for the appellant is right in the general proposition on which he rests his appeal. The prothonotary of the court of common pleas is merely the clerk of the court. He has no authority, *virtute officii*, to act as the clerk, agent, or attorney of any person. It is his duty to record upon the minutes of the court all judgments rendered by or confessed before the court whose clerk he is. If he is not personally present, the court may direct any competent bystander to make the entries upon the record; for the legal effect of such entries does not depend upon the person by whom they may be copied or recorded, but upon the jurisdiction of the court whose acts they are. It is also the duty of the prothonotary to enter, by himself or his clerks, on the records of the court, any amicable action entered into in writing, and filed in his office, when the court is not in session. He may also note the confession

---

[32] Accord: *Wilhelm* v. *Locklar*, 46 Fla. 575, 35 So. 6 (1903). Compare *Jones* v. *Bradshaw*, 16 Grat. (Va.) 355 (1863). And see *Aultman Taylor Co.* v. *Mead*, 109 Ky. 583, 60 S. W. 294 (1901); *Teel* v. *Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796 (1891); *Flanagan* v. *Bruner*, 10 Tex. 257 (1853); *Rosebrough* v. *Ansley*, 35 Ohio St. 107 (1878); *Stein* v. *Brunner*, 42 La. Ann. 772, 7 So. 718 (1890); *Saunders* v. *Lipscomb*, 90 Va. 647, 19 S. E. 450 (1894); *Hazel* v. *Jacobs*, 78 N. J. L. 459, 75 Atl. 903, 27 L. R. A. (N. S.) 1066 (1910); *Acme Food Co.* v. *Kirsch*, 166 Mich. 433, 131 N. W. 1123, 38 L. R. A. (N. S.) 814n (1911); *Jarrett* v. *Sippley*, 157 S. W. 975, 175 Mo. App. 197 (1913); *Irose* v. *Balla*, 181 Ind. 491, 104 N. E. 851 (1914); *Hutson* v. *Wood*, 263 Ill. 376, 105 N. E. 343 (1914).

[33] The statement of facts is abridged and the opinion of the court below and arguments of counsel are omitted.

of judgment in such action by the defendant.[84] This he does simply as the clerk and keeper of the records of the court in which the parties agree that their action shall be entered. *Cook v. Gilbert,* 8 S. & R. 567. He has no authority in the premises, and no duty to discharge except to put faithfully into records of the court what the parties have agreed shall go there. As an individual, he may be authorized to act for another in the same manner that any other person may be; and, when so authorized, his powers are derived from the instrument under which he acts, and not from his office. His commission as prothonotary gives him no right to act as attorney in fact or at law for suitors or others, and imposes no duties except such as grow out of his relations to the court as its clerk. To justify him in acting for suitors, an express authority must be shown, coming either from the person affected by his acts, or from an act of the general assembly. By the act of February 24, 1806, it was made the duty of the prothonotary of any court of record within the commonwealth, on the application of the holder, to enter judgment on any note, bond or other instrument of writing in which judgment is confessed by the maker, or which contains a warrant of attorney for an attorney at law or other person to appear and confess judgment thereon. The act directs that the judgment be entered against the person or persons who executed the instrument, and for the amount which, from the face of the instrument, may appear to be due thereon. If the amount due can not be ascertained from the face of the instrument, the prothonotary can not enter judgment upon it, for the act of 1806 gives him no power to inquire beyond. *Connay* v. *Halstead,* 73 Pa. 354.[85]

The instrument on which the judgment in this case was entered is a contract bearing date the ninth of April, 1884, by which the plaintiff sold to the defendant a farm for $4,500. This amount was to be paid in yearly installments, with interest annually on the whole sum unpaid. The contract contained a confession of judgment in these words: "The said party of the second part, in case default be made for the space of three months in all or any of the above payments, does hereby confess judgment to the said party of the first part, his heirs or assigns, for the whole amount unpaid on the above agreement." On the back of the contract were the following indorsements: "April 1, 1885, paid $275; April 1, 1886, paid $520; April 2, 1888, $305." There was no indorsement for either 1887 or 1889, and neither that for 1886, nor that for 1888, was for the whole amount of the payment then falling due. The judgment was entered on the first day of June, 1889.

When this contract was presented to the prothonotary two ques-

[84] See the acts of March 21, 1806, 4 Sm. L. 326, § 8, and June 13, 1836, P. L. 568, § 40; P. & L. Dig. (2d ed.) 5870-71; 10 P. & L. Dig. of Decisions, 15853; *Carter* v. *Allen,* 19 Phila. 461 (1888).

[85] In *Connay* v. *Halstead,* the agreement was for the sale of a tract of land at ten dollars an acre, the number of acres to be ascertained by a survey. *Held,* that until the number of acres should be determined, a matter wholly outside of the paper, the amount of the purchase money could not be known and the prothonotary had no guide in entering judgment. See also *Latrobe Bldg., &c., Assn.* v. *Fritz,* 152 Pa. St. 224, 25 Atl. 558 (1893).

tions were suggested for his consideration. The first grew out of the terms of the confession. Had the maker made default in any payment for the space of three months? The second arose from the words of the act of 1806. Could the amount due be ascertained from the face of the instrument? If both questions could be answered affirmatively, the judgment could be entered. If either could not be so answered, the prothonotary had no power in the premises. The possession of an instrument in writing for the payment of money affords proof, *prima facie*, of a right in the holder to recover upon it according to its terms. The holder is not required to prove that it has not been paid. His case is made by the production of the instrument in the first instance, and the burden of showing payment is on him who alleges it. Whether the instrument be a note, a bond, or a contract, like that on which this judgment was entered, the rules of evidence are the same. The instrument makes for the holder a case, *prima facie*, on which he could recover before a jury, or have a judgment entered by virtue of the power of attorney. Both the default and the amount due were ascertainable in the first instance from the face of the instrument. If payments had been made that did not appear on the paper, so that there was in fact no default, the court would on application hear the defendant's proofs, and strike off the judgment; but, until the *prima facies* of the instrument is overcome by proof, the judgment must stand. The trouble with the appellant's case is that the general rule which he invokes is not applicable upon the facts of this case. The instrument was within the act of 1806, and upon its face it was practicable for the prothonotary to determine the existence of a default, and the amount due to the holder. The judgment was rightly entered, and the rule to strike it off was rightly refused.[86]

The judgment is therefore affirmed.

---

[86]The prothonotary's power does not extend beyond entering judgment in those cases where the instrument fixes an amount or sum certain or the amount can be ascertained upon the face of the instrument. Compare *Helvete* v. *Rupp*, 7 Serg. & R. (Pa.) 306 (1821); *James* v. *Crownover*, 3 Sad. (Pa.) 73, 6 Atl. 42 (1886); *Miller* v. *Flint Glass Works*, 172 Pa. St. 70 (1895); *First Natl. Bank* v. *Bartlett*, 35 Pa. Super. Ct. 593 (1908), with *Rabe* v. *Heslip*, 4 Pa. St. 139 (1846); *Weaver* v. *McDevitt*, 21 Pa. Super. Ct. 597 (1902); *Stranburg* v. *Manross*, 19 Pa. D. R. 849 (1910); *Toledo Computing Scale Co.* v. *Manfred*, 20 Pa. Dist. R. 69 (1910); *Purvis* v. *Dempsey*, 238 Pa. 173, 85 Atl. 1091 (1913). On a penal bond judgment should be entered for the amount of the penalty. *Waldo* v. *Fobes*, 1 Mass. 10 (1804); *Den* v. *Zullers*, 7 N. J. L. 153 (1824); *Suburban Bldg. & L. Assn.* v. *Paulus*, 80 Mo. App. 36 (1899); *Keech* v. *O'Herron*, 41 Pa. Super. Ct. 108 (1909); *Keating* v. *Peddrick*, 240 Pa. 590, 88 Atl. 11 (1913). Compare *Disoway* v. *Edwards*, 134 N. Car. 254, 46 S. E. 501 (1904).

Judgment can not be entered for a sum in excess of the amount limited by the warrant. *Tucker* v. *Gill*, 61 Ill. 236 (1871); *Sloane* v. *Anderson*, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21 (1883); *Mutual Guarantee Building, &c., Assn.* v. *Fallen*, 21 Pa. C. C. 617 (1898); *Fortune* v. *Bartolomei*, 164 Ill. 51, 45 N. E. 274 (1896). A warrant of attorney may confer authority to confess judgment before the debt becomes due. *Roundy* v. *Hunt*, 24 Ill. 598 (1860); *Farwell* v. *Huston*, 151 Ill. 239, 37 N. E. 864, 42 Am. St. 237 (1894); *Integrity T. T. Co.* v. *Rau*, 153 Pa. 488, 26 Atl. 220 (1893); *Allport* v. *Meutsch*, 166 Ill. App. 172 (1911). Contra: *Warwick* v. *Petty*, 44 N. J. L. 542 (1882); *Spier* v. *Corll*, 33 Ohio St. 236 (1877), and see *Reeves* v. *Kroll* 133 Wis. 196, 113 N. W. 440 (1907).

JOHN GUYER'S ADMINISTRATOR *v.* WILLIAM GUYER

SUPERIOR COURT OF DELAWARE, 1881

6 *Houst.* (*Del.*) 430

Judgment No. 386, May Term, 1880, of this court at the suit of *John Guyer* v. *William G. Guyer,* had upon a rule laid for the purpose at the following November term, been stricken from the record by order of the court on the proof made under the rule, and afterwards at that term, November 27, 1880, judgment was again entered at the suit of the administrator of John Guyer, deceased, against William G. Guyer, on the same judgment-bond, and by virtue of the same warrant of attorney appended to it; and now, at this term, Whitely, for the defendant, had obtained a rule upon the plaintiff to show cause wherefore the latter judgment should not be set aside.

Vandegrift (Bradford with him) now showed cause. The first judgment referred to, and which was set aside by the order of the court, was an absolute nullity. The warrant of attorney on which it was irregularly and improperly entered was to confess judgment at the suit of John Guyer, his executors, administrators, etc., in the usual form, and which, of course, imported at the suit of John Guyer in his lifetime or at the suit of his executor or administrator after his death; but it was proved on the hearing of the rule to set aside the judgment, and upon which it was set aside by the court, that it was not entered until two years after the death of John Guyer, and was, even as late as that, entered in his own name as a living party to the judgment, not only several terms after his death, but two weeks before any administration had been granted on his estate. All, therefore, that had been done in the matter of entering the judgment, up to that time, by any one, as the agent, friend or representative of the deceased obligee in the bond and warrant of attorney was wholly without authority in law, and was also without any effect or operation whatever in law, and the judgment afterwards properly and correctly entered upon the same bond and warrant of attorney, in the name of his duly appointed administrator, is regular, lawful and valid. 3 Wash. 558; 7 Bingh. 337; 8 T. R.; 4 Taunt. 884; 1 Sug. 371; 2 Sug. 238; 1 Houst. 516; 4 Harr. 280, 527; 3 Harr. 241, 264, 519. The error and irregularity in the entering of the first judgment could not possibly have been amended by the court.[87]

---

[87] A warrant of attorney to confess judgment, if coupled with an interest, is not revocable at the will of the debtor. *Odes* v. *Woodward,* 2 Ld. Raym. 766, 849 (1702); *Odes* v. *Woodward,* 1 Salk. 87; *Wassell* v. *Reardon,* 11 Ark. 705, 44 Am. Dec. 245 (1851); *Rapley* v. *Price,* 11 Ark. 713 (1851); *Baker* v. *Lukens,* 35 Pa. 146 (1859); *Spencer* v. *Reynolds,* 9 Pa. C. C. 249 (1899). Compare *Evans* v. *Fearne,* 16 Ala. 689, 50 Am. Dec. 197 (1849); *Gale* v. *Chase,* 3 Johns. (N. Y.) 147 (1808); *Sherman* v. *Brenner,* 1 W. N. C. (Pa.) 193 (1874); *Rea* v. *Forrest,* 88 Ill. 275 (1878); *First Nat. Bk.* v. *Cunningham,* 48 Fed. 510 (1891), and see *Hunt* v. *Rousmanier,* 8 Wheat. (U. S.) 174, 5

Whiteley. Any entry of judgment by a warrant of attorney is an execution of the warrant, and it is thereupon *functus officio.* This is not the cause of an entirely unauthorized entry of a judgment on the warrant of attorney in question, but it was in strict conformity with the terms of it, and nothing *aliunde,* or outside the instrument itself, can be allowed to annul or defeat the execution of it when made in literal conformity with the terms of the power conferred by it. 1 Tidd. 552; 1 Houst. 516; 3 Wash. 568; 6 S. & R. 166; 5 Watts 289; 1 Sug. 89.

THE COURT: The attempt to enter the first judgment in the name of the obligee in the bond several terms of the court after his death, under the authority of the warrant of attorney, was so utterly inconsistent with the power conferred by it, and contrary to law, that we had, and still have, no hesitation in considering it as a total failure to execute the warrant, and an absolute nullity in contemplation of law. The rule in this case must therefore be discharged.[88]

L. ed. 589 (1823). Judgment, however, can not be entered by warrant of attorney after the death of the debtor. Note, 1 Vent. 310 (1678); *Savile* v. *Wiltshire,* Barnes 270 (1746); *Bennett* v. *Davis,* 3 Cow. (N. Y.) 68 (1824); *Milnor* v. *Milnor,* 9 N. J. L. 93 (1827); *Heath* v. *Brindley,* 2 Ad. & El. 365 (1834); *Blackburn* v. *Godrick,* 9 Dowl. 337 (1841); *Lanning* v. *Pawson,* 38 Pa. St. 480 (1861); *Tobias* v. *Dorsey,* 2 W. N. C. (Pa.) 15 (1875); *Gordon* v. *Bartley,* 4 W. N. C. (Pa.) 37 (1877); *Maddock* v. *Stevens,* 15 N. Y. Civ. Pro. 248 (1888). Nor can judgment be confessed in favor of a creditor dead at the time. *Wild* v. *Sands,* 2 Str. 718 (1726); *Short* v. *Coglin,* 1 Anst. 225 (1792); *Cowie* v. *Allaway,* 8 D. & E. 257 (1799); *Hensall* v. *Matthew,* 7 Bingh. 337 (1831); *Finney* v. *Ferguson,* 3 Watts. & S. (Pa.) 413 (1842); *Wentz* v. *Bealor,* 14 Pa. C. C. 337 (1894). But if the warrant is in favor of the creditor, "his executors and administrators," judgment may be entered in favor of the personal representatives. *Coles* v. *Haden,* Barnes, 44 (1746); *Baldwin* v. *Atkins,* 2 Dowl. 591 (1834).

As to warrants twenty years old, see *Parsons* v. *Cannon,* 27 Del. 298, 88 Atl. 470 (1912); *Bierly* v. *Hamor,* 50 Pa. Super. Ct. 124 (1912).

[88]A judgment having been once entered on a warrant of attorney the warrant is *functus officio* and a second judgment can not be entered. *Campbell* v. *Canon,* Add. (Pa.) 267 (1795); *Livezley* v. *Pennock,* 2 Browne (Pa.) 321 (1813); *Fairchild* v. *Camac,* 3 Wash. C. C. 558, Fed. Cas. No. 4610 (1819); *Martin* v. *Rex,* 6 Serg. & R. 296 (1820); *Neff* v. *Barr,* 14 Serg. & R. 166 (1826); *Ulrich* v. *Voneida,* 1 P. & W. (Pa.) 245 (1830); *Manufacturers & Mechanics Bank* v. *Cowden,* 3 Hill (N. Y.) 461 (1842); *Ely* v. *Karmany,* 23 Pa. St. 314 (1854); *Banning* v. *Taylor,* 24 Pa. St. 297 (1855); *Dixon* v. *Miller,* 20 Pa. C. C. 335 (1897); *Palmer* v. *Hohman,* 47 Pitts. L. J. 96 (1899). Where the power has been irregularly exercised, can a second judgment be entered after the first has been set aside? It was so held in *Huner* v. *Doolittle,* 3 G. Greene (Iowa) 76 (1851), and, *semble, Coulson* v. *Clutterbuck,* 2 Dowl. (N. S.) 391 (1842); *Bennett* v. *Simmons,* 2 D. & L. 98 (1844); 2 Chitty's Pr. 869. In Pennsylvania a power to confess judgment authorized by a warrant of attorney is exhausted by the entry of judgment, and a second judgment can not be entered, although the first has been stricken off because no formal confession was filed of record. *Bellevue Bor.* v. *Hallett,* 234 Pa. 191, 83 Atl. 66 (1912). Accord: *Osterhout* v. *Briggs,* 37 Pa. Super. Ct. 169 (1908); *Philadelphia* v. *Johnson,* 208 Pa. 645, 57 Atl. 1114 (1904), affg. 23 Pa. Super. Ct. 591 (1903); *Commonwealth* v. *Massi,* 225 Pa. 548, 74 Atl. 419 (1909); *Heeren* v. *Remington,* 47 Pa. Super. Ct. 437 (1911).

SELIGMAN TRIER ET AL. *v.* EDWARD HERMAN ET AL.

COURT OF APPEALS OF NEW YORK, 1889

115 *N. Y.* 163[39]

Appeal from judgment of the general term of the Supreme Court in the First Judicial Department, entered upon an order made May 13, 1887, which affirmed a judgment in favor of defendants, entered upon an order sustaining a demurrer to plaintiff's complaint.

This action was brought by plaintiffs, as judgment-creditors of the defendants Edward and Moses Herman, to vacate a judgment obtained against him by defendant Tuska.

The complaint alleged, in substance, that the judgment in favor of Tuska was entered upon service of summons and complaint and an offer of judgment served on the same day the complaint was served; that the object of procuring judgment in this form was to evade the statute; that a portion of the cause of action was a promissory note, the consideration of which was not set forth in the complaint as required by the statute relating to judgments by confession, as to setting forth the consideration of the claim upon which judgment is sought; that the judgment was, in effect, a judgment by confession, and so was void for want of such statement.

EARL, J.: A creditor may obtain a judgment against his debtor in either one of three ways: (1) He may serve a summons in an action and take judgment after a trial or by default, and he must pursue the regular practice to that end.[40] (2) He may serve a summons and complaint and obtain an offer of judgment from the defendant, and upon that enter judgment under section 738 of the Code; and if he adopts that course, he must pursue the practice prescribed;[41] or (3), he may obtain a judgment by confession in the

[39] Affirming 44 Hun (N. Y.) 489. The statement of facts has been modified from that report and the arguments of counsel omitted.

[40] N. Y. Code Civ. Proc., § 1212, *et seq.*

[41] N. Y. Code Civ. Proc., § 738. The defendant may, before the trial, serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer can not be given in evidence upon the trial; but if the plaintiff fails to obtain a more favorable judgment, he can not recover costs from the time of the offer, but must pay costs from that time.

See *Hill v. Northrop*, 9 How. (N. Y.) 525 (1854); *Ranney* v. *Russell*, 3 Duer 689, 10 N. Y. Super. Ct. 689 (1854); *Bridenbacker* v. *Mason*, 16 How. Pr. (N. Y.) 203 (1858); *White* v. *Bogart*, 73 N. Y. 256 (1878); *Riggs* v. *Waydell*, 78 N. Y. 586 (1879); *Shepherd* v. *Moodline*, 150 N. Y. 183, 44 N. E. 963 (1896); *United States Mortgage, &c., Co.* v. *Hodgson*, 30 Misc. 86, 61 N. Y. S. 868 (1899).

manner provided in section 1273, etc., of the Code.[42] He has the statutory right to pursue either of these methods. He may pursue one for the express purpose of avoiding the others, because the statute gives him the absolute choice. If his practice is regular and his claim and proceedings are honest and *bona fide*, no court will deprive him of the advantage his judgment will give him. He can not compel his debtor to give a confession of judgment, and if he can not obtain one, he must pursue one of the other methods.

Here there is no claim that defendants' practice was irregular, or that the debt for which judgment was taken was not actually due, or that there was any fraud or bad faith practiced upon any one.

This case is unlike that of *White* v. *Cotzhausen*, 129 U. S. 329, because in that case there was but one statute regulating the matter, and that was violated; and it is more like the case of *Beards* v. *Wheeler*, 11 Hun 539; 76 N. Y. 213.

For these reasons, and those expressed more at large in the opinion of the general term, the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.[43]

---

[42]N. Y. Code Civ. Proc., § 1273. A judgment by confession may be entered, without action, either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both, as prescribed in this article.

§ 1274. A written statement must be made, and signed by the defendant, to the following effect:

1. It must state the sum, for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts, out of which the debt arose; and must show that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed is for the purpose of securing the plaintiff, against a contingent liability, it must state concisely the facts, constituting the liability; and must show, that the sum confessed therefor does not exceed the amount of the liability.

The statement must be verified by the oath of the defendant, to the effect, that the matters of fact therein set forth are true. See *Truscott* v. *King*, 6 N. Y. 147 (1852); *Lanning* v. *Carpenter*, 20 N. Y. 447 (1859); *Freligh* v. *Brink*, 22 N. Y. 418 (1860); *Gandall* v. *Finn*,* 40 N. Y. 217, 2 Abb. Dec. 232 (1864); *Wood* v. *Mitchell*, 117 N. Y. 439, 22 N. E. 1125 (1889); *Critten* v. *Vanderburgh*, 151 N. Y. 536, 45 N. E. 952 (1897); *Blackmer* v. *Greene*, 20 App. Div. 532, 47 N. Y. S. 113 (1897); *Wild* v. *Porter*, 22 App. Div. 179, 47 N. Y. S. 1036 (1897); *Anderson* v. *Shutts*, 114 App. Div. 308, 99 N. Y. S. 893, 37 Civ. Proc. R. 141 (1906). Under these sections judgment can not be confessed for a tort. *Burkham* v. *Van Suan*, 14 Abb. Pr. (N. S.) 163 (1873).

[43]Generally, a judgment by consent of the parties is as conclusive upon the parties and their privies as a judgment *in invitum*. *Harding* v. *Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066 (1905); *Houpt* v. *Bohl*, 71 Ark. 330, 75 S. W. 470 (1903); *Clark* v. *Charles*, 55 Nebr. 202, 75 N. W. 563 (1898); *Casler* v. *Chase*, 160 Mo. 418, 60 S. W. 1040 (1900), but it may be inquired into for fraud. *Edison Gen. Electric Co.* v. *Westminster & V. T. Co.*, L. R. (1897) App. Cas. 193; *Hambleton* v. *Yocum*, 108 Pa. St. 304 (1885).

SECTION 3. JUDGMENT BY DEFAULT

MORRICE *v.* GREEN

COURT OF KING'S BENCH, 1699

3 Salk. 213.

In this case it was held that a judgment by ***nihil dicit*** is where one is in court, and required to make answer to what is objected against him, but he is silent and says nothing in his defense.[44]

There is likewise a judgment for departing in despite of the court, and that is where the party appears, and, being to attend that day, goes out of the court without leave of the court; as in common recoveries, where the common vouchee comes in and pleads ***nul tort, nul disseisin,*** and then the demandant imparls generally, and not to a day certain; and for that reason the vouchee is still obliged to attend the court, but doth not; then the entry is, *postea eodem die revenit* the demandant, and because the vouchee is not there but is departed, therefore the demandant hath judgment.[45]

And lastly there is a judgment by default, and that is where the party hath a day certain, and is demandable, and being demanded doth not appear, whereupon judgment is given against him by default; and these are distinct judgments, which can not be used the one for the other. See Co. Entr. 269 a. Rast. Ent. 173 b.[46]

---

[44]Tidd's Practice, 562; Comyn's Digest, "Pleader," (e) 42; *Foster* v. *Filley,* 2 Ill. 256 (1836); *Cross* v. *Watson,* 6 Blackf. (Ind.) 129 (1842); *Summerlin* v. *Dowdle,* 24 Ala. 428 (1854); *Safford* v. *Vail,* 22 Ill. 327 (1859); *Dart* v. *Hercules,* 34 Ill. 395 (1864); *Wilcox* v. *Field,* 1 Colo. 3 (1864); *McNasser* v. *Sherry,* 1 Colo. 12 (1864); *Gilder* v. *McIntyre,* 29 Tex. 89 (1867); *Hoehme* v. *Rupear,* 1 Colo. 405 (1871); *Gomer* v. *Shiner,* 4 Colo. 246 (1878); *Hutchinson* v. *Powell,* 92 Ala. 619, 9 So. 170 (1890); *Glens Falls Ins. Co.* v. *Porter,* 44 Fla. 568, 33 So. 473 (1902); *Endowment Dept.* v. *Harvey,* 6 Ala. App. 239 (1912). For form see Stephen on Pleading (9 Amer. ed.) 114.

[45]Co. Litt. 139a; Brooke's Abridgment, "Departure in Despite"; 7 Viner's Abridgment, 449; Y. B. 22, Edw. III 2; Y. B. 3, Hen. IV, 2; Y. B. 9, Hen. V, 5; Y. B. 9, Hen. VI, 58; *Lilburne* v. *Heron,* Cro. Jac. 292 (1611).

[46]Co. Litt. 259b; *Sleigh* v. *Chetham,* 1 Show. 20, 65 (1689); *Staple* v. *Hayden,* 1 Salk. 216 (1703); *Howell* v. *Denniston,* 3 Caines (N. Y.) 96 (1805); *Mason* v. *Germaine,* 1 Mont. 263 (1870); *Holtzman* v. *Martinez,* 2 N. Mex. 271 (1882); *Grigg* v. *Gilmer,* 54 Ala. 425 (1875); *Falken* v. *Housatonic R. Co.,* 63 Conn. 258, 27 Atl. 1117 (1893); *Chicago, C. C. & St. L. R. Co. and P. & E. Ry. Co.* v. *Bozarth,* 91 Ill. App. 68 (1900). "At common law judgment against the defendant for default of appearance was unknown, the penalty for his contumacy being distress infinite and outlawry. But if after appearing he neglected to make defense by plea or demurrer within the time allowed, judgment by *nihil dicit*—'he says nothing'—might be taken against him." *Abeles* v. *Powell,* 6 Pa. Super. Ct. 123 (1897); *Rhoades* v. *Delaney,* 50 Ind. 468 (1875); *Douglass* v. *Langdon,* 29 Iowa 245 (1870); *Fanning* v. *Russell,* 81 Ill. 398 (1876). By statute of 5 George II, ch. 27, to expedite the plaintiff's proceedings, if the defendant after service of process did not appear at the return day or within eight days thereafter, the plaintiff was permitted to enter a *common appearance* or file common bail and proceed as if the defendant had appeared. *Carter* v. *Daisy,* 42 Miss. 501 (1869). There

DAVIS *v.* GRANISS

SUPREME COURT OF INDIANA, 1839

5 *Blackf. (Ind.)* 79

Error to the La Porte Circuit Court.

SULLIVAN, J.: Assumpsit by C. B. Graniss and others against Davis and one Allison on a promissory note. Davis appeared and pleaded to the action. Allison, on whom process had been duly served, entered no appearance. An issue was made on the plea filed by Davis. Verdict and judgment against Davis alone.

This judgment must be reversed. The error consists in taking judgment against one of the defendants only. The principles which govern suits against joint contractors are, we presume, familiar to all. A judgment by default should have been taken against Allison, and the jury that tried the issue made on the plea filed by Davis, should have been sworn to assess the damages against Allison also. 2 Arch. Pr. 23.

Judgment reversed.[47]

---

would seem to be little material difference between a judgment by *nihil dicit* and one by default. *Winn* v. *Levy*, 2 How. (Miss.) 902 (1838); *Manville* v. *Parks*, 7 Colo. 128, 2 Pac. 212 (1883); *Elyton Land Co.* v. *Morgan*, 88 Ala. 434, 7 So. 249 (1889), and see *Barbe* v. *Davis*, 1 Miles (Pa.) 118 (1835). In fact, the modern tendency is to use the term "default" in its broadest sense, so as to include any failure by a party to a suit to take a step required by law in its prosecution or defense. 6 Enc. Pl. & Pr. 10; *Warren* v. *Kennedy*, 1 Heisk. (Tenn.) 437 (1870); *Acheson* v. *Inglis*, 155 Iowa 239, 135 N. W. 632 (1912). But a judgment for want of a sufficient affidavit of defense is a judgment upon defense made, and not on a default. *Abeles* v. *Powell*, 6 Pa. Super. Ct. 123 (1897).

For the modern English practice see Rules of Supreme Court, order xxvii. And see N. Y. Code Civ. Proc., §§ 1212-15; Penna. acts June 13, 1836. P. L. 568, § 33; P. & L. Dig. (2d ed.) 5845; March 28, 1835, P. L. 88, § 2; P. & L. Dig. (2d ed.) 5847; May 25, 1887, P. L. 271, § 5; P. & L. Dig. (2d ed.) 5853; April 22, 1889, P. L. 41; P. & L. Dig. (2d ed.) 5867. New Jersey Comp. Stat. (1910), p. 4094, § 133; N. J. Laws, 1912, p. 394; Mass. Rev. Laws (1902) ch. 173, § 54; Cal. Code Civ. Proc. (1915), § 585; Ohio Gen. Code (1910) p. 2482.

A judgment by default against one who has neither been served with process nor entered an appearance in the action is irregular and void. *Moore* v. *Watkins*, 1 Ark. 268 (1839); *Townsand* v. *Townsand*, 21 Ill. 540 (1859); *Swift* v. *Dixon*, 131 N. Car. 42, 42 S. E. 458 (1902); *Ault* v. *Cowan* (2), 20 Pa. Super. Ct. 628 (1902); *Jones* v. *Roland*, 8 Blackf. (Ind.) 272 (1846); *Harris* v. *Hardeman*, 14 How. (U. S.) 334, 14 L. ed. 444 (1852). Statutes providing for constructive service are in derogation of the common law and must be strictly followed. *Jordan* v. *Giblin*, 12 Cal. 100 (1859); *Thompson* v. *Carroll*, 36 N. H. 21 (1857); *Bardsley* v. *Hines*, 33 Iowa 157 (1871); *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565 (1877); *Bowler* v. *Ennis*, 46 App. Div. 309, 61 N. Y. S. 686 (1899); *Porter* v. *Prince*, 188 Mass. 80, 74 N. E. 256 (1905). Judgment by default entered prior to the time allowed by law for an appearance is erroneous. *Wingert* v. *Connell*, 4 Serg. & R. (Pa.) 237 (1818).

[47] At common law, where judgment by default was signed as to part of the defendants in a joint action, and issue joined as to the residue, a special

BOULTER *v.* FORD.

COURT OF KING'S BENCH, 1662

Siderfin 76.[48]

Covenant is brought against two upon an indenture by which they covenant artificially to erect a house, etc. One makes default wherefore judgment is against him. The other pleads that the two did artificially erect the house upon which they are at issue and found for the defendant. And it was moved for the plaintiff, notwithstanding the verdict, he should have a writ of inquiry against that defendant against whom judgment is given by default because here the act to be done should be done by both and one is condemned of nonfeasance by the judgment. But it was held by the court that no writ of inquiry should issue against the other defendant to charge him with any damages, for it appears by the

---

venire was awarded *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury that tried the issue in that case assessed the damages for all. 2 Arch. Pr. 700; *Heydon's Case*, 11 Co. 5 (1612); *Cressy* v. *Webb*, 2 Str. 1222 (1744); *Dicker* v. *Adams*, 2 B. & P. 163 (1800); *Hart* v. *De Lord*, 17 Johns. (N. Y.) 269 (1820); *Van Schaik* v. *Trotter*, 6 Cow. (N. Y.) 599 (1827); *O'Neal* v. *O'Neal*, 4 Watts & S. (Pa.) 130 (1842); *Day* v. *Brawley*, 1 Pa. St. 429 (1845); *Gerrish* v. *Cummings*, 4 Cush. (Mass.) 391 (1849); *Chase* v. *Lovering*, 27 N. H. 295 (1853); *Storey* v. *Bird*, 8 Mich. 316 (1860); *Commonwealth* v. *McCleary*, 92 Pa. St. 188 (1879); *Netso* v. *Foss*, 21 Fla. 143 (1884); *Watsontown Nat. Bank* v. *Messenger*, 6 Pa. C. C. 609 (1889); *Stainbrook* v. *Duncan*, 45 Ill. App. 344 (1892); *Coles* v. *McKenna*, 80 N. J. L. 48, 76 Atl. 344 (1910); *Ernst Tosetti Brew. Co.* v. *Wagner*, 168 Ill. App. 27 (1912); *Long* v. *Gwin*, 188 Ala. 196, 66 So. 88 (1914). Hence, in an action against several persons on a joint debt if one defaults, final judgment can not be entered against him until the issues as to the others are disposed of. *Russell* v. *Hogan*, 2 Ill. 552 (1839); *Teal* v. *Russell*, 3 Ill. 319 (1840); *Hulme* v. *Janes*, 6 Tex. 242, 55 Am. Dec. 774 (1851); *Barker* v. *Justice*, 41 Miss. 240 (1866); *Campbell* v. *Floyd*, 153 Pa. St. 84, 25 Atl. 1033, 1038 (1893); *Murtland* v. *Floyd*, 153 Pa. St. 99, 25 Atl. 1038 (1893); *Uher* v. *Cameron State Bank* (Tex. Civ. App.), 125 S. W. 321 (1910); *Siltz* v. *Springer*, 236 Ill. 276, 85 N. E. 748 (1908). Compare: *McIntyre* v. *Smith*, 108 Va. 736, 62 S. E. 930 (1908). See, also, *Blessing* v. *McLinden*, 81 N. J. L. 379, 79 Atl. 347, 35 L. R. A. (N. S.) 312n (1911); *Cellulose Package Mfg. Co.* v. *Calhoun*, 166 Cal. 513, 137 Pac. 238 (1913).

Generally, in actions on joint contracts, where no purely personal defense is interposed by one defendant, judgment must be rendered against all who are served or none. *Tuttle* v. *Cooper*, 27 Mass. 281 (1830); *Rohr* v. *Davis*, 9 Leigh (Va.) 30 (1837); *State* v. *Gibson*, 21 Ark. 140 (1860); *Adderton* v. *Collier*, 32 Mo. 507 (1862); *Donnelly* v. *Graham*, 77 Pa. St. 274 (1875); *Curry* v. *Roundtree*, 51 Cal. 184 (1875); *Stapp* v. *Davis*, 78 Ind. 128 (1881); *Wootters* v. *Kauffman*, 67 Tex. 488, 3 S. W. 465 (1887); *Penfold* v. *Slyfield*, 110 Mich. 343, 68 N. W. 226 (1896); *Schofield* v. *Palmer*, 134 Fed. 753 (1904); *Bolts* v. *Muehlhof*, 37 Pa. Super. Ct. 375 (1908); *Edgerton* v. *Chicago, R. I. & P. R. Co.*, 146 Ill. App. 199 (1909), and, therefore, an interlocutory judgment against one could not be made final until the case is concluded as to the others. 1 Black on Judgments (2d ed.), § 206; *Taylor* v. *Beck*, 3 Rand. (Va.) 316 (1825); *Dow* v. *Rattle*, 12 Ill. 373 (1851); *Swansey* v. *Parker*, 50 Pa. St. 441, 88 Am. Dec. 549 (1866).

[48] S. C. 1 Keb. 284. Part of the case is omitted.

verdict that the covenant is performed. And the other defendant shall have costs against the plaintiff. See *Tilly and Woody's Case*, 7 Edw. IV, 31; *Parker and Lawrence's Case*, *Hob.* 14, 17.

WILKINS' ADMR. *v.* BROCK AND ROSELLE

SUPREME COURT OF VERMONT, 1908

81 *Vt.* 332.[49]

ROWELL, C. J.: This is an action for malpractice as physicians. The declaration contains a count in trespass for assault and battery and two counts in case. At the close of all the testimony, the count in trespass was ruled out, there being no evidence to support it, and the case submitted only on the other counts.

The defendant Roselle let judgment go by default. The defendant Brock pleaded not guilty, and the issue was tried by jury and found for the plaintiff, and damages assessed against the defendants jointly by direction of the court, the defendant Roselle not appearing. To this the defendant Brock excepted, and objects that Roselle was not a party on trial, and stood as though she had never been a party to the action, and that he was prejudiced by bringing thus prominently before the jury that she had admitted her guilt, as the jury would be likely to think that as she was guilty he was also, as they joined in the treatment complained of. But here was no error, for the judgment against Roselle was interlocutory, not final, and therefore she remained a party for the purpose of assessing damages; and though she was defaulted and Brock found guilty, yet the final judgment was to be joint, for they were declared against jointly, and there could be but one assessment of damages, and that assessment had to be by the jury that tried the issue between the plaintiff and Brock. Mr. Tidd says that in an action against several, if some let judgment go by default and others plead to issue, the jury that tries the issue assesses damages against all. 2 Tidd's Pr., 3d Am. ed. 894.[50] So in *Heydon's Case*, 11 Co. (5a), which was trespass for assault and battery against

---

[49] Only so much of the case as relates to the question of default is printed. The judgment of the court below was reversed upon other grounds.

[50] "In trespass or other action for wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant and proceed against the others." 1 Tidd's Practice (8th ed.) 736; *Walsh* v. *Bishop*, Cro. Car. 239, 243 (1631); *Lover* v. *Salkeld*, 2 Salk. 455 (1699); *Greeves* v. *Rolls*, 2 Salk. 456 (1703); *Dale* v. *Eyre*, 1 Wils. 306 (1751). So a verdict and judgment against one or more defendants may be regarded as equivalent to a *nol. pros.* as to the others, although there is no formal entry to that effect. *Cridland* v. *Floyd*, 6 Serg. & R. (Pa.) 412 (1821); *Breidenthal* v. *McKenna*, 14 Pa. St. 160 (1850); *Davis* v. *Taylor*, 41 Ill. 405 (1866); *St. Louis, &c., R. Co.* v. *Smith*, 43 Ill. 176 (1867); *McDonald* v. *Judson*, 97 Ill. App. 414 (1900); *Lynch* v. *Chicago*, 152 Ill. App. 160 (1909).

Generally, there is no contribution between tort feasors; one may be sued severally or any or all together, and where more than one is sued a verdict or judgment may be rendered for or against any or all. *Sparrow* v. *Bromage*,

three, two pleaded to issue and tried separately, and damages in different amounts assessed. One let judgment go by default, and a writ of inquiry of damages was awarded on the roll but not issued. Thereupon a great question was moved, and depended for divers terms, how, and against whom, and for what amount, judgment should be entered; and at last, on consideration had of the precedents and the books, judgment was entered against all for the sum first assessed, and that judgment was affirmed on error. So in 1 Saund. 207a, note (2), it is said that where several are jointly charged in an action of trespass and plead jointly, or sever in their pleas, or one lets judgment go by default, and the jury assesses several damages, the verdict is wrong and the judgment erroneous. But that the plaintiff may cure the verdict by entering a *nol. pros.* as to all the defendants but one, and taking judgment against him only. So in *Bohun* v. *Taylor*, 6 Cow. 313, it is said that where there is but one trespass, and all are found guilty of the whole, the damages must be entire, though the defendants sever, and one lets judgments go by default. And in *Gerrish* v. *Cummings*, 4 Cush. 391, it is said that in an action of trover there can be but one assessment of damages; and though one defendant is defaulted and the other found guilty, yet there must be a joint judgment, and that the verdict, which is to fix the amount of damages, fixes it as well for the party defaulted as for the party that pleaded.[51]

---

83 Conn. 27, 74 Atl. 1070 (1910); *Jansen* v. *Varnum*, 89 Ill. 100 (1878); *Vieths* v. *Skinner*, 47 Ill. App. 325 (1892); *Howard* v. *Dayton Co.*, 94 Ga. 416, 20 S. E. 336 (1894); *Peacock* v. *Feaster*, 51 Fla. 269, 40 So. 74 (1906); *Lovelace* v. *Miller*, 150 Ala. 422, 43 So. 734 (1907); *Tanzer* v. *Breen*, 131 App. Div. 654, 116 N. Y. S. 110 (1909); *Reid* v. *Miller*, 205 Mass. 80, 91 N. E. 223 (1910); *Pecaro* v. *Halberg*, 246 Ill. 95, 92 N. E. 600 (1910); *Winn* v. *Kansas City B. R. Co.*, 245 Mo. 406, 151 S. W. 98 (1912); *Boehm* v. *General E. Co.*, 179 Mo. App. 663, 162 S. W. 723 (1914). But in Pennsylvania the practice is that where the declaration is for a joint tort and the evidence fails to show joint action by the defendants, the plaintiff must amend, otherwise there will be a variance. *Weist* v. *Traction Co.*, 200 Pa. 148, 49 Atl. 891 (1901); *Dempsey* v. *Devers*, 43 Pa. Super. Ct. 193 (1910). See *Linquist* v. *Hodges*, 248 Ill. 491, 94 N. E. 94 (1911).

[51] Accord: *Bostwick* v. *Lewis*, 1 Day (Conn.) 33 (1802); *Wakely* v. *Hart*, 6 Binn. (Pa.) 316 (1814), *semble; Bohun* v. *Taylor*, 6 Cow. (N. Y.) 313 (1826); *Gerrish* v. *Cummings*, 58 Mass. (4 Cush.) 391 (1849); *Turner* v. *McCarthy*, 4 E. D. Sm. (N. Y.) 247 (1885); *O'Shea* v. *Kirker*, 8 Abb. Pr. 69, 17 N. Y. Super. Ct. 120 (1859); *O'Shea* v. *Kirker*, 4 Bosw. 120 (1859). Where a joint tort is proved the jury can not award several damages against the individual defendants. *Rodney* v. *Strode*, 1 Carth. 19 (1685); *Sabin* v. *Long*, 1 Wils. 30 (1743); *Hill* v. *Goodchild*, 5 Burr. 2790 (1771); *Mitchell* v. *Milbank*, 6 T. R. 199 (1795); *Halsey* v. *Woodruff*, 9 Pick. (Mass.) 555 (1830); *Gardner* v. *Field*, 67 Mass. 151 (1854); *Beal* v. *Finch*, 11 N. Y. 128, 9 How. Pr. 385 (1854); *Greenlands Ltd.* v. *Wilmshurst*, L. R. 3 K. B. 507 (1913); *Foy* v. *Barry*, 159 App. Div. 749, 144 N. Y. S. 971 (1913). But see *Brown* v. *Thayer*, 212 Mass 392, 99 N. E. 237 (1912).

Cressy v. *Webb*, King's Bench 1744, 2 Strange 1222. Webb only pleaded to issue, the other defendants let judgment go by default. And it came on at Guildhall to try the issue, and also to assess the damages as to the others. On the trial Webb was acquitted, and a doubt arose whether the plaintiff could go on; but the chief justice thought he might proceed, and he did so. Accord: *Jones* v. *Harris*, 2 Str. 1108 (1738); *Legrand* v. *Page*, 7 T. B. Mon. (Ky.) 401 (1828). But otherwise if the defense "destroys the cause of action as to all the defendants." *Biggs* v. *Greenfield*, 8 Mod. 217, 2 Ld. Raym. 1372

KARON ET AL. *v.* EISEN ET AL.

SUPREME COURT OF NEW YORK, APPELLATE TERM, 1911

2 N. Y. Civ. Proc. (N. S.) 197.[52]

Appeal from an order of the City Court of New York entered at special term denying a motion made by the defendant Samuel Wiesenfeld to vacate a judgment by default entered against him.

PAGE, J.: The complaint in this action alleges, so far as material to this appeal, that Eisen and Einhorn made their promissory note payable to the plaintiffs for the sum of $803.25; that thereafter, and before delivery thereof to the plaintiffs, and in order to lend credit to said note, and to induce the plaintiffs to accept the same, for a valuable consideration, the firm of B. Wiesenfeld & Co., composed of the defendants Benjamin Wiesenfeld, Samuel Wiesenfeld, and Max Spalter, duly indorsed said note, and the same was, with the indorsement thereon, duly delivered to the plaintiffs, for value received, and the plaintiffs thereby became the lawful owners and holders thereof, for value, and in due course. Due presentation, demand at maturity, non-payment, and notice thereof were also duly alleged. Benjamin Wiesenfeld and Max Spalter answered. Samuel Wiesenfeld did not answer. Therefore a judgment for the full amount demanded in the complaint was entered against him. Motion was made to vacate the judgment, and was denied.

The liability of the members of the firm of B. Wiesenfeld & Co. was a joint liability, and the plaintiffs could not take judgment against one joint defendant until the issue raised by the other joint defendants has been disposed of. *Smith* v. *Weston*, 81 Hun 87, 89; 30 N. Y. Supp. 649.[53] It is only where the liability is several that judgment can be taken against a defendant upon his default, in a case where some of the defendants have answered, and then the action must be severed. Code Civ. Proc. sections 456, 1205. In this case the action has not been and could not be severed. Therefore, if plaintiff was successful on the trial of the issue raised, a judgment would be entered against all of the defendants named, who are jointly indebted, and the appellant would have two judgments against him on the same cause of action, and in the same action. The clerk had no power or authority to enter the judgment. Therefore it should have been vacated.[54]

Order reversed.

(1723); *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423 (1914); and see *Doremus* v. *Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649 (1901).

[52] S. C. 128 N. Y. S. 137. Part of the opinion is omitted.

[53] Accord: *Catlin* v. *Billings*, 13 How. Pr. (N. Y.) 511 (1857); *Warner* v. *Ford*, 17 How. Pr. (N. Y.) 54 (1858); *Aucker* v. *Adams*, 23 Ohio St. 543 (1873); *Smith* v. *Weston*, 81 Hun 87, 30 N. Y. S. 649 (1894); *Osbun* v. *Bartram*, 8 O. C. D. 259, 15 Ohio C. Ct. 224 (1897); *Bauer* v. *Hawes*, 115 App. Div. 492, 101 N. Y. S. 455 (1906). See Pomeroy's Civil Remedies (3d ed.), § 299 *et seq.*

[54] Compare *Stedeker* v. *Bernard*, 102 N. Y. 327, 6 N. E. 791 (1886). By § 454 of the New York Code of Civil Procedure two or more persons severally liable upon the same instrument may be joined as defendants. By § 456,

SIR FRANCIS GOODWIN *v.* WELSHE & OVER

COURT OF KING'S BENCH, 1609

Yelverton 151.[55]

Sir Francis brought several actions of trespass against the two defendants for goods taken, and declared to damages. The attorney for the defendants pleaded *non sum informatus;* and thereupon judgment is given severally for the plaintiff and writs of inquiry of damages issued, and were returned. And it was moved that the writs should not be filed, because the plaintiff at the time of the inquiry did not prove that the goods belonged to him, but only proved the value of the goods; for by Serjeant Nichols there is a difference between an action confessed and *non sum informatus;* for in the first case the property is likewise confessed to be in the plaintiff, but it is not so in the other case; for this judgment passes without the defendant's privity and only for want of pleading, as in the case of *nihil dicit.* But, *per tot' Cur',* it is all one, and the plaintiff need not prove property in either of the cases, and the reason is, because the writ commands only the value to be inquired and no more, and that alone is the charge of the jury. And, by all the justices, they themselves as judges, if they would, might in these cases assess damages, without issuing any writ; for it issues only *quia nescitur quae damna;* but if they will trouble themselves with the assessment of damages they may.[56] But it is otherwise in the case of *non cul.* pleaded, for there the trespass is denied, which must be tried by the jury, and there the property and the value also ought to be proved. *Nota* also, in the first case, the judgment is,

---

where the summons is against persons "alleged to be severally liable," judgment may be taken against one or more where plaintiff would be entitled to judgment if the action was against him or them alone. When judgment is so taken the action is served and plaintiff proceeds against the other defendants. § 1205 provides: "Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment, against one or more defendants, and direct that the action be severed and proceed against the others, as the only defendants therein." See Pomeroy's Civil Remedies (3d ed.), § 403; *Bank of Genessee* v. *Field,* 19 Wend. (N. Y.) 643 (1839); *Parker* v. *Jackson,* 16 Barb. (N. Y.) 33 (1852); *Pruyn* v. *Black,* 21 N. Y. 300 (1860); *McIntosh* v. *Ensign,* 28 N. Y. 169 (1863); *Stimson* v. *Van Pelt,* 66 Barb. (N. Y.) 151 (1868); *Fielden* v. *Lahens,* 6 Abb. Pr. (N. S.) 341 (1867); *Weidman* v. *Sibley,* 16 App. Div. 616, 46 N. Y. S. 1102 (1897); *Lawton* v. *Partridge,* 111 App. Div. 8, 97 N. Y. S. 516 (1906); *Draper* v. *Interborough Transit Co.,* 124 App. Div. 357, 108 N. Y. S. 691 (1908); *Sayre* v. *Progressive C. Co.,* 159 App. Div. (N. Y.) 799 (1913); *Lyon* v. *Page,* 21 Mo. 104 (1855); *Key* v. *Robinson,* 8 Ind. 368 (1856); *People* v. *Frisbie,* 18 Cal. 402 (1861); *Shain* v. *Forbes,* 82 Cal. 577, 23 Pac. 198 (1890); *Bailey Loan Co.* v. *Hall,* 110 Cal. 490, 42 Pac. 962 (1895); *Cole* v. *Roebling Const. Co.,* 156 Cal. 443, 105 Pac. 255 (1909).

[55] S. C. Cro. Jac. 220; 1 Brownl. 214.

[56] *Bruce* v. *Rawlings,* 3 Wils. 61 (1770); *Longman* v. *Fenn,* 1 H. Bl. 541 (1791); *Watkins* v. *Phillips,* 2 Whart. (Pa.) 209 (1837); *Bell* v. *Bell,* 9 Watts 47 (1839). See, also, *Jarvis* v. *Blanchard,* 6 Mass. 4 (1811).

quod recuperet querens. If then upon a writ of inquiry of damages the plaintiff should be obliged to prove property and fail of it, that would go in avoidance of the first judgment, which can not be. Yelverton of counsel with the plaintiff.[57]

HOOKIN *v.* QUILTER

COURT OF KING'S BENCH, 1747

2 Str. 1271[58]

There were three counts in the declaration as executrix, and a fourth was for use and occupation of the plaintiff's house. Judgment by default in common bench and reversed on error.

For *per curiam* there being no verdict, we can presume nothing, but that the fourth count is, as it appears, in her own right, which can not be joined with the others, and the damages are intire.[59]

---

[57]Letting judgment go by default is an admission of the cause of action. *East India Co.* v. *Glover,* 1 Str. 612 (1725); *Bevis* v. *Lindsell,* 2 Str. 1149 (1740); *Anonymous,* 3 Wils. 155 (1771); *Snowden* v. *Thomas,* 2 Wm. Bl. 748 (1771); *Thellusson* v. *Fletcher,* 1 Dougl. 315 (1780); *Leib* v. *Bolton,* 1 Dall. (Pa.) 82, 1 L. ed. 46 (1784); *Greene* v. *Hearne,* 3 T. R. 301 (1789); *Shepherd* v. *Charter,* 4 T. R. 275 (1791); *De Gaillon* v. *L'Aigle,* 1 B. & P. 368 (1799); *Kingston* v. *Haychurch,* 1 Chitty R. 644 (1819); *Bates* v. *Loomis,* 5 Wend. (N. Y.) 134 (1830); *Forter* v. *Smith,* 10 Wend. (N. Y.) 377 (1833); *Carter* v. *Hunter,* 3 Ala. 30 (1841);; *In re Toppan,* 24 N. H. 43 (1851); *Froust* v. *Bruton,* 15 Mo. 619 (1852); *Willson* v. *Willson,* 25 N. H. 229, 57 Am. Dec. 320 (1852); *Clark* v. *Compton,* 15 Tex. 32 (1855); *Cook* v. *Skelton,* 20 Ill. 107, 71 Am. Dec. 250 (1858); *Hunt* v. *San Francisco,* 11 Cal. 250 (1858); *Whittey* v. *Douge,* 9 Iowa 597 (1859); *Creamer* v. *Dikeman,* 39 N. J. L. 195 (1877); *Bullard* v. *Sherwood,* 85 N. Y. 253 (1881); *Banks* v. *Gay Mfg. Co.,* 108 N. Car. 282, 12 S. E. 741 (1891); *Hellen* v. *Steinwender,* 28 Fla. 191, 10 So. 207 (1891); *Martin* v. *New York, &c., R. Co.,* 62 Conn. 331, 25 Atl. 239 (1892); *Grinnell* v. *Bebb,* 126 Mich. 157, 85 N. W. 467 (1901); *Lenney* v. *Finley,* 118 Ga. 427, 45 S. E. 317 (1903); *Parratt* v. *Hartsuff,* 75 Nebr. 706, 106 N. W. 966 (1906); *Wolf* v. *Powers,* 144 Ill. App. 168 (1908); *Brown Con. Co.* v. *MacArthur B. Co.,* 236 Mo. 41, 139 S. W. 104 (1911); *Buck* v. *Citizens C. M. Co.,* 254 Ill. 198, 98 N. E. 228 (1912). Where the claim is unliquidated the damages must be proved. *Reigne* v. *Dewees,* 2 Bay (S. Car.) 405 (1802); *William* v. *Cooper,* 3 Dowl. 204 (1834); *Webb* v. *Webb,* 16 Vt. 636 (1844); *Rose* v. *Gallup,* 33 Conn. 338 (1866); *Mississippi R. Co.* v. *Green,* 9 Heisk. (Tenn.) 588 (1872); *Dunlap* v. *Horton,* 49 Ala. 412 (1873). Otherwise where the claim is liquidated, *Holdipp* v. *Otway,* 2 Saund. 106 (1669); *Arden* v. *Connell,* 5 B. & Ald. 885 (1822); *O'Neal* v. *O'Neal,* 4 Watts. & S. (Pa.) 130 (1842); *Mass. M. L. Co.* v. *Kellogg,* 82 Ill. 614 (1876); *Hartman* v. *Farrior,* 95 N. Car. 177 (1886); *St. Louis, &c., Co.* v. *Zumwalt,* 31 Okla. 159, 120 Pac. 640 (1912). And see as to assessment of damages, 23 Cyc. 760; 6 Enc. Pl. & Pr. 127.

[58]S. C. *Hooker* v. *Quilter,* 1 Wils. 171, where it appears that the action was assumpsit, the first three counts being for use and occupation of a house of plaintiff's testator. Judgment was by *nihil dicit,* a writ of inquiry issued and entire damages were assessed.

[59]*Smith* v. *Carley,* 8 Ind. 451 (1856). Assumpsit on a promissory note, the declaration failed to aver that defendant was the maker of the note and that the note was unpaid. Judgment by default reversed. *Per curiam*: "As

McELROY *v.* READING

COURT OF COMMON PLEAS, PHILADELPHIA, 1870

7 Phila. (*Pa.*) 433

Sur rule to strike off nonsuit. *Sur* rule to strike off narr.

LUDLOW, J.: Judgments of *nonsuit* and *non pros.* are, in modern practice, different judgments; the former involves the nonappearance on call of the plaintiff on the trial, or such a defect in point of law, or inadequacy of proof, as renders it either impolitic or impossible for the plaintiff to proceed with the suit; a judgment of *non pros.*, especially under our rule of court, which permits a defendant to enter such a judgment if a narr. is not filed within a year, is a judgment by default for *laches.* Under our rule a *non pros.* may be entered by order of an attorney in the office of the clerk of the court, while a *nonsuit* can, only at the trial, be suffered by the plaintiff, or be ordered by the court.

In this case a *nonsuit* was by mistake ordered by defendant's attorney, and, as the parties insist upon their legal rights, this judgment must be stricken from the record; and then nothing will justify us in striking off the narr., for a plaintiff may, at any time, file his narr., if a *non pros.* has not been ordered according to the rule.

Rule to strike off *nonsuit* is made absolute. Rule to strike off narr. is discharged.[60]

---

a general rule, a default, regularly taken, admits the cause of action; but, then, there must be a declaration or complaint containing such a statement of facts as will, when admitted, in point of law authorize a judgment against the defendant."

Accord: *Collins* v. *Gibbs*, 2 Burr. 899 (1759); *Bowdell* v. *Parsons*, 10 East. 359 (1808); *Randolph* v. *Cook*, 2 Port. (Ala.) 286 (1835); *Huntress* v. *Effingham*, 17 N. H. 584 (1845); *Hall* v. *Jackson*, 3 Tex. 305 (1848); *Winston* v. *Miller*, 20 Miss. 550 (1849); *Hollis* v. *Richardson*, 13 Gray (Mass.) 392 (1859); *Griffith* v. *Clarke*, 18 Md. 457 (1862); *Comm.* v. *Hoffman*, 74 Pa. St. 105 (1873); *McAllister* v. *Kuhn*, 96 U. S. 87, 24 L. ed. 615 (1877); *Argall* v. *Pitts*, 78 N. Y. 239 (1879); *Cragin* v. *Lovell*, 109 U. S. 194, 27 L. ed. 903 (1883); *Harmon* v. *Ashmead*, 60 Cal. 439 (1882); *Chaffin* v. *McFadden*, 41 Ark. 42 (1883); *Johnson* v. *Mantz*, 69 Iowa 710, 27 N. W. 467 (1886); *Old* v. *Mohler*, 122 Ind. 594, 23 N. E. 967 (1889); *Doud* v. *Duluth Milling Co.*, 55 Minn. 53, 56 N. W. 463 (1893) *Chestnut Street Bank* v. *Ellis*, 161 Pa. St. 241, 28 Atl. 1082 (1894); *Shields* v. *Clement*, 12 Misc. 506, 33 N. Y. S. 676, 67 N. Y. St. 376 (1895); *Schueler* v. *Mueller*, 193 Ill. 402, 61 N. E. 1044 (1901); *Gillian* v. *Gillian*, 65 S. Car. 129, 43 S. E. 386 (1902); *Forsyth* v. *Stumbaugh*, 13 Pa. D. R. 339 (1903); *Werten* v. *Koosa*, 169 Ala. 258, 53 So. 98 (1910); *Gadsden* v. *Home Fertilizer Co.*, 89 S. Car. 483, 72 S. E. 15 (1911); *Davies Exr.* v. *Louisville*, 159 Ky. 252, 166 S. W. 969 (1914). In assumpsit for goods sold and delivered after judgment for want of a plea, judgment will not be struck off because the statement omitted to lay a venue. *American Mfg. Co.* v. *S. Morgan Smith Co.*, 25 Pa Super. Ct. 176 (1904).

Where on default damages were assessed on all the counts and one was bad on general demurrer, judgment was reversed. *Dryden* v. *Dryden*, 9 Pick. (Mass.) 546 (1830). Contra: *Swearingen* v. *Bank*, 13 Ohio, 200 (1844); *Hunt* v. *San Francisco*, 11 Cal. 250 (1858).

[60] Judgment of *non prosequitur*, or *non pros.* is a final judgment for costs only, signed by the defendant, whenever the plaintiff, in any stage of the cause, neglects to prosecute his suit, or part of it, within the time limited by

SECTION 4. AMENDMENT OF JUDGMENTS

BRONSON *v.* SCHULTEN

SUPREME COURT OF UNITED STATES, 1881

104 *U. S.* 410

Error to the Circuit Court of the United States for the Southern District of New York.

The plaintiffs sued Bronson, as collector of customs for the port of New York, to recover duties, paid under protest, in excess of the amount authorized by law upon seventy-four entries of goods at the custom house. On the trial there was a verdict for the plaintiffs fixing the precise error under which the excessive duty had been exacted and leaving to a referee the determination of the actual amount due. Upon the report of the referee judgment was entered August 5, 1860, and the amount paid to and accepted by the plaintiffs. It subsequently appeared that in thirty-four of the entries, for which claims were made, the sums which should have been allowed the plaintiffs were omitted in the adjustment. On January 26, 1877, the circuit court made an order that the judgment be vacated and the assessment of damages under the verdict be referred to a referee. On March 10, 1877, the referee reported that there was due plaintiffs, in addition to what had been paid under the judgment set aside, the sum of $1,205.90, on which interest was allowed to the amount of $2,017.21. For these sums judgment was rendered. To reverse this judgment the present writ of error is brought.[61]

MILLER, J.: If there was no question of lapse of time, or of the power of the court over its own judgments after the term at which

---

the rules of the court for that purpose. 2 Archbold's Practice (7 ed.) 1052; 1 Tidd's Practice (9th ed.) 458; 3 Bl. Comm. 296; *Powell* v. *White*, 1 Dougl. 168 (1779); *Thurston* v. *Murray*, 3 Binn. (Pa.) 413 (1811); *Howes* v. *Austin*, 35 Ill. 396 (1864); *Commonwealth* v. *Casey*, 94 Mass. 214 (1866), at p. 218; *Walton* v. *Lefever*, 17 Lanc. L. R. 203 (1900); *Wolf* v. *Stillman Co.*, 79 N. J. L. 284, 75 Atl. 436 (1910). In some states *non pros.* and *nonsuit* have been used as convertible terms. *Partlow* v. *Elliott*, Meigs (Tenn.) 547 (1838); *Buena Vista Co.* v. *Parrish*, 34 W. Va. 652, 12 S. E. 817 (1891).

In most jurisdictions the term *non pros.* is no longer employed, the modern equivalent being judgment of *dismissal for want of prosecution*. *Whistler* v. *Hancock*, L. R. 3 Q. B. 83 (1878); *Script Phonography Co.* v. *Gregg*, 59 L. J. Ch. 406 (1890); *Davey* v. *Bentinck*, L. R. (1893), 1 Q. B. 185; Rules of Supreme Court (England), order 27, rule 1; New York Code Civ. Proc., § 822; *Gross* v. *Clark*, 87 N. Y. 272, 1 Civ. Proc. 464 (1881); *Herb* v. *Metropolitan Hospital*, 80 N. Y. App. Div. 145, 80 N. Y. S. 552, 12 N. Y. Ann. Cas. 415 (1903); *Finn* v. *Scottish Union, &c. Ins. Co.*, 137 App. Div. 60, 122 N. Y. S. 37 (1910); California Code Civ. Proc. § 583; *Mowry* v. *Weisenborn*, 137 Cal. 110, 69 Pac. 971 (1902); *People* v. *Reuter*, 88 Ill. App. 586 (1899); *Anderson* v. *Broward*, 45 Fla. 160, 34 So. 897 (1903); *Colorado Eastern R. Co.* v. *Union Pac. R. Co.*, 94 Fed. 312 (1899).

[61] The statement of facts is abridged from the opinion of the court, part of which is omitted.

they are rendered, and if there were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could be granted, because of the negligence, carelessness, and inattention and laches of the plaintiffs, or of their attorney, in the matter.

Does the power of the court over its own judgments, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.[62]

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if error exists, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court,

---

[62] "During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore, the roll is alterable during that term as the judges shall direct; but when that term is past, then the record is in the roll and admitteth no alteration, averment, or proof to the contrary." Co. Litt. 260; Y. B. 7 Hen. VI 28; Y. B. 9 Edw. IV 3; *Blackamore's Case*, 8 Co. 156 (1610); *Anonymous*, 3 Salk. 31 (1694); *Day* v. *Wilber*, 2 Caines (N. Y.) 258 (1804); *Neale* v. *Caldwell*, 3 Stew. (Ala.) 134 (1830); *Frink* v. *King*, 4 Ill. 144 (1841); *People* v. *Mayor of New York*, 25 Wend. (N. Y.) 252 (1841); *Huntington* v. *Finch*, 3 Ohio St. 445 (1854); *Cooper* v. *Galbraith*, 24 N. J. L. 219 (1853); *Robinson* v. *Hartford Co.*, 12 Md. 132 (1858); *Mason* v. *Pearson*, 118 Mass. 61 (1875); *King* v. *Brooks*, 72 Pa. St. 363 (1872); *Lance* v. *Bonnell*, 105 Pa. St. 46 (1884); *Fraley* v. *Feather*, 46 N. J. L. 429 (1884); *State* v. *Sowders*, 42 Kans. 312, 22 Pac. 425 (1889); *Ginrich* v. *Ginrich*, 146 Ind. 227, 45 N. E. 101 (1896); *Flickinger* v. *Omaha Bridge & R. Co.*, 98 Iowa 358, 67 N. W. 372 (1869); *Aull* v. *St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289 (1898); *In re Herndon Borough*, 19 Pa. Super. Ct. 127 (1902); *Bottineau Land &c. Co.* v. *Hintze*, 150 Iowa 646, 125 N. W. 842 (1911); *Kansas City* v. *Woerishoeffer*, 249 Mo. 1, 155 S. W. 779 (1912); *Carey* v. *Vickers*, 38 Okla. 643, 134 Pac. 851 (1913).

The amendment of judgments and orders and the time within which such power may be exercised is, in some jurisdictions, regulated by statute or rule of court. See N. Y. Code Civ. Proc. §§ 724, 1282, 1283. *In re Henderson*, 157 N. Y. 423, 52 N. E. 183 (1898); *Cooper* v. *Cooper*, 57 App. Div. (N. Y.) 595 (1900); *Smith* v. *Smith*, 121 App. Div. 480, 106 N. Y. S. 137 (1907); *Heinitz* v. *Darmstadt*, 140 App. Div. 252, 125 N. Y. S. 109 (1910); Cal. Code Civ. Proc., §§ 473, 663; Mississippi Code (1906), § 1016; *Graves* v. *Fulton*, 7 How. (Miss.) 592 (1843). For England, see Rules of Supreme Court, order xxviii, rule 11; *In re Suffied*, L. R. 20 Q. B. Div. 693 (1888); *Bright* v. *Sellar*, L. R. (1904), 1 K. B. 6; *Muir* v. *Jenks*, L. R. (1913), 2 K. B. 412.

that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *Railroad Company,* 102 U. S. 107; *Public Schools* v. *Walker,* 9 Wall. 603; *Brown* v. *Aspden,* 14 How. 25; *Cameron* v. *McRoberts,* 3 Wheat. 591; *Sibbald* v. *United States,* 12 Pet. 488; *United States* v. *The Brig Glamorgan,* 2 Curt. C. C. 236; *Bradford* v. *Patterson,* 1 A. K. Marsh. (Ky.) 464; *Ballard* v. *Davis,* 3 J. J. Marsh. (Ky.) 656.

But to this general rule an exception has crept into practice in a large number of the state courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis,* a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through default of the clerk.[63]

In Rolle's Abridgment, page 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court.

In *Pickett's Heirs* v. *Legerwood,* 7 Pet. 144, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in the British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis,* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case.

There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the prin-

---

[63] 1 Archbold's Practice (7th ed.) 389; *Ledgerwood* v. *Pickett,* 1 McLean, 143, Fed. Cas. No. 8175 (1831); *Smith* v. *Kingsley,* 19 Wend. (N. Y.) 620 (1838); *Hurst* v. *Fisher,* 1 Watts & S. (Pa.) 438 (1841); *Stephens* v. *Stephens,* 1 Phila. (Pa.) 108, 7 Leg. Int. 183 (1850); *McKindley* v. *Buck,* 43 Ill. 488 (1867); *Mississippi & Tenn. R. Co.* v. *Wynne,* 42 Miss. 315 (1868); *McLemore* v. *Durivage,* 92 Tenn. 482, 22 S. W. 207 (1893); *Brady* v. *Washington Ins. Co.,* 82 Ill. App. 380 (1898); *Stevenson* v. *Virtue,* 13 Pa. Super. Ct. 103 (1900); *Consolidated Coal Co.* v. *Oeltjen,* 189 Ill. 85, 59 N. E. 600 (1901); *Dobbs* v. *State,* 63 Kans. 321, 65 Pac. 658 (1901); *Hadley* v. *Bernero,* 103 Mo. App. 549, 78 S. W. 64 (1903); *Madden* v. *Ferguson,* 182 Ill. App. 210 (1913); *Jeude* v. *Sims,* 258 Mo. 26, 166 S. W. 1048 (1914).

ciples of the courts of equity in cases which go a little further in administering summary relief than the old fashioned writ of error *coram vobis* did. This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the state where a system has been adopted which amalgamates the equitable and common law jurisdiction in one form of action, as most of the rules of procedure do.

It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the state court cited by them on this point in support of the action of the circuit court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that state,[64] and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there.

The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they can not go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case.

It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief.[65]

As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain for seventeen years, but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

---

[64] *Montgomery* v. *Ellis*, 6 How. Prac. (N. Y.) 326 (1851); *Wetmore* v. *Law*, 34 Barb. (N. Y.) 515, 22 How. Prac. 130 (1860); *In re Buffalo*, 78 N. Y. 362 (1879); *Furman* v. *Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. 629 (1897); *Weston* v. *Citizen's Nat. Bank*, 88 App. Div. 330, 84 N. Y. S. 743 (1903), and note 62 *supra*.

[65] *McBride* v. *Little*, 115 Mass. 308 (1874); *Cairo &c. R. Co.* v. *Titus*, 27 N. J. Eq. 102 (1876); *Perkins* v. *St. Louis &c. R. Co.*, 143 Mo. 513, 45 S. W. 269 (1897); *Gardener* v. *Van Alstyne*, 22 App. Div. 579, 48 N. Y. S. 114 (1897); *Heller* v. *Dyerville Mfg. Co.*, 116 Cal. 127, 47 Pac. 1016 (1897).

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them, when the error, if any existed, only needed a comparison of their own bill of particulars with the reports of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside.

Judgment reversed.[66]

---

[66]Accord: *Sadler* v. *Evans*, 4 Burr. 1984 (1766); *Currie* v. *Henry*, 3 Johns. (N. Y.) 140 (1808); *Killpatrick* v. *Rose*, 9 Johns. (N. Y.) 78 (1812); *Usher* v. *Dansey*, 4 M. & S. 94 (1815); *Judson* v. *Blanchard*, 3 Conn. 579 (1821); *Catlin* v. *Robinson*, 2 Watts (Pa.) 373 (1834); *Darling* v. *Gurney*, 2 Dowl. 101 (1833); *Jackson* v. *Ashton*, 10 Pet. (U. S.) 480, 19 L. ed. 502 (1836); *Stephens* v. *Cowan*, 6 Watts (Pa.) 511 (1837); *Albers* v. *Whitney*, 1 Story 310, Fed. Cas. No. 137 (1840); *Wilkie* v. *Hall*, 15 Conn. 32 (1842); *Bank of U. S.* v. *Moss*, 6 How. (U. S.) 31, 12 L. Ed. 331 (1848); *O'Conner* v. *Mullen*, 11 Ill. 57 (1849); *Ullery* v. *Clark*, 18 Pa. St. 148 (1851); *Baldwin* v. *Kramer*, 2 Cal. 582 (1852); *Coughran* v. *Gutcheus*, 18 Ill. 390 (1857); *State* v. *Disney*, 5 Sneed (Tenn.) 598 (1858); *Layman* v. *Graybill*, 14 Ind. 166 (1860); *Cook* v. *Wood*, 24 Ill. 295 (1860); *Commonwealth* v. *Weymouth*, 84 Mass. 144, 79 Am. Dec. 776 (1861); *De Castro* v. *Richardson*, 25 Cal. 49 (1864); *Underwood* v. *Sledge*, 27 Ark. 295 (1871); *Foster* v. *Redfield*, 50 Vt. 285 (1877); *Fraley* v. *Feather*, 46 N. J. L. 429 (1884); *Barrell* v. *Tilton*, 119 U. S. 637, 30 L. ed. 511 (1886); *Radclyffe* v. *Barton*, 154 Mass. 157, 28 N. E. 148 (1891); *Wiggins* v. *Steiner*, 103 Ala. 655, 16 So. 8 (1893); *McGurry* v. *Wall*, 122 Mo. 614, 27 S. W. 327 (1894); *Deering* v. *Quivey*, 26 Ore. 556, 38 Pac. 710 (1895); *Cornell University* v. *Parkinson*, 59 Kans. 365, 53 Pac. 138 (1898); *United States* v. *Fur Clippings*, 106 Fed. 161 (1900); *Page* v. *Shields*, 102 Ill. App. 575 (1902); *Perkins* v. *Castleberry*, 119 Ga. 702, 46 S. E. 825 (1903); *Wetmore* v. *Carrick*, 205 U. S. 141, 51 L. Ed. 745 (1906); *Collins* v. *Hawkins*, 77 Ark. 101, 91 S. W. 26 (1905); *Loeser* v. *Savings Bank*, 163 Fed. 212 (1908); *United States* v. *New York Cent. R. Co.*, 164 Fed. 324 (1908); *Merrifield* v. *Western Cottage Piano, &c. Co.*, 149 Ill. App. 1 (1909); *Zelig* v. *Blue Point Oyster Co.*, 61 Ore. 535, 113 Pac. 852 (1911); *Philip Carey Co.* v. *Vickers*, 38 Okla. 643, 134 Pac. 851 (1913); *Cramer* v. *Illinois C. M. Assn.*, 260 Ill. 516, 103 N. E. 459 (1913); *Kendrick* v. *Williams*, 157 Ky. 767, 164 S. W. 72 (1914).

In Pennsylvania "Judgments by confession or upon default remain indefinitely within the control of the court, and upon proper cause shown may be opened up or vacated at any time; but not so with respect to judgments obtained adversely. The power committed to the discretion of the court with respect to the latter has a fixed limitation." *Pennsylvania Stave Co.'s Appeal*, 225 Pa. 178, 73 Atl. 1107 (1909); *Castle* v. *Reynolds*, 10 Watts (Pa.) 51 (1840); *Abeles* v. *Powell*, 6 Pa. Super. Ct. 123 (1897); *Dean* v. *Munhall*, 11 Pa. Super. Ct. 69 (1899); *McCready* v. *Gans*, 242 Pa. 364, 89 Atl. 459 (1913). Such control as the court may thereafter exert over the judgment is in the exercise of its chancery powers alone, and is exceptional. *Fisher* v. *Hestonville R. Co.*, 185 Pa. St. 602, 40 Atl. 97 (1898); *Gazzam* v. *Reading*, 202 Pa. 23, 51 Atl. 1000 (1902); *Benson* v. *Railway Co.*, 232 Pa. 187, 81 Atl. 198 (1911); *Wickel* v. *Mertz*, 49 Pa. Super. Ct. 472 (1912).

PURSLEY *v.* WICKLE

APPELLATE COURT OF INDIANA, 1891

4 Ind. App. 383

On the 14th of November, 1885, in the Howard Circuit Court, Wickle, in an action against Pursley for damages on account of alleged fraud in the exchange of lands, recovered judgment for one dollar, as also for all costs by him laid out and expended not theretofore adjudged against him.

At the March term, 1890, of said court, Pursley filed a "motion to modify and correct" said judgment, so that the recovery of costs would be for one dollar only.

Counsel for Pursley complained that in the rendering of the judgment in favor of the appellee for costs, and which it is now sought to modify, section 592, R. S. 1881, was disregarded. That section is as follows:

"In all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages except in actions for injuries to character and false imprisonment, and where the title to real estate comes to question."

On the part of Wickle it was insisted that whatever may be said of the action of the court in its judgment for costs, that judgment could not now be amended or modified upon the motion made by the appellant.

The court overruled the motion and appellant excepted.[67]

NEW, J.: It is well settled that courts have the power to correct mistakes and supply omissions in their records whenever and wherever the records supply the means of making such corrections or supplying such omissions. *Miller* v. *Royce*, 60 Ind. 189; *Reily* v. *Burton*, 71 Ind. 118; *Chissom* v. *Barbour*, 100 Ind. 1; 1 Work's Practice, sections 714, 715, 716, 1030, 1031.

This power is inherent and belongs to the court as such; it does not depend upon a statutory grant of jurisdiction. 1 Black Judgments, section 161; Freeman Judgments (3d ed.), section 71.

The authorities all hold that a court has plenary control over its orders, judgments and decrees during the term at which they are rendered. Nor is it only in respect to clerical misprisions or omissions that this power of amendment during the term may be exercised; it also extends to the errors of the court, for during the term the proceedings are in all respects *in fieri*.

And as regards mere clerical errors arising from misprisions of clerk, it is always in the power of the court, even after the close of the term, upon motion of one party and due notice to the other, to correct such errors where a showing is made in manner and form as required by law of what the correction should consist.

---

[67]The statement of facts is abridged from the opinion of the court.

But in order to secure stability and reliability to the records of the courts and properly guard the rights of parties litigant rules of practice have grown up under the sanction and observance of the courts which impose important limitations on their power to modify or amend their own judgments.

The power to amend judgments upon motion and notice by making additions or elisions on account of clerical errors after the close of the term at which the judgment was rendered is allowed only for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment actually rendered. The only purpose of the amendment in such cases is to make the record conform to the very judgment pronounced by the court; to set right the record and make it speak the truth, so that clerical errors shall not misrepresent what was in fact the action of the court. The rendition of a judgment and the entry of it are different and distinct from each other. The former is the action of the court, while the latter is the act of the clerk of the court.

Amendments of the kind we are speaking of are not allowed as a means of incorporating into a judgment a mere after-thought nor as a means of modifying or enlarging the judgment, so that it shall express something which the court did not do, even though the proposed amendment embraces matters which should have entered into the judgment of the court.

Amendments upon such motions are not permitted to perform the office of appeal or writ of error, or as a method of reviewing the judgment, correcting judicial mistakes or substituting a judgment for the one in fact rendered. Ample provision had been made by the code for the correction of judicial errors in most cases. See Black Judgments, sections 153 to 160; Freeman Judgments (3d ed.), section 69 to section 102; *Bole* v. *Newberger*, 81 Ind. 274; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Goucher* v. *Patterson*, 94 Ill. 525; *Merrill* v. *Shirk*, 128 Ind. 503.

The appellant's motion is not to reform or amend the judgment as to what "seemeth to be misprision of the clerk therein." On the contrary, the plain purpose of the motion is to so change the judgment that it shall be essentially different in substance from what it was as pronounced and different from what it was intended to be, so far as it can be determined from anything disclosed in the record before us.[68]

Judgment affirmed.

---

[68]Accord: Y. B. 9 Edw. IV 3; *Anonymous*, Goldsb. 151 (1600); *Anonymous*, Cro. Jac. 213 (1609); *Villars* v. *Parry*, 1 Ld. Raym. 182 (1696); *Philips* v. *Smith*, 1 Str. 136 (1718); *Foot* v. *Cady*, 1 Root (Conn.) 173 (1790); *Taylor* v. *Starr*, 2 Root (Conn.) 293 (1795); *Greene* v. *Coggswell*, 3 Ohio 487 (1828); *Ballard* v. *Davis*, 3 J. J. Marsh. (Ky.) 656 (1830); *Chambers* v. *Hodges*, 3 Tex. 517 (1848); *Ullery* v. *Clark*, 18 Pa. St. 148 (1851); *Morrison* v. *Dapman*, 3 Cal. 255 (1853); *Whitwell* v. *Emory*, 3 Mich. 84, 59 Am. Dec. 220 (1853); *Forquer* v. *Forquer*, 19 Ill. 68 (1857); *Gove* v. *Lyford*, 44 N. H. 525 (1863); *De Castro* v. *Richardson*, 25 Cal. 49 (1864); *Aetna Life Ins. Co.* v. *McCormick*, 20 Wis. 265 (1866); *Rogers* v. *Bradford*, 8 Bush. (Ky.) 163 (1871); *Wolfe* v. *Davis*, 74 N. Car. 597 (1876); *Robinson* v. *Brown*, 82 Ill. 279 (1876); *Blatchford* v. *Newberry*, 100 Ill. 484 (1881); *Browder* v. *Faulkner*, 82

MASON AND OTHERS *v.* FOX, STEVENSON & THORPE

COURT OF KING'S BENCH, 1621

Cro. Jac. 632[a]

Ejectment in the common pleas of a lease of Robert Tyrwhyt; and judgment being given for the plaintiff upon a verdict, error was thereof brought and assigned, because the judgment was, *quod recuperet versus Franciscum Stephenson* possession of a messuage, sixty acres of land, fifteen acres of meadow, and fifteen acres of pasture; whereas the verdict was entered, that he was found guilty of the ejectment of a messuage, ten acres of meadow, and thirteen acres of pasture, and for the residue not guilty; so as there is not any land in the verdict, and a lesser quantity of meadow and pasture than is in the judgment. And it was moved that it was amendable; for it is the misprision of the clerk, who ought to have entered the judgment according to the verdict, and the paper copy for entering the judgment was right enough; so that the mis-enterings of it upon the roll was amendable by the statute of 8 Hen. 6, ch. 12. But it was objected to that it was not amendable; for being in point of judgment, it is always imputed to be the act and error of the court, and not merely the default of the clerk: as where a *capiatur* is entered for a *misericordia*, or a *Concessum est per Curiam* where it should have been a *consideratum est, etc.*, it hath been adjudged to be error, and

---

Ala. 257, 3 So. 30 (1886); *Knox* v. *Moser*, 72 Iowa 154, 33 N. W. 617 (1887); *Stannard* v. *Hubbel*, 123 N. Y. 520, 25 N. E. 1084 (1890); *Crew* v. *McCafferty*, 124 Pa. St. 200, 16 Atl. 743, 10 Am. St. 578 (1889); *Egan* v. *Egan*, 90 Cal. 15, 27 Pac. 22 (1891); *Radclyffe* v. *Barton*, 154 Mass. 157, 28 N. E. 148 (1891); *McKay* v. *Dennington*, 82 Hun 509, 31 N. Y. S. 716, 64 N. Y. St. 394 (1894); *Hicklin* v. *Marco*, 64 Fed. 609 (1894); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. 725 (1895); *Heath* v. *New York Bldg. &c. Bank. Co.*, 146 N. Y. 260, 40 N. E. 770 (1895); *Griffith* v. *Maxwell*, 19 Wash. 614, 54 Pac. 35 (1898); *May* v. *Stimson Lumber Co.*, 119 N. Car. 96, 25 S. E. 721 (1896); *State* v. *Donovan*, 10 N. Dak. 203, 86 N. W. 709 (1901); *Chicago &c. R. Co.* v. *State*, 159 Ind. 237, 64 N. E. 860 (1902); *Rice* v. *Donald*, 97 Md. 396, 55 Atl. 620 (1903); *Goldreyer* v. *Cronan*, 76 Conn. 113, 55 Atl. 594 (1903); *Dunscomb* v. *Poole*, 41 Misc. 335, 84 N. Y. S. 749 (1903); *Pisa* v. *Resek*, 206 Ill. 344, 69 N. E. 67 (1903); *Day* v. *Mountin*, 89 Minn. 297, 94 N. W. 887 (1903); *McInnes* v. *Sutton*, 35 Wash. 384, 77 Pac. 736 (1904); *Camplin* v. *Jackson*, 34 Colo. 447, 83 Pac. 1017 (1905); *Smith* v. *Smith*, 121 App. Div. 480, 106 N. Y. S. 137 (1907); *Olson* v. *Mattison*, 16 N. Dak. 231, 112 N. W. 994 (1907); *Laugesen* v. *Sanford*, 135 Wis. 252, 115 N. W. 808 (1908); *Story Mercantile Co.* v. *McClellan*, 145 Ala. 629, 40 So. 123 (1906); *Boardman* v. *Hesseltine*, 200 Mass. 495, 86 N. E. 931 (1909); *Forrester* v. *Lawler*, 14 Cal. App. 171, 111 Pac. 284 (1910); *Heinitz* v. *Darmstadt*, 140 App. Div. 252, 125 N. Y. S. 109 (1910); *Silliman* v. *Silliman*, 66 Ore. 402, 133 Pac. 769 (1913); *Juster* v. *Court of Honor*, 120 Minn. 325, 139 N. W. 701 (1913). Compare *Ehrhart's Estate*, 31 Pa. Super. Ct. 120 (1906), and see *Lewis* v. *Linton*, 24 Pa. C. Ct. 188 (1900); *Pritchard* v. *Mines*, 56 Ind. App. 671, 106 N. E. 411 (1914). So also, a court of equity will not interfere with a judgment at law merely because it is erroneous. *Jacobs* v. *Morange*, 47 N. Y. 57 (1871); *Cross* v. *Gall*, 65 W. Va. 276, 64 S. E. 533 (1909); *West Chicago Park Comm.* v. *Riddle*, 151 Ill. App. 487 (1909).

[a] S. C. *Anonymous*, W. Jones, 9. Part of the case is omitted.

not amendable. And thereupon it was much debated whether it might be amendable.

All the justices of the King's Bench and Barons of the Exchequer were assembled to consider thereof; and they all agreed and resolved (except Tanfield, Chief Baron, who doubted thereof, upon divers precedents shown to them), that it was amendable, and not like to the cases put; for the entry of a *capiatur* instead of a *misericordia* is an error in point of law,[70] and can not be imputed to the default of the clerk, the clerk having nothing to induce him either ways; but here the verdict is the guide to the judgment, and the court direct the judgment to be entered according to that verdict; for the judgment is but the consequent of the verdict, and when the verdict is before the clerk to enter his judgment, it is but his misprision that he did not enter it according to the verdict, especially here, when the entry of the judgment in the paper is according to the verdict, and the entry on the roll is in another manner and disagreeing from the verdict, and so a mere misprision of the clerk, and no default in the court; wherefore it is amendable.[71]

---

[70]See 3 Bl. Comm. 398. By the statute of jeofails, 16 & 17 Car. II, ch. 8, a *capiatur* for a *misericordia* was made amendable after verdict. *Anonymous*, 3 Mod. 112 (1686).

[71]Accord: *Grenvile* v. *Smith*, Cro. Jac. 628 (1621); *Aylesworth* v. *Chadwell*, Cro. Car. 38 (1626); *Anonymous*, 1 Vent. 132 (1671); *Cradock* v. *Radford*, 4 Mod. 371 (1694); *Verelst* v. *Rafael*, Cowp. 425 (1776); *Doe* v. *Perkins*, 3 T. R. 749 (1790); *Dunbar* v. *Hitchcock*, 3 M. & S. 591 (1815). "There can be no doubt that it is competent for a court of record, under its general, inherent and necessary authority, to correct the mistakes and supply the defects of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term *nunc pro tunc*." *Balch* v. *Shaw*, 61 Mass. 282 (1851). Accord: *Close* v. *Gillespey*, 3 Johns. (N. Y.) 526 (1808); *Waldo* v. *Spencer*, 4 Conn. 71 (1821); *Chichester* v. *Cande*, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238 (1824); *Chamberlain* v. *Crane*, 4 N. H. 115 (1827); *Hall* v. *Williams*, 10 Maine 278 (1833); *Hunt* v. *Allen*, 22 N. J. L. 533 (1850); *Fay* v. *Wenzell*, 62 Mass. 315 (1851); *Lewis* v. *Ross*, 37 Maine 230, 59 Am. Dec. 49 (1854); *Ohio* v. *Beam*, 3 Ohio St. 308 (1854); *Smith* v. *Hood*, 25 Pa. St. 218, 64 Am. Dec. 692 (1855); *Emery* v. *Whitwell*, 6 Mich. 474 (1859); *Burson* v. *Blair*, 12 Ind. 371 (1859); *State* v. *Dowd*, 43 N. H. 454 (1862); *Doane* v. *Glenn*, 1 Colo. 454 (1872); *Smith* v. *Kennedy*, 63 Ala. 334 (1879); *Bean* v. *Ayres*, 70 Maine 421 (1879); *Ecker* v. *Bank*, 64 Md. 292, 1 Atl. 849 (1885); *Law* v. *Kennedy*, 2 Walk. (Pa.) 497 (1876); *Wiggin* v. *Superior Court*, 68 Cal. 398, 9 Pac. 646 (1886); *Cohn* v. *Scheuer*, 115 Pa. St. 178, 8 Atl. 421 (1886); *Bohlen* v. *Metropolitan &c. R. Co.*, 121 N. Y. 546, 24 N. E. 932 (1890); *Hatton* v. *Harris*, L. R. (1892) App. Cas. 547; *Hogue* v. *Corbit*, 156 Ill. 540, 41 N. E. 219, 47 Am. St. 232 (1895); *Bostwick* v. *Van Vleck*, 106 Wis. 387, 82 N. W. 302 (1900); *Stevenson* v. *Black*, 168 Mo. 549, 68 S. W. 909 (1902); *Willard's Estate*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554 (1903); *West Chicago Park Comrs.* v. *Boal*, 232 Ill. 248, 83 N. E. 824 (1908); *Kreisel* v. *Snavery*, 135 Mo. App. 155, 115 S. W. 1059 (1908); *Gage* v. *Weineck*, 148 Ill. App. 140 (1909); *Keech Co.* v. *O'Herron*, 41 Pa. Super. Ct. 108 (1909); *Brown* v. *Clark*, 81 Conn. 562, 71 Atl. 727 (1909); *Strodi* v. *Stafford Co.*, 65 Misc. 625, 121 N. Y. S. 93 (1910); *Clark* v. *Scovill*, 198 N. Y. 279, 91 N. E. 800 (1910); *Schloss* v. *Lennon*, 123 Minn. 420, 144 N. W. 148 (1913); *Green* v. *Commonwealth*, 152 Ky. 239, 153 S. W. 242 (1913).

SECTION 5. OPENING AND VACATING JUDGMENTS.

DEERING *v.* QUIVEY

SUPREME COURT OF OREGON, 1895

26 Ore. 556

This is an action by William Deering & Company against the partnership of Creighton & Quivey, and comes here on appeal from an order of the Circuit Court of Benton County vacating a judgment of that court, and permitting the defendants to file an answer. The transcript shows that a demurrer to the complaint having been overruled, the defendants refused to further plead or answer, and judgment was on April 14, 1892, rendered against them. It also appears from the affidavit of their attorney, filed on November 25th of that year, that they had a valid and meritorious defense to the action, but, believing that said demurrer constituted a legal defense, suffered judgment to be rendered against them, intending to test the issue of the law raised thereby upon appeal to this court; and that he, for such purpose, in proper time, prepared a notice of appeal, and took it to the office of the sheriff of the said county for service, but finding said officer absent therefrom, left it with the deputy clerk, who promised to deliver it to the sheriff upon his return. Believing said notice had been served, the appeal was otherwise perfected, and the transcript filed in this court. The cause was set for hearing, and he prepared a brief therefor, but did not discover that said notice had not been served until after November 23d, which was too late to take an appeal. He also filed with said affidavit copies of said notice, and the undertaking on appeal, and tendered an answer duly verified by the defendants, and moved the court to set aside and vacate said judgment, and permit said answer to be filed. This motion was on June 5, 1893, granted, and an order made by the court vacating said judgment, and permitting said answer to be filed, from which order and judgment the plaintiffs appeal.[72]

MOORE, J.: The statute provides that the court "may, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." Hill's Code, section 102. It can not be successfully contended that there was any mistake, inadvertence, surprise, or excusable neglect on the part of the defendants when they elected to rely upon their demurrer to the complaint, and suffered judgment to be rendered against them for want of answer. "A motion or proceeding," says Mr. Black in his work on judgments, section 330, "to vacate or set aside a judgment can not be sustained on any

[72]Part of the opinion of the court is omitted.

grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence." Relief will not be granted when a party has knowingly acquiesced in the judgment complained of, or has been guilty of laches and unreasonable delay in seeking his remedy. *Craig* v. *Worth*, 47 Md. 281; *Elder* v. *Bank of Lawrence*, 12 Kans. 242. The defendants had an opportunity to plead to the complaint, but they voluntarily declined to do so, and consented to and knowingly acquiesced in the judgment which was rendered. The liberal provisions of the statute above quoted are intended for the benefit of those who, by reason of any of the causes there assigned, have not had their day in court. The defendants, having had this right, can not claim any relief under that section of the statute.

The remedy, if there is any in this case, must be based upon the inherent right of every court of record to correct, modify, or vacate its judgments and decrees. This right, however, exists only while the proceedings of the court remain in the breast of the judges, or during the term at which the judgment or decrees was rendered; and at the close of such term all final proceedings had therein become conclusive, and the court loses jurisdiction of them. Freeman on Judgments (3d ed.), section 69. "When a final judgment," says Pleasants, J., in *Brewster* v. *Norfleet* (Texas Civ. App.), 22 S. W. 226, "has been rendered in a cause, and the term of the court has expired, the jurisdiction of the court over the subject matter of litigation is gone; and the court has no power to set aside the judgment, and to hear the case anew, for the purpose of correcting errors committed upon the former trial." This was the rule of the common law and, unless modified by statute, still prevails in most of the courts.[73]

Reversed.

[73]It is generally held that in the absence of statutory authority, a court has no power to open, vacate or set aside a final judgment obtained adversely, after the expiration of the term at which such judgment was rendered. *Cameron* v. *McRoberts*, 3 Wheat. (U. S.) 591, 4 L. ed. 467 (1818); *Lampsett* v. *Whitney*, 4 Ill. 170 (1841); *Slatter* v. *Glover*, 14 Ala. 648, 48 Am. Dec. 118 (1848); *Blair* v. *Russell*, 1 Ind. 516 (1849); *Cook* v. *Wood*, 24 Ill. 295 (1860); *Spafford* v. *Janesville*, 15 Wis. 474 (1862); *Lattimer* v. *Ryan*, 20 Cal. 628 (1862); *Hall* v. *Paine*, 47 Conn. 429 (1880); *Donnell* v. *Hamilton*, 77 Ala. 610 (1884); *Gilbert Arnold Land Co.* v. *O'Hare*, 93 Wis. 194, 67 N. W. 38 (1896); *Jones* v. *New York Life Ins. Co.*, 14 Utah 215, 47 Pac. 74 (1896); *Hill* v. *Egan*, 39 W. N. C. (Pa.) 267 (1896); *Schmidt* v. *Rehwinkel*, 86 Ill. App. 267 (1899); *Dean* v. *Munhall*, 11 Pa. Super. Ct. 69 (1899); *Chicago* v. *Nicholes*, 192 Ill. 489, 61 N. E. 434 (1901); *Turner* v. *Davis*, 132 N. Car. 187, 43 S. E. 637 (1903); *People* v. *District Court*, 33 Colo. 405, 80 Pac. 1065 (1905); *Curtiss* v. *Bell*, 131 Mo. 245, 111 S. W. 131 (1908); *Ayres* v. *Anderson Tully Co.*, 89 Ark. 160, 116 S. W. 199 (1909); *McCready* v. *Gaus*, 242 Pa. 364, 89 Atl. 459 (1913); *Tryon* v. *Pennsylvania R. Co.*, 213 Fed. 49 (1914).

In a number of states statutes provide that the courts may within a prescribed time (frequently a year) relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. New York Code Civ. Proc., § 724; California Code Civ. Proc., § 473; Ohio Gen. Code (1910), § 11631. A party seeking relief under such statutes must show good and sufficient reasons for failing to defend at the proper time. *Cowton* v. *Anderson*, 1 How. Prac. (N. Y.) 145 (1845); *Milwaukee Mut. Loan &c. Soc.* v. *Jagodzinski*, 84 Wis. 35, 54 N. W. 102 (1893); *Mitchell* v. *Allen*,

ANONYMOUS

SUPREME COURT OF NEW YORK, 1826

6 *Cow.* (*N. Y.*) 390

J. A. Collier, for the defendant, moved to set aside a default for want of a plea, on the ground of merits.

H. P. Hunt, contra, read an affidavit showing that by reason of the defendant's doubtful circumstances, the plaintiff would be in danger of losing his debt, unless the judgment was suffered to stand as security.

Curia. Let the defendant plead and go to trial on payment of costs; the judgment to remain as security.

Collier. Do the court mean the cost of resisting the motion merely, or the costs of the default and subsequent proceedings also?

Curia. Both must be paid. The plaintiff is entitled to them as a

---

110 Ga. 282, 34 S. E. 851 (1899). In New York it is held that the court has power, independently of the statutes, to set aside judgments improperly obtained; the only limitation is that the motion must be within one year. *Weston* v. *Citizens' Nat. Bk.*, 88 App. Div. 330, 84 N. Y. S. 743 (1903); *Clark* v. *Scovill*, 198 N. Y. 279, 91 N. E. 800 (1910).

The principle has been applied to mistakes of fact. *Cannon* v. *Reynolds*, 5 El. & Bl. 301 (1855); *Capen* v. *Stoughton*, 82 Mass. 364 (1860); *Mead* v. *Norris*, 21 Wis. 310 (1867); *Kimball* v. *Kelton*, 54 Vt. 177 (1881); *Babcock* v. *Day*, 104 Pa. St. 4 (1883); *Keith* v. *McCaffrey*, 145 Mass. 18, 12 N. E. 419 (1887); *Sargent* v. *Kindred*, 5 N. Dak. 8, 63 N. W. 151 (1905); *Wright* v. *Krabbenhoft*, 104 Minn. 460, 116 N. W. 940 (1908); *Lithuanian Soc.* v. *Tunila*, 80 Conn. 642, 70 Atl. 25 (1908); *Hilt* v. *Heimberger*, 235 Ill. 235, 85 N. E. 304 (1908). Compare *Clemons* v. *Field*, 99 N. Car. 400, 6 S. E. 790, 6 Am. St. 529 (1888); *Lowe* v. *Hamilton*, 132 Ind. 406, 31 N. E. 1117 (1892); *Devlin* v. *Boyd*, 69 Hun 328, 23 N. Y. S. 523, 53 N. Y. St. 247 (1893). Also to accident and neglect excusable under the circumstances. *Sage* v. *Matheny*, 14 Ind. 369 (1860); *Atwood* v. *Chichester*, 3 Q. B. Div. 722 (1878); *Davis Estate*, 15 Mont. 347, 39 Pac. 292 (1894); *Grady* v. *Donahoo*, 108 Cal. 211, 41 Pac. 41 (1895); *Thompson* v. *Connell*, 31 Ore. 231, 48 Pac. 467, 65 Am. St. 818 (1897); *Ennis* v. *Fourth Nat. Bk.*, 102 Iowa 520, 71 N. W. 426 (1897); *Queal* v. *Bulen*, 89 Minn. 477, 95 N. W. 310 (1903); *Boyd* v. *Williams*, 70 N. J. L. 185, 56 Atl. 135 (1903); *Capital Fire Ins. Co.* v. *Davis*, 85 Ark. 385, 108 S. W. 202 (1908); *Lichter* v. *Seitzman*, 121 N. Y. S. 609 (1910); *Robinson* v. *Carmichael*, 134 Ga. 654, 68 S. E. 582 (1910). Compare, where the excuses were insufficient, *Shaffer* v. *Sutton*, 49 Ill. 506 (1869); *Prager* v. *Beardsley*, 133 App. Div. 592, 118 N. Y. S. 232 (1909); *Kachel* v. *Stutz*, 137 App. Div. 199, 121 N. Y. S. 979 (1910); *Gainsville* v. *Johnson*, 59 Fla. 459, 51 So. 852 (1910); *Gurske* v. *Britt*, 86 Nebr. 312, 125 N. W. 539 (1910).

As to negligence of counsel see 17 A. & E. Encyc. of Law (2d ed.) 833 and compare *Kreite* v. *Kreite*, 93 Ind. 583 (1883); *Butler* v. *Morse*, 66 N. H. 429 23 Atl. 90 (1891); *Amherst College* v. *Allen*, 165 Mass. 178, 42 N. E. 570 (1896); *Saupp* v. *Flanigan*, 7 Pa. Dist. R. 604 (1898); *Morris* v. *Wofford*, 114 Ga. 935, 41 S. E. 56 (1902); *Eggleston* v. *Royal T. Co.*, 205 Ill. 170, 68 N. E. 709 (1903); *Alferitz* v. *Cahen*, 145 Cal. 397, 78 Pac. 878 (1904); *Barlow* v. *Burns*, 70 N. J. L. 631, 57 Atl. 262 (1904); *Fisher* v. *Henning* (Tex. Civ. App.), 164 S. W. 913 (1914), with *Philips* v. *Hawley*, 6 Johns. (N. Y.) 129 (1810); *Sharp* v. *New York*, 31 Barb. 578 (1860); *Densereau* v. *Salliant*, 22 R. I. 500, 48 Atl. 668 (1901); *Brand* v. *Baker*, 42 Ore. 426, 71 Pac. 320 (1903); *Lenz* v. *Rowe*, 66 N. J. L. 131, 48 Atl. 525 (1901); *Van Cott* v. *Webb-Miller*, 25 Pa. Super. Ct. 51 (1904).

consequent of the default; and at all events. Were this otherwise, the plaintiff would lose these costs altogether, if he should not succeed. We do not mean his obtaining them should in any way depend on the event of the suit.

Rule accordingly.[74]

CHARLES LUDWIN *v* GUSEPPE SIANO

SUPREME COURT OF NEW YORK, 1901

36 *Misc.* (*N. Y.*) 537

Appeal by the plaintiff from an order made by the Municipal Court of the city of New York, second district, borough of Manhattan, vacating a judgment and discharging the defendant from arrest and imprisonment.[75]

MCADAM, P. J.: On the return day of the summons both parties appeared. The plaintiff declined to pay the clerk's trial fee, whereupon the justice dismissed the complaint. The defendant then departed from the court-room, whereupon the plaintiff paid the trial fee and, concealing the fact that it was the same case in which the justice had granted such dismissal, took from the justice a judgment as upon the defendant's default, with a provision adjudging the defendant liable to arrest and imprisonment. The defendant was incarcerated under the execution issued, whereupon he obtained from the justice an order to show cause why the proceedings should not be set aside. The justice, after hearing the parties, decided that a fraud upon the court had been committed, vacated the judgment and execution and discharged the defendant from further imprisonment. The propriety of the order can not be questioned, but the

---

[74] In opening a judgment and allowing the defendant a hearing on the merits the court may impose equitable terms as a condition precedent to granting relief. *Anonymous*, 3 Doug. 431 (1784); *Lorimer* v. *Lule*, 1 Chitty, Rep. 134 (1879); *Cash* v. *Wells*, 1 B. & Ad. 375 (1830); *Livingston* v. *Livingston*, 3 Johns. (N. Y.) 254 (1808); *Denton* v. *Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237 (1810); *Pierson* v. *Holman*, 5 Blackf. (Ind.) 482 (1840); *Bailey* v. *Clayton*, 20 Pa. St. 295 (1853); *Blodget* v. *Conklin*, 9 How. Prac. (N. Y.) 442 (1854); *Mott* v. *Union Bank*, 8 Bosw. 591 (1861); *McMurray* v. *Erie*, 59 Pa. St. 223 (1868); *McTague* v. *Pennsylvania & N. E. R. Co.*, 44 N. J. L. 62 (1882); *Huston Tp. &c. Ins. Co.* v. *Beale*, 110 Pa. St. 321, 1 Atl. 926 (1885); *Exley* v. *Berryhill*, 36 Minn. 117, 30 N. W. 436 (1886); *Missouri Pac. R. Co.* v. *Linson*, 39 Kans. 416, 18 Pac. 498 (1888); *Bond* v. *Neuschwander*, 86 Wis. 391, 57 N. W. 54 (1893); *Law* v. *O'Regan*, 179 Mass. 107, 60 N. E. 397 (1901); *Chicago* v. *English*, 198 Ill. 211, 64 N. E. 976 (1902); *Shenstone* v. *Wilson*, 117 App. Div. 752, 102 N. Y. S. 1037 (1907); *Friedland* v. *Commonwealth F. Ins. Co.*, 136 App. Div. 6, 120 N. Y. S. 126 (1909); *Heiliger* v. *Ritter*, 78 Misc. 264, 138 N. Y. S. 212 (1912). The payment of accrued costs may be imposed. *Sisted* v. *Lee*, 1 Salk. 402 (1704); *Roland* v. *Kreyenhagen*, 18 Cal. 455 (1861); *Norris* v. *Dodge*, 23 Ind. 190 (1864); *Flanigan* v. *Thompson*, 4 W. N. Cas. (Pa.) 74 (1877); *Ueland* v. *Johnson*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. 698 (1899); *Goodness* v. *Metropolitan S. R. Co.*, 49 App. Div. 76, 63 N. Y. S. 476 (1900); *Bloor* v. *Smith*, 112 Wis. 340, 87 N. W. 870 (1901); *Kressh* v. *Novick*, 162 App. Div. 891, 148 N. Y. S. 55 (1914).

[75] Part of the opinion is omitted.

justice's power to make it is challenged, the plaintiff claiming that he can only open a judgment and not vacate one.

This court has held that a justice of the municipal court has power in a proper case to vacate a judgment for want of jurisdiction under the amendment of 1896, ch. 748. *Szerlip* v. *Baier*, 21 Misc. Rep. 331.

The only available objection to the order is that it allowed ten dollars costs on granting the motion, which the municipal court has no statutory power to allow. The order will, therefore, be modified by striking out the provision as to ten dollars costs and as modified affirmed, with costs.[76]

IN RE COLLEGE STREET

Supreme Court of Rhode Island, 1877

11 *R. I.* 472

Motions to vacate assessments for benefit made in the matter of the widening of College street. The assessments were made by commissioners appointed by the court under an act of 1854 relating to streets in the city of Providence, and, upon the filing of their report, notice was given and the report was subsequently confirmed by the court. It appeared that, by an act of 1873, the power to assess for benefits had been taken away from such commissioners and that the report in so far as it reported assessments was unauthorized and void.[77]

Durfee, C. J.: The report was confirmed at the March term, 1874. The motions were not filed until the October term, 1874, or

---

[76]The court may open or vacate a judgment procured by collusion or fraud where the court has been imposed upon, or a party deprived of his day in court without fault on his part or that of his counsel. *Binsse* v. *Barker*, 13 N. J. L. 263, 23 Am. Dec. 720 (1832); *Bell* v. *Kelly*, 17 N. J. L. 270 (1839); *Cochran* v. *Eldridge*, 49 Pa. St. 365 (1865); *Gillespie* v. *Ront*, 39 Ill. 247 (1866); *Mayberry* v. *McClurg*, 51 Mo. 256 (1873); *Dugan* v. *McGlann*, 60 Ga. 353 (1878); *Zellerbach* v. *Allenberg*, 67 Cal. 296, 7 Pac. 908 (1885); *Taylor* v. *Sharp*, 8 Manitoba 163 (1892); *O'Neill's Estate*, 90 Wis. 480, 63 N. W. 1042 (1895); *Larson* v. *Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. 544 (1896); *Adams School Tp.* v. *Irwin*, 150 Ind. 12, 49 N. E. 806 (1897); *Furman* v. *Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. 629 (1897); *Rivers* v. *West*, 103 Ga. 582, 30 S. E. 555 (1897); *Cotterall* v. *Koon*, 151 Ind. 182, 51 N. E. 235 (1898); *Bates* v. *Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. 497 (1898); *Nugent* v. *Metropolitan St. R. Co.*, 46 App. Div. 105, 61 N. Y. S. 476, 7 N. Y. Ann. Cas. 193 (1899); *Wright* v. *Simpson*, 200 Ill. 56, 65 N. E. 628 (1902); *Pelts* v. *Bollinger*, 180 Mo. 252, 79 S. W. 146 (1903); *Keyes* v. *Brackett*, 187 Mass. 306, 72 N. E. 986 (1905); *French* v. *Raymond*, 82 Vt. 156, 72 Atl. 324 (1909); *Wade* v. *Watson*, 133 Ga. 608, 66 S. E. 922 (1909); *United States* v. *Aakervik*, 180 Fed. 137 (1910); *Wagner* v. *Beadle*, 82 Kans. 468, 108 Pac. 859 (1910); *Miller* v. *Barto*, 247 Ill. 104, 93 N. E. 140 (1910); *Roberts* v. *Pratt*, 152 N. Car. 731, 68 S. E. 240 (1910); *Wickel* v. *Mertz*, 49 Pa. Super. Ct. 472 (1912); *Moore* v. *Moore*, 139 Ga. 597, 77 S. E. 820 (1913).

[77]The statement of facts is abridged from a part of the opinion of the court.

later. Ordinarily the court has no power over its judgments, to alter or annul them upon mere motion after the close of the term at which they were rendered. It is claimed, however, in support of the motions, that, while this is ordinarily so, yet the rule has its exceptions, and that judgments may be set aside on motion after the term at which they were entered, when they are irregular, or void for want of jurisdiction. The cases support this claim.[78]

In *Hervey & Co.* v. *Edmunds,* 68 N. C. 243, the court say that a judgment void for want of jurisdiction of the subject matter may be set aside or stricken from the records *ex mero motu,* or at the instance of any person interested in having it done. In that case the motion was made several terms after the entry of the judgment. It was refused; not, however, because made too late. In *Formen et al.* v. *Carter et al.,* 9 Kans. 674, the opinion of the court was that a void judgment can be set aside at any time on motion. In *Crane Adm'r* v. *Barry,* 47 Ga. 476, the court entered judgment on an award, having power to transform a statutory award into a judgment. At a subsequent term the court set the judgment aside on motion, holding it to be void upon the ground that the award was not statutory, but simply a common law award. In *Shuford* v. *Cain,* 1 Abb. U. S. 302, a judgment rendered by a United States Circuit Court, in a cause over which it had no jurisdiction under the Judiciary Act, was set aside by the court on motion at a subsequent term as a nullity. See also *Cannon* v. *Reynolds,* 5 El. & B. 301.

We think the cases abundantly show our authority to grant the motions. We think, too, the motions ought to be granted; for though our decree is void, it is not necessarily innocuous. Under the act of 1854 the assessments are not enforced by execution issuing out of this court, but are added to the taxes of the persons whose estates are assessed, and are a lien upon those estates. In the case at bar the assessments have been added to the taxes. This has been done under the sanction of our decree. The persons whose estates are clouded by the assessments, and who are threatened with their collection, move us to vacate the decree and the report confirmed by it, in so far as they purport to confirm or report any assessments against them.

Assessments vacated.[79]

---

[78]Citing *Hooe* v. *Barber,* 4 Hen. & M. 439 (1809); *Holmes* v. *Howie,* 8 How. Pr. (N. Y.) 383 (1851); *Keaton* v. *Banks,* 10 Ired. (N. Car.) 381, 51 Am. Dec. 393 (1849); *Ex Parte Crenshaw,* 15 Pet. (U. S.) 119, 10 L. ed. 682 (1841); *Harris* v. *Hardeman,* 14 How. (U. S.) 344, 14 L. ed. 449 (1852); *Wood* v. *Luse,* 4 McLean 254, Fed. Cas. No. 17950 (1847); *Franks* v. *Lockey,* 45 Vt. 395 (1873); *Hallett* v. *Righters,* 13 How. Pr. (N. Y.) 43 (1856); *Pitt* v. *Davison,* 37 Barb. (N. Y.) 97 (1861); *Dederick* v. *Richley,* 19 Wend. (N. Y.) 108 (1838); *Manufacturers &c. Bank* v. *Boyd,* 3 Den. (N. Y.) 257 (1846); *Reynolds* v. *Stansbury,* 20 Ohio 344, 55 Am. Dec. 459 (1851); *Winslow* v. *Anderson,* 3 Dev. & B. (N. Car.) 9, 32 Am. Dec. 651 (1838); *City* v. *Boyd,* 50 Ill. 453 (1869); *Cowles* v. *Hayes,* 69 N. Car. 406 (1873).

[79]A void judgment, or a judgment rendered in proceedings materially irregular, may be vacated or set aside after the time when ordinarily it would become final. *Page* v. *South,* 2 D. & L. 108 (1844); *Anlaby* v. *Praetorius,* L. R. 20 Q. B. Div. 764 (1888); *Hunt* v. *Yeatman,* 3 Ohio, 15 (1827); *Huntington* v. *Finch,* 3 Ohio St. 445 (1854); *Downing* v. *Still,* 43 Mo. 309 (1869);

SECTION 6. COLLATERAL ATTACK

(a) Personal Actions

ANONYMOUS

COURT OF EXCHEQUER, 1364

Liber Assisarum, 38 Edw. III 21[80]

Certain men were outlawed in the King's Bench in the time of *Shardelowe*[81] and their chattels were forfeited. And the names of the men so outlawed were sent into the Exchequer with the amount of their goods, among whom there was a man, sent with the others by misprision of a clerk, who was not outlawed, who had chattels to the value of £6. And a writ issued to the sheriff where the chattels were to levy them to the use of the King, who returned that a lord had seized the said goods, and thereupon a writ issued to him out of the Exchequer to make him reply to the King concerning the said goods, who came and alleged that the said man whose goods he had in his hands was not outlawed. And upon this came parcel of record of the King's Bench by writ which was issued out of Chancery. And Green[82] came with the defendant into the Exchequer and testified that he was not outlawed, but it was a misprision of the clerk.

Skipwith.[83] Although all the justices wished to declare otherwise, when they had the record before them they should not be received.[84]

Olney v. *Harvey*, 50 Ill. 453, 99 Am. Dec. 530 (1869); *Foreman* v. *Carter*, 9 Kans. 674 (1872); *Lucy* v. *Dowling*, 114 Mass. 92 (1873); *White* v. *Coulter*, 59 N. Y. 629 (1874); *Guyer* v. *Guyer*, 6 Houst. (Del.) 430 (1881); *Dobbins* v. *McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. 626 (1887); *Pantall* v. *Dickey*, 123 Pa. St. 431, 16 Atl. 789 (1889); *Mueller* v. *Reimer*, 46 Minn. 314, 48 N. W. 1120 (1891); *Dalton* v. *West End. S. R. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. 410 (1893); *People* v. *Temple*, 103 Cal. 447, 37 Pac. 414 (1894); *Maurys* v. *Fitzwater*, 88 Fed. 768 (1898); *Rorer* v. *People's Bldg. &c. Assn.*, 47 W. Va. 1, 34 S. E. 758 (1899); *Union C. Co.* v. *Leffler*, 122 Ga. 640, 50 S. E. 483 (1905); *Kerns* v. *Morgan*, 11 Idaho 572, 83 Pac. 954 (1905); *Herrold* v. *Union Tp. Poor Dist.*, 31 Pa. Super. Ct. 43 (1906); *Shumake* v. *Shumake*, 17 Idaho 649, 107 Pac. 42 (1910); *Lushington* v. *Seattle A. & D. Co.*, 60 Wash. 546, 111 Pac. 785 (1910); *Dorian* v. *First Catholic Slovak Union*, 51 Pa. Super. Ct. 116 (1912); 3 Blackst. Comm. 406.

[80] Translated from Tottell's Edition of 1561; S. C. Brooke's Abridgment, Record 45.

[81] John de Shardelowe, justice of the Common Bench and King's Bench, died 1344 (Foss.).

[82] Henry Green, chief justice of the King's Bench, 1362 (Dugdale, Foss.).

[83] William de Skipwith, chief baron of the Exchequer, 1363, Dugdale, Foss.).

[84] "And the rolles being the records or memorialls of the judges of the court of record, import in them such uncontrollable credit and veritie, as they admit no averment, plea or proofe to the contrarie." Co. Litt. 269, Har. & B. Ed. See also Y. B. 3 Edw. II, Trin. 4 ch. 155 (S. S.); Y. B. 37 Hen. VI 21b; Y. B. 7 Hen. VII 4; *Verney* v. *Digman*, Dyer 89b (1553); *Wright* v.

NICHOLAS F. PALMER, EXECUTOR, v. THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX

SUPREME COURT OF NEW JERSEY, 1908

77 *N. J. L.* 143

On the rule to show cause why a writ of mandamus should not issue.

The facts established by the proofs taken under this rule are: That the relator, on November 19, 1907, instituted an action in the Essex County Circuit Court against the board of chosen freeholders of the county of Essex, by the issue of a summons on that day returnable December 6, 1907. Declaration was attached to and served with the summons November 20, 1907. On December 10, 1907, judgment by default for want of a plea was duly entered and execution has been issued thereon and returned unsatisfied by the sheriff.

After entry of the judgment application was made to the circuit court to open it because improvidently entered, and because the defendant had a legal defense in the statute of limitations, which application was refused. Thereupon this rule was obtained[85] requiring the said board of freeholders and the individual members thereof to show cause why a peremptory or alternative writ of mandamus should not issue commanding them to add to the amount to be raised by taxation for current expenses, etc., for the coming year, an amount sufficient to pay the execution, and commanding them to order the county auditor and collector to pay to the petitioner the amount of the execution out of any funds in their hands belonging to the board of freeholders.

VOORHEES, J.: The issuance of the writ asked for is resisted upon several grounds, each of which is an attack upon the judgment. It is well settled that where a court of general jurisdiction has jurisdiction of the subject matter and has acquired jurisdiction over

---

Wickam, Cro. Eliz. 468 (1595); *Hyndes Case*, 4 Coke 70b (1590); *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565 (1814); *Croswell* v. *Byrnes*, 9 Johns. 290 (1812); *Selin* v. *Snyder*, 7 Serg. & R. (Pa.) 166 (1821); *In re Coursen's Will*, 4 N. J. Eq. 408 (1843); *McCarthy* v. *Marsh*, 5 N. Y. 263 (1851); *Walker* v. *Armour*, 22 Ill. 658 (1859); *Hahn* v. *Kelly*, 34 Cal. 391, 94 Am. Dec. 742 (1867); *Kemper* v. *Waverly*, 81 Ill. 278 (1876) *Ferguson* v. *Kumler*, 25 Minn. 183 (1878); *Kostenbader* v. *Kuebler*, 199 Pa. 246, 48 Atl. 972, 85 Am. St. 783 (1901).

[85] A judgment can not be collaterally attacked in proceedings for its enforcement. *Porter* v. *Rountree*, 111 Ga. 369, 36 S. E. 761 (1900); *Toomey* v. *Rosansky*, 11 Pa. Super. Ct. 506 (1899), and the principle is applicable to proceedings by mandamus to compel a municipal corporation to provide for the payment of a judgment. *Harshman* v. *Knox*, 122 U. S. 306, 30 L. ed. 1152 (1886); *Edmundson* v. *Independent School Dist.*, 98 Iowa 639, 67 N. W. 671, 60 Am St. 224 (1896); *Bear* v. *Brunswick*, 122 N. Car 434, 29 S. E. 719, 65 Am. St. 711 (1898); *Tucker* v. *Hubbert*, 196 Fed. 849, 117 C. C. A. 365 (1912). But it may be shown that the court was without jurisdiction. *Moore* v. *Edgefield*, 32 Fed. 498 (1887); *Brownsville* v. *Loague*, 129 U. S. 493, 32 L. ed. 780 (1888).

the person of the defendant, its judgment is invincible against collateral attack. It is only where there is lack of jurisdiction in one or both of the above particulars that the judgment is void and may be so treated in a collateral proceeding.[86] *Westcott* v. *Danzenbaker*, 1 Halst. 132; *Van Dyke* v. *Bastedo*, 3 Gr. 224; *Godfrey* v. *Myers*, 3 Zab. 197; *Hess* v. *Cole*, Id. 116; *National Docks Co.* v. *Pennsylvania Railroad Co.*, 7 Dick. Ch. Rep. 58; *Podesta* v. *Binns*, 3 Robb. 387.

Jurisdiction will be presumed in cases of domestic judgments of courts of general jurisdiction.[87] *Miller* v. *Dungan*, 6 Vroom. 389.

The defendants insist that the record discloses upon its face that the judgment was improvidently and prematurely entered, and hence is void. The reasoning of the defendants on this subject is that the statute of 1846 (Gen. Stat., pp. 408, 410) requires the service of summons issued against a board of chosen freeholders to be made "thirty days at least before the session of the court to which such process is returnable," and, as such service was not made in this case, the judgment is a nullity. There would be no merit in this contention if the above statute was impliedly repealed by section 52 of the Practice Act. *Roache* v. *Jersey City*, 11 Vroom 257.

But, assuming the premature entry of the judgment, that fact does not render it void. It will stand until reversed or set aside.[88] *Hoey* v. *Aspell & Co.*, 33 Vroom 200.

---

[86] "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if its acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." *Elliott* v. *Peirsol*, 1 Pet. (U. S.) 328 (1828); *Lucy* v. *Deas*, 59 Fla. 552, 52 So. 515 (1910); *Miller* v. *Rowan*, 251 Ill. 344, 96 N. E. 285 (1911); *Johnson* v. *North Star Lumber Co.*, 206 Fed. 624 (1913). See Brooke's Abr., Error 177, 187; Viner's Abr. Judgment, G., a.; 29 Lib. Ass. 26; Y. B. 22 Edw. IV 30, 31. Compare Y. B. 19 Edw. IV 8; *Gold* v. *Strode*, Carth. 148 (1690).

[87] Accord: *Foot* v. *Stevens*, 17 Wend. (N. Y.) 483 (1837); *Bridgeport* v. *Blinn*, 43 Conn. 274 (1876); *Hering* v. *Chambers*, 103 Pa. St. 172 (1883); *O'Connor* v. *Felix*, 87 Hun (N. Y.) 179, 33 N. Y. S. 1074, 67 N. Y. St. 777 (1895); *Hereford* v. *People*, 197 Ill. 222, 64 N. E. 310 (1902); *Menager* v. *De Leonis*, 140 Cal. 402, 73 Pac. 1052 (1903); *Wilkins* v. *McCorkle*, 112 Tenn. 688, 80 S. W. 834 (1904); *Forrest* v. *Fey*, 218 Ill. 740, 75 N. E. 789, 1 L. R. A. (N. S.) 740 and note (1905); *Flowers* v. *Reece*, 92 Ark. 611, 123 S. W. 773 (1909). As to the application of the principle where the service of process is constructive compare *Cadmus* v. *Jackson*, 52 Pa. St. 295 (1866); *Adams* v. *Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. 74 (1888); *Hardy* v. *Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. 80 (1892); *Sweeny* v. *Girolo*, 154 Pa. St. 609, 26 Atl. 600 (1893); *Hunter* v. *Ruff*, 47 S. Car. 525, 25 S. E. 65, 58 Am. St. 907 (1896); *Co-operative Savings &c. Loan Assn.* v. *McIntosh*, 105 Iowa 697, 75 N. W. 520, with *Hallett* v. *Salter*, 13 How. Pr. (N. Y.) 43 (1856); *Galpin* v. *Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959 (1873); *Ferguson* v. *Crawford*, 86 N. Y. 609 (1881); *Schissel* v. *Dickson*, 129 Ind. 139, 28 N. E. 540 (1891); *Dutton* v. *Smith*, 10 App. Div. 566, 42 N. Y. S. 80, 4 N. Y. Ann. Cas. 25 (1896); *Parsons* v. *Weis*, 144 Cal. 410, 77 Pac. 1007 (1904), and see *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565 (1877); *Martin* v. *Martin*, 214 Pa. 389, 63 Atl. 1026 (1906), as to nonresidents.

[88] Accord: *Myers* v. *Clark*, 3 Watts & S. (Pa.) 535 (1842); *Whitwell* v.

Irregularities in proceedings in court of general jurisdiction as against collateral attack are cured by judgment (*Apel* v. *Kelsey*, 52 Ark. 341; *Fischer* v. *Holmes*, 123 Ind. 525), which is fatal to the objection that in actions against boards of freeholders the statute does not permit a declaration to be served with the summons. If the provisions of section 95 of the Practice Act (Pamph. L. 1903, p. 537), include municipal corporations defendant, this objection has no foundation. *Dock* v. *Elizabethtown Manufacturing Co.*, 5 Vroom 312, and *Cooper* v. *Cape May Point*, 38 Vroom 437, are cases which point to this construction.

Nor can it be successfully urged that because the declaration on its face exhibits a cause of action barred by the statute of limitations, it is equivalent to stating no cause of action whatever. Such is the contention of the defendant. The statute does not obliterate the cause of action. This defense may be waived. To be availed of it must be pleaded.[89] *Christie* v. *Bridgman*, 6 Dick. Ch. Rep. 331; *Peer* v. *Cookerow*, 2 Beas. 136; *West Hoboken* v. *Syms*, 20 Vroom 546.

These are matters that should be addressed to the court in which the judgment was entered and that were correctly decided by it in refusing to open judgment, and, while we have considered them, they can not be availed of as a means of collateral attack upon the recovery.[90]

Rule absolute.

Barbier, 7 Cal. 54 (1857); *White* v. *Crow*, 110 U. S. 183, 28 L. ed. 113 (1883); *Wells* v. *Atkins*, 68 Vt. 191, 34 Atl. 694, 54 Am. St. 880 (1896); *Brewing Association* v. *McGowan*, 49 La. Ann. 630, 21 So. 766 (1897).

[89]Accord: *Cox* v. *Thomas*, 9 Grat. (Va.) 323 (1852).

[90]Accord: *Rex* v. *Vincent*, 1 Str. 481 (1721); *Duchess of Kingston's Case*, 20 St. Tr. 335 (1776); *Commonwealth* v. *Morrison*, 4 Bibb. (Ky.) 336 (1816); *Orphans' Court* v. *Groff*, 14 Serg. & R. (Pa.) 181 (1826); *Elliott* v. *Peirsol*, 1 Pet. (U. S.) 328, 7 L. ed. 164 (1828); *Buell* v. *Cross*, 4 Ohio, 327 (1831); *Vandyke* v. *Bastedo*, 15 N. J. L. 224 (1836); *Voorhees* v. *Bank of U. S.*, 10 Pet. (U. S.) 449, 9 L. ed. 490 (1836); *Wright* v. *Marsh*, 2 G. Gr. (Iowa) 94 (1849); *Buckmaster* v. *Rider*, 12 Ill. 207 (1850); *Billings* v. *Russell*, 23 Pa. St. 189, 62 Am. Dec. 330 (1854); *Morrow* v. *Weed*, 4 Iowa 77, 66 Am. Dec. 122 (1856); *Sears* v. *Terry*, 26 Conn. 273 (1857); *Hendrick* v. *Whittemore*, 105 Mass. 23 (1870); *Martin* v. *McLean*, 49 Mo. 361 (1872); *Lancaster* v. *Wilson*, 27 Grat. (Va.) 624 (1876); *Hume* v. *Little Flatrock Draining Assn*, 72 Ind. 499 (1880); *Otterson* v. *Middleton*, 102 Pa. St. 78 (1883); *Hunting* v. *Blun*, 143 N. Y. 511, 38 N. E. 716 (1894); *Pearse* v. *Hill*, 163 Mass. 493, 40 N. E. 765 (1895); *Corey* v. *Morrill*, 71 Vt. 51, 42 Atl. 976 (1898); *Hall* v. *Sauntry*, 72 Minn. 420, 75 N. W. 720, 71 Am. St. 497 (1898); *In re McNeil's Estate*, 155 Cal. 333, 100 Pac. 1086 (1909); *Bickford* v. *Bickford*, 74 N. H. 448, 69 Atl. 579 (1908); *Point Pleasant* v. *Greenlee*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. 971 (1907); *Smith* v. *Young*, 136 Mo. App. 65, 117 S. W. 628 (1908); *In re Jenkins*, 132 App. Div. 339, 117 N. Y. S. 74 (1909); *Powell* v. *Scranton*, 227 Pa. 604, 76 Atl. 505 (1910); *Clark* v. *Atlantic City*, 180 Fed. 598 (1910); *Continental Fertilizer Co.* v. *Pass*, 7 Ga. App. 721, 67 S. E. 1052 (1910); *Lucy* v. *Deas*, 59 Fla. 552, 52 So. 515 (1910); *Martin* v. *McCall*, 247 Ill. 484, 93 N. E. 418 (1910); *Morris* v. *Robbins*, 83 Kans. 335, 111 Pac. 470 (1910); *Bailey* v. *Hopkins*, 152 N. Car. 748, 67 S. E. 569 (1910); *Welch* v. *Lacroix*, 111 Maine 324, 89 Atl. 69 (1913); *Gunby* v. *Cooper*, 177 Mo. App. 354, 164 S. W. 152 (1914).

If after judgment another court may in another suit inquire into the errors and irregularities in the prior proceedings, "a judgment, though un-

EARP *v.* MINTON

SUPREME COURT OF NORTH CAROLINA, 1905

138 *N. Car.* 202

Action by Dorinda Earp against L. L. Minton, heard by Judge W. R. Allen and a jury, at the June term, 1904, of the Superior Court of Wilkes County.

This was a civil action tried in the superior court upon appeal from the judgment of a justice of the peace. The plaintiff alleges that she is the owner of a cow and that the defendant is in wrongful and unlawful possession of her. The defendant admits the possession of the cow, but denies that his possession is wrongful and unlawful and avers that he is an innocent purchaser for value. It appears from the record that the defendant purchased the cow from one Cranor, who came into possession of her by virtue of a judgment secured by him in an action brought before a justice of the peace against Dorinda Earp, the plaintiff in this action, to recover possession of the cow. In the present action this judgment was introduced and relied on by defendant to establish his right to the possession of the cow.

The court submitted the following issues: 1. Is the plaintiff owner of the property in dispute? Ans. Yes. 2. What was the value of the cow? Ans. Twenty-five dollars. 3. Was the judgment upon which the defendant relies procured by fraud? Ans. Yes.

From a judgment for the plaintiff the defendant appealed.

BROWN, J.: The defendant excepts to the submission of the third issue as to fraud in the procurement of the judgment in *Cranor* v. *Earp* and to the admission of certain testimony and parts of his Honor's charge relating to that issue. The defendant's ground of objection to the issue, the evidence and the charge is the same; that is that a judgment can not be collaterally attacked for fraud, but it must be impeached, if at all, by an independent action.[91] We do not deem it necessary to consider these exceptions separately.

---

reversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain and a cloud would rest upon every title." *Lancaster* v. *Wilson*, 27 Grat. (Va.) 624 (1876). "Commentators upon it have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.*" Per Campbell, J., in *Jeter* v. *Hewett*, 22 How. (U. S.) 352, 16 L. ed. 345 (1859).

But a proceeding void on the face of the record may be attacked collaterally. *Allens* v. *Lyon*, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463n, 116 Am. St. 791 (1907). "Upon collateral attack the judgment will be set aside, generally speaking, for but one of three reasons: lack of jurisdiction of the person, lack of jurisdiction of the subject-matter of the action, or an absolute lack of jurisdiction to render such judgment as the one given." *Baldwin* v. *Foster*, 157 Cal. 643, 108 Pac. 714 (1910).

[91] A code substitute for a bill of review or a bill to impeach for fraud. *Peterson* v. *Vann*, 83 N. Car. 118 (1880).

We think that his Honor committed error in submitting the issue to the jury, and it follows that the admission of evidence and his Honor's charge thereto are likewise erroneous. It is well settled by this court that it is not permissible for a party to attack a judgment in a collateral proceeding on account of fraud. When a judgment is attacked for fraud the proper remedy is by motion in the cause, if the action is then pending, but if it has been ended by final judgment, an independent action must be instituted. *Carter* v. *Rountree*, 109 N. Car. 29; *Smith* v. *Gray*, 116 N. Car. 311; *Burgess* v. *Kirby*,, 94 N. Car. 575.

In the case before us the judgment is attacked for fraud in its procurement. At most, it is only voidable for an irregularity not apparent. It is not such an irregularity as to render the judgment absolutely void, hence it can not be attacked collaterally, but it must be impeached, if at all, by a separate proceeding instituted for that purpose. *Burgess* v. *Kirby, supra; Neville* v. *Pope*, 95 N. Car. 346; *Brittain* v. *Mull*, 99 N. Car. 483. If it is contended that the summons in the case of *Cranor* v. *Earp* was improperly or irregularly served, or that defendant was sick and could not attend the trial, her remedy was to move in that cause before the justice to set aside the judgment.

We are of opinion that in submitting the issue as to fraud in the procurement of the judgment in *Cranor* v. *Earp* and admitting evidence and instructing the jury in regard thereto, his Honor committed error.[92]

New trial.

---

[92]Accord: *Bush* v. *Sheldon*, 1 Day (Conn.) 170 (1803); *Sims* v. *Slacum*, 3 Cranch (U. S.) 300 (1806); *Peck* v. *Woodbridge*, 3 Day (Conn.) 30 (1808); *Homer* v. *Fish*, 18 Mass. 435, 11 Am. Dec. 218 (1823); *McRae* v. *Mattoon*, 30 Mass. 53 (1832); *Anderson* v. *Anderson*, 8 Ohio 108 (1837); *Tarbox* v. *Hays*, 6 Watts 398, 31 Am. Dec. 478 (1837); *Granger* v. *Clark*, 22 Maine 128 (1842); *Greene* v. *Greene*, 68 Mass. 361, 61 Am. Dec. 454 (1854); *Mason* v. *Messenger*, 17 Iowa 261 (1864); *Christmas* v. *Russel*, 72 U. S. 290, 18 L. ed. 475 (1866); *The Acorn*, 2 Abb. 434, Fed. Cas. No. 29 (1870); *Simpson* v. *Kimberlin*, 12 Kans. 579 (1874); *Krekeler* v. *Ritter*, 62 N. Y. 372 (1875); *Blanchard* v. *Webster*, 62 N. H. 467 (1883); *Otterson* v. *Middleton*, 102 Pa. 78 (1883); *Sherburne* v. *Shephard*, 142 Mass. 141, 7 N. E. 719 (1886); *Stewart* v. *Stitsher*, 83 Ga. 297, 9 S. E. 1041 (1889); *Ogle* v. *Baker*, 137 Pa. St. 378, 20 Atl. 998, 21 Am. St. 886 (1890); *Murphy* v. *France*, 101 Mo. 151, 13 S. W. 817 (1890); *Edgerton* v. *Edgerton*, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. 557 (1892); *Nevitt* v. *First Nat. Bk.*, 91 Hun 43, 36 N. Y. S. 294, 71 N. Y. St. 376 (1895); *Langdon* v. *Blackburn*, 109 Cal. 19, 41 Pac. 814 (1895); *Bowman* v. *Wilson*, 64 Ill. App. 73 (1895); *Kansas City R. Co.* v. *Morgan*, 76 Fed. 429 (1896); *Sanders* v. *Price*, 56 S. Car. 1, 33 S. E. 731 (1899); *People* v. *Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399, 773 (1901); *Johnson* v. *Stebbins-Thompson Realty Co.*, 167 Mo. 325, 66 S. W. 933 (1901); *Logan* v. *Central Iron Co.*, 139 Ala. 548, 36 So. 729 (1903); *Oster* v. *Broe*, 161 Ind. 113, 64 N. E. 918 (1903); *Camden Nat. Bk.* v. *Fries-Breslin Co.*, 214 Pa. 395, 63 Atl. 1022 (1906); *Mahoney* v. *State Insurance Co.*, 133 Iowa 570, 110 N. W. 1041 (1907); *Ulber* v. *Dunn*, 143 Iowa 260, 119 N. W. 269 (1909); *Lang* v. *Dunn*, 145 Iowa 363, 124 N. W. 192 (1910); *Morris* v. *Traveler's Insurance Co.*, 189 Fed. 211 (1911). Contra: *Hall* v. *Hamlin*, 2 Watts (Pa.) 354 (1834); *Jackson* v. *Summerville*, 13 Pa. St. 359 (1850); *Mandeville* v. *Reynolds*, 68 N. Y. 528 (1877); *Phelps* v. *Benson*, 161 Pa. St. 418, 29 Atl. 86 (1894); *Pray* v. *Jenkins*, 47 Kans. 599, 28 Pac. 716 (1892); *Sager* v. *Mead*, 164 Pa. 125, 30 Atl. 284 (1894). In some cases it has been held that the judg-

CROUSE *v.* McVICAR

COURT OF APPEALS OF NEW YORK, 1912

207 N. Y. 213

Appeal from a judgment of the appellate division of the Supreme Court in the fourth judicial department, entered March 17, 1911, modifying and affirming as modified a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at special term. The nature of the action and the facts, so far as material, are stated in the opinion.[98]

CULLEN, C. J.: One Crouse died on the twenty-first day of November, 1892, leaving a last will and testament whereby, after many legacies, he bequeathed a large residuary estate of personalty to the persons who would be entitled to take the same under the law if he had died intestate. The plaintiff and certain others, first cousins of the testator, were his next of kin, unless the defendant Dorothea Edgarita Crouse, who was then an infant aged six years, was his legitimate child. The claim was made on behalf of said infant that she was such child, and by the defendant Eula H. Potulicka that she was the widow of said testator. In this state of conflicting claims the executors of the will of the deceased brought an action in the Supreme Court against all the persons claiming any portion of the estate under the will, asking that it be determined who were entitled to the estate. The complaint in this action does not set forth in full the judgment roll in the executors' action, but it does state the object of the action and that the issue in it was as to the status of the defendant Dorothea. It alleges that the action was brought on for trial, when the parties entered into stipulation by which it was agreed that the conflicting claimants, the first cousins on one side and Dorothea on the other, should share the residuary estate equally and that judgment to that effect should be had. In accordance with the stipulation, which the guardian was authorized by the court to make on behalf of the infant, judgment was entered on the 19th day of February, 1895, which decreed that the residuary estate be divided as stipulated (certain deductions being made from the infant's share

---

ment is impeachable collaterally, where the fraud is practiced in the act of obtaining judgment; where the court is misled. *Abonloff* v. *Oppenheimer*, L. R. 10 Q. B. Div. 295 (1883); *Pfiffner* v. *Krapfel*, 28 Iowa 27 (1869); *Amador C. & M. Co.* v. *Mitchell*, 59 Cal. 168 (1881); *Richardson* v. *Trimble*, 38 Hun (N. Y.) 409, 17 Abb. N. Cas. 210 (1886); *First Nat. Bk.* v. *Cunningham*, 48 Fed. 510 (1891); *Daniels* v. *Benedict*, 50 Fed. 347 (1892); *Cotterell* v. *Koon*, 151 Ind. 182, 51 N. E. 235 (1898); *Wonderly* v. *Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. 474 (1899); *Fort Jefferson Imp. Co.* v. *Green*, 112 Ky. 85, 65 S. W. 161 (1901); *Cooley* v. *Barker*, 122 Iowa 440, 98 N. W. 289, 101 Am. St. 276 (1904); *Mahoney* v. *State Insurance Co.*, 133 Iowa 570, 110 N. W. 1041 (1907); *Hall* v. *Cox*, 104 Ark. 303, 149 S. W. 80 (1912). Contra: *Sherburne* v. *Shepard*, 142 Mass. 141, 7 N. E. 719 (1886); *Carr* v. *Miner*, 42 Ill. 179 (1866); *Cody* v. *Cody*, 98 Wis. 445, 74 N. W. 217 (1898); *Davis* v. *Davis*, 61 Maine 395 (1873).

[98] The arguments of counsel and part of the opinion of the court are omitted.

in favor of third parties, details of which are immaterial in this controversy). A copy of that judgment is annexed to the complaint and forms part thereof. The complaint then charges that the claim on behalf of Dorothea was not only false but fraudulent and made in bad faith, and that it was intended to support it by the perjury of certain witnesses who had been suborned for the purpose; that plaintiff did not know at the time and had no means of knowing that the claim was fraudulent, but supposed it was made in good faith, and that relying on the false statements made in various stages of the suit he made the compromise and entered into the stipulation above recited. He asks as relief that the judgment be set aside and that the defendant Dorothea restore to him the moneys awarded to her out of his share.

I think the courts below were right in holding that the complaint did not state facts sufficient to constitute a cause of action. The complaint was evidently framed, and the appeal has been argued, as if the action were to set aside for fraud merely an agreement to compromise and to recover money paid thereunder. But this is a mistaken view. There is a solemm judgment rendered in one action which it is sought to attack by another. The court whose decree is assailed had jurisdiction of the subject-matter of the action, of the parties thereto and jurisdiction to render a judgment distributing the estate of the decedent. It matters not whether that judgment was right or wrong. Until reversed on appeal or set aside it was conclusive. Nor does it matter when the cause was brought on for trial, instead of hearing testimony the court made its decree on the stipulation of the parties. A judgment by default is as conclusive as any other judgment, and a judgment rendered on the express stipulation of the parties can hardly be of less effect than one rendered on the failure of a party to appear. Parties may by their stipulation make the law of the case which the courts may and at times are bound to enforce. (*In re N. Y., Lackawanna & W. R. R. Co.*, 98 N. Y. 447).

The judgment sought to be set aside was therefore subject to the same and only to the same attack that could be made on any other judgment. It is doubtless true that a judgment can be set aside for fraud by an action brought for that purpose, but it is settled law (save possibly in one or two jurisdictions) that the fraud for which a judgment can be impeached must be in some matter other than the issue in controversy in the action. By Professor Pomeroy it is said (Equity Jurisprudence, section 1361): "Equity will not restrain a legal action or judgment when the controversy will be decided by the court of equity upon a ground equally available at law, unless the party invoking the aid of equity can show some special equitable feature or ground of relief, and, in the case assumed, this special feature or ground must necessarily be something connected with the mode of trying and deciding the legal action, and not with the cause of action or the defense themselves."[94] In *United States* v. *Throck-*

[94]Accord: *Bateman* v. *Willoe*, 1 Sch. & L. 210 (1803); *Prothero* v. *Forman*, 2 Swanst. 227 (1818); *Emerson* v. *Udall*, 13 Vt. 477, 37 Am. Dec. 604

morton, 98 U. S. 61, 66, it was held: "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." (See, also, Black on Judgments, section 372.) In *Rose* v. *Wood*, 70 N. Y. 8, the complaint charged that the defendants, combining with others to cheat and defraud the plaintiff by perjury and false testimony, obtained a judgment setting aside a deed and asked that the judgment so obtained might itself be set aside for the fraud and perjury. The complaint was held on demurrer not to state a cause of action. *Mayor, etc., of New York* v. *Brady*, 115 N. Y. 599, is to the same effect. In the latter case is to be found an extensive review of the authorities. In *Smith* v. *Lewis*, 3 Johns. (N. Y.) 157, it was held that an action would not lie for suborning witness to testify falsely by which the plaintiff was cast in judgment. The reason of the rule is stated by Chancellor Kent, then chief justice, that otherwise there could be no final determination of a suit. So here, if in this action the plaintiff should be successful, thereafter the defendant might sue to set aside the adverse judgment on the ground that plaintiff's claim had been made in bad faith and supported by perjury. The principle on which the rule rests is the oft-repeated maxim, *Interest republicae ut sit finis litium*. It does not follow that a defeated litigant is without redress for perjury. He can apply in the original action and in a proper case obtain relief.

The fact that the decree now sought to be vacated rests on stipulation does not differentiate it in principle from one where the

---

(1841); *Warner* v. *Conant*, 24 Vt. 351, 58 Am. Dec. 178 (1852); *Holmes* v. *Stateler*, 57 Ill. 209 (1870); *Hetzell* v. *Bentz*, 8 Phila. (Pa.) 261 (1871); *Tyler* v. *Hammersley*, 44 Conn. 419, 26 Am. Rep. 479 (1877); *Walker* v. *Shreve*, 87 Ill. 474 (1877); *Holmes* v. *Steele*, 28 N. J. Eq. 173 (1877); *Lebanon Mut. Ins. Co.* v. *Erb*, 1 Sad. (Pa.) 181, 1 Atl. 559, 571 (1885); *Harding* v. *Hawkins*, 141 Ill. 572, 31 N. E. 307, 33 Am. St. 347 (1889); *Gazzam* v. *Reading*, 202 Pa. 231, 51 Atl. 1000 (1902); *Stewart* v. *Wood*, 86 Ark. 504, 111 S. W. 983 (1908); *Zetlin* v. *Zetlin*, 202 Mass. 205, 88 N. E. 762 (1909); *Mushbaugh* v. *East Peoria*, 260 Ill. 27, 102 N. E. 1027 (1913); *Buchler* v. *Black*, 213 Fed. 880 (1914). Contra: *Laun* v. *Kipp*, 155 Wis. 347, 145 N. W. 183 (1914); *Zohrlant* v. *Meugelberg*, 158 Wis. 392, 148 N. W. 314, 149 N. W. 280 (1914); *De Soto Coal Min. &c. Co.* v. *Hill*, 188 Ala. 667, 65 So. 988 (1914). And see *Cole* v. *Langford*, L. R. (1898) 2 Q. B. 36; *Birch* v. *Birch*, L. R. (1902) Probate 130.

It is frequently said that the fraud that will justify equitable interference with a judgment or decree must be that which occurs in the procuring of the judgment by which the defendant is deprived of his day in court, or the court itself is imposed upon. *Patch* v. *Ward*, L. R. 3 Ch. App. 203 (1867); *Ellis* v. *Kelly*, 6 Bush (Ky.) 621 (1871); *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93 (1878); *Ross* v. *Wood*, 70 N. Y. 8 (1877); *Mayor of City of New York* v. *Brady*, 115 N. Y. 599, 22 N. E. 237 (1889); *Weaver* v. *Vandevanter*, 84 Tex. 691, 19 S. W. 889 (1892); *Platt* v. *Threadgill*, 80 Fed. 192 (1897); *Parsons* v. *Weis*, 144 Cal. 410, 77 Pac. 1007 (1904); *Pratt* v. *Griffin*, 223 Ill. 349, 79 N. E. 102 (1906); *Wilson* v. *Anthony*, 72 N. J. Eq. 836, 66 Atl. 907 (1907); *Cantwell* v. *Kimmerle*, 179 Ill. App. 66 (1913); *Friebe* v. *Elder*, 181 Ind. 597, 105 N. E. 151 (1914); *Hollister* v. *Sobra*, 264 Ill. 535, 106 N. E. 507 (1914).

judgment was rendered after hearing evidence.[95] The stipulation acted as a substitute for evidence. Each party being afraid of the effect of the evidence of the adverse party stipulated that the adversary's claim should prevail to the extent of one-half. No fraud is charged except in statements made as to the issue itself. If perjury in that respect made on the witness stand and inducing a court or jury to render an erroneous decision would not support an action to set aside the judgment, it is difficult to see why it should be of more moment because it frightened the parties into a compromise.

Judgment affirmed.

DUNLAP *v.* GLIDDEN AND OTHERS

SUPREME JUDICIAL COURT OF MAINE, 1850

31 Maine 435

Two actions on the case, each charging, that Dunlap was the just and lawful owner of a lot of land; that said Glidden, however, had sued out a writ of entry for the land against Dunlap, and in that action had obtained a verdict and judgment for the same; that said verdict was obtained by the fraud of Glidden and by false testimony of two of the defendants and of other witnesses, under a conspiracy among all the defendants, by fraud and perjury, to deprive and cheat the plaintiff of his said land.

The defendants protesting, that the fraud and conspiracy are falsely charged, pleaded that the plaintiff is estopped, by the said judgment, from proving his allegations.

The plaintiff replies, that he ought not to be estopped, etc., because neither the parties nor the cause of action in the former suit were the same as in this action, and re-asserts, that said judgment was obtained by fraud, perjury and conspiracy as in the writ alleged. To that replication the defendants demur generally, and there is a joinder in the demurrer.[96]

---

[95] Accord: *Powell* v. *Shank*, 3 Watts, (Pa.) 235 (1834); *Gifford* v. *Thorn*, 9 N. J. Eq. 702 (1855); *Hanscom* v. *Hewes*, 78 Mass. 334 (1859); *Donnelly* v. *Wilcox*, 113 N. Car. 408, 18 S. E. 339 (1893); *In re South American & Mex. Co.*, L. R. (1895) 1 Ch. 37; *Adler* v. *Van Kirk Land & Const. Co.*, 114 Ala. 551 (1896); *Kidd* v. *Huff*, 105 Ga. 209, 31 S. E. 430 (1898); *Harding* v. *Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066 (1904); *South Penn. Oil Co.* v. *Calf Creek Oil &c. Co.*, 140 Fed. 507 (1905); *Commonwealth* v. *Churchill*, 131 Ky. 251, 115 S. W. 189 (1909); *Lewis* v. *St. Louis I. &c. R. Co.*, 107 Ark. 41, 154 S. W. 198 (1913). Contra: *Lamb* v. *Gatlin*, 2 Dev. & B. (N. Car. Eq.) 37 (1838); *Jenkins* v. *Robertson*, L. R. (1867) 1 H. L. Scotch 117, and compare *Wadhams* v. *Gay*, 73 Ill. 415 (1874); *Gay* v. *Parpart*, 106 U. S. 679, 1 Sup. Ct. 456, 27 L. ed. 256 (1882); *Lawrence Mfg. Co.* v. *Janesville Mills*, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. ed. 1005 (1891); *Carr* v. *Illinois Cent. R. Co.*, 180 Ala. 159, 60 So. 277, 43 L. R. A. (N. S.) 634n (1912).

[96] The argument of counsel and part of the opinion of the court are omitted.

WELLS, J.: The cause of action in these suits is the same, but the same defendants are not all joined in each of them. The declarations allege in substance, that Benjamin Glidden, Jr., commenced an action against the plaintiff to recover several parcels of real estate, that a verdict was rendered in that action in favor of Glidden, and judgment was entered on the verdict, that all of the defendants fraudulently conspired together to defeat the plaintiff's title, and to aid Glidden in his suit, and that by the false testimony of two of the defendants and others, the verdict was obtained against the plaintiff.

These actions are brought to recover damages arising from the judgment obtained by Glidden against the plaintiff, and if they should be sustained, the record would present the anomaly of a judgment remaining in full force, and of another, in which damages were rendered on account of the existence of the former one. But the judgment against the plaintiff, so long as it remains in force, must be considered as true and just. He can not be permitted to aver the falsity of that judgment, as the ground for the recovery of damages. It constitutes in itself a clear and unequivocal denial of his allegations. He says, that by the fraud and conspiracy of the defendants, he has lost the land, but the judgment imports that it was properly rendered in the ordinary course of judicial proceedings. * * *

The plaintiff can not recover upon the ground alleged of false testimony given by some of the defendants. For an action will not lie against a witness for giving false testimony in another case. *Damport* v. *Sympson*, Cro. Eliz. 520; *Eyers* v. *Sedgwicke*, Cro. Jac. 601.[97]

If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy by law. The court, which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial, so that upon a further investigation, justice might be done.[1] The witnesses, if guilty, might be indicted

---

[97]Accord: *Harding* v. *Bodman*, Hutton 11 (1617); *Smith* v. *Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469 (1808); *Cunningham* v. *Brown*, 18 Vt. 123, 46 Am. Dec. 140 (1846); *Lyford* v. *Demerit*, 32 N. H. 234 (1855); *Engstrom* v. *Sherburne*, 137 Mass. 153 (1884); *Castrique* v. *Behrens*, 3 El. & El. 710 (1861); *Huffer* v. *Allen*, L. R. 2 Exch. 15 (1866); *Horner* v. *Schinstock*, 80 Kans. 136, 101 Pac. 996 (1909).

[1]A new trial on the ground of perjury is discretionary. *Fabrilius* v. *Cock*, 3 Burr. 1771 (1765); *Struthers* v. *Wagner*, 6 Phila. (Pa.) 262 (1867); *Shanahan* v. *Insurance Co.*, 6 Pa. Super. Ct. 65 (1897). It has been said that a new trial will not be granted on this ground until after the perjured witness has been convicted, or is dead. *Dyche* v. *Patton*, 3 Jones' Eq. (N. Car.) 332 (1857); *Tovey* v. *Young*, Prec. Ch. 193 (1702); *Wheatley* v. *Edwards*, Lofft. 87 (1772); *Benfield* v. *Petrie*, 3 Dougl. 24 (1781); *Warwick* v. *Bruce*, 4 M. & S. 140 (1815); *Seeley* v. *Mayhew*, 4 Bing. 561 (1828); *Great Falls M. Co.* v. *Mathes*, 5 N. H. 574 (1832); *Holtz* v. *Schmidt*, 12 Jones & Sp. (N. Y.) 327, 44 N. Y. Super. Ct. 327 (1878). "Perhaps the rule laid down in these cases may be too strict and exacting for all circumstances, but it is obviously founded in wise policy." *Dexter* v. *Handy*, 13 R. I. 474 (1881). A conviction will not necessarily lead to a new trial if the court is otherwise satisfied with the verdict. *Davies* v. *Brecknell*, L. R. 3 P. & D. 88 (1873).

for perjury, and so might all those be indicted, who unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford the most convincing evidence, that a review of the action should take place.

It is contended on the part of the plaintiff, that the pleas of the defendants are bad. But it does not become necessary to decide that question, for the declarations being bad, judgment must be rendered against the plaintiff as the party, who committed the first error in pleading.

The declarations in both actions are adjudged bad.[2]

---

[2]False or perjured testimony is not, alone, ground for impeaching a judgment collaterally. *Bulkley* v. *Stewart*, 1 Day (Conn.) 130, 2 Am. Dec. 57 (1803); *Peck* v. *Woodbridge*, 3 Day (Conn.) 30 (1808); *Smith* v. *Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469 (1808); *Tipton* v. *Gardner*, 4 Ad. & El. 317 (1835); *Pilmore* v. *Hood*, 8 Scott, 180 (1839); *Abbott* v. *Bahr*, 3 Pinn. (Wis.) 193 (1851); *Demerit* v. *Lyford*, 27 N. H. 541 (1853); *Greene* v. *Greene*, 68 Mass. 361, 61 Am. Dec. 454 (1854); *Dilling* v. *Murray*, 6 Ind. 324, 63 Am. Dec. 385 (1855); *Lyford* v. *Demerritt*, 32 N. H. 234 (1855); *Woodrow* v. *O'Conner*, 28 Vt. 776 (1856); *Field* v. *Sanderson*, 34 Mo. 542, 86 Am. Dec. 124 (1864); *Elkins* v. *Page*, 45 N. H. 310 (1864); *Cottle* v. *Cole*, 20 Iowa 481 (1866); *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929 (1879); *New York Cent. R. Co.* v. *Harrold*, 65 How. Pr. (N. Y.) 89 (1883); *Lebanon Mut. Ins. Co.* v. *Erb*, 2 Chest. Co. (Pa.) 535 (1885); *Burton* v. *Perry*, 146 Ill. 71, 34 N. E. 60 (1893); *United States* v. *Chung Shee*, 71 Fed. 277 (1895); *Baker* v. *Wadsworth*, L. J. (N. S.) 67 Q. B. Div. 301 (1898); *Maddox* v. *Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567 (1899); *Word* v. *Schow*, 29 Tex. Civ. App. 120, 68 S. W. 192 (1902); *El Capitan Co.* v. *Lees*, 13 N. M. 407, 86 Pac. 924 (1906); *Bleakley* v. *Barclay*, 75 Kans. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230 (1907). Nor, by the weight of authority, is such testimony, alone, ground for equitable relief. *Smith* v. *Lowry*, 1 Johns. Ch. (N. Y.) 320 (1814); *Vaughn* v. *Johnson*, 9 N. J. Eq. 173 (1852); *Boston & W. R. Co.* v. *Sparhawk*, 83 Mass. 448, 79 Am. Dec. 750 (1861); *Ross* v. *Wood*, 70 N. Y. 8 (1877); *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. ed. 93 (1878); *Flower* v. *Lloyd*, L. R. 10 Ch. D. 327 (1878); *Metcalf* v. *Gilmore*, 59 N. H. 417, 47 Am. Rep. 217 (1879); *Kountz's Appeal* (Pa.), 36 Phila. Leg. Int. 186 (1879); *Pico* v. *Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. 159 (1891); *Codde* v. *Mahiat*, 109 Mich. 186, 66 N. W. 1093 (1896); *United States* v. *Gleeson*, 90 Fed. 778 (1898); *McDougall* v. *Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. 849 (1899); *Maryland & Co.* v. *Marney*, 91 Md. 360, 46 Atl. 1077 (1900); *Sohler* v. *Sohler*, 135 Cal. 323 (1902); *Wood* v. *Davis*, 108 Fed. 130 (1900); *Evans* v. *Woodsworth*, 213 Ill. 404, 72 N. E. 1082 (1905); *French* v. *Raymond*, 82 Vt. 156, 72 Atl. 324 (1909); *Lucy* v. *Deas*, 59 Fla. 552, 52 So. 515 (1910). Contra: *Burgess* v. *Lovengood*, 55 N. Car. (2 Jones) 457 (1856); *Kersey* v. *Rash*, 3 Del. Ch. 321 (1869), *semble*; *Stowell* v. *Eldred*, 26 Wis. 504 (1870); *Graver* v. *Faurot*, 76 Fed. 257 (1896); *Davis* v. *Jones* (Tex.), 149 S. W. 727 (1912); *El Reno F. I. Co.* v. *Sutton* 41 Okla. 297, 137 Pac. 700 (1913), and contra, by statute, *Laithe* v. *McDonald*, 12 Kans. 340 (1873); *Brown* v. *Byam*, 59 Iowa 52, 12 N. W. 770 (1882); *Landers* v. *Smith*, 78 Maine 212, 3 Atl. 463 (1886); *Stewart* v. *Duncan*, 40 Minn. 410, 42 N. W. 89 (1889); *Hass* v. *Billings*, 42 Minn. 63, 43 N. W. 797 (1889); *Mourdy* v. *Witzka*, 89 Minn. 300, 94 N. W. 885 (1903); *Munro* v. *Callahan*, 55 Nebr. 75, 75 N. W. 151, 70 Am. St. 366 (1898); *Beck* v. *Juckett*, 111 Iowa 339, 82 N. W. 762 (1900); *Van Antwerp* v. *Lathrop*, 70 Nebr. 747, 98 N. W. 35 (1904); *Young* v. *Lindquist*, 126 Minn. 414, 148 N. W. 455 (1914).

In *Nugent* v. *Metropolitan S. Ry. Co.*, 49 App. Div. (N. Y.) a judgment was vacated because the perjured testimony was inspired and manufactured by one of the attorneys.

THOMAS ATKINSON AND FRANCIS ATKINSON *v.* PASCHAL ALLEN

SUPREME COURT OF VERMONT, 1839

12 *Vt.* 619

Ejectment, for the whole of the first division of the right of Charles Murray, in Charleston, being lot No. 5. Plea, not guilty, and trial by jury.[a]

Upon the trial in the county court, the plaintiffs introduced testimony tending to prove that, in 1806, one John Atkinson took possession of one hundred acres of the west part of said lot. The plaintiffs also read in evidence two deeds from John Atkinson to themselves, conveying the land in question, one dated in 1820, and the other in 1821; also, an act of the legislature, passed in 1819, authorizing the plaintiffs to hold lands in this state. The possession of John Atkinson was continued until the fall of 1810, and then vacated until 1818, when he again took possession, and he and the plaintiffs, from that time, continued in possession until 1829, when the plaintiffs were evicted by one Alpha Allyn, who continued in possession until July, 1833. The plaintiffs did not connect their claim of title with Murray, the original grantee. The defendant was in possession of the land previous to, and at the time of the commencement of this suit. Here the plaintiffs rested.

The defendant then read in evidence a judgment of the county court, rendered at the June term, 1833, in favor of Charles Murray, of the city of London, in England, against Alpha Allyn, showing a recovery of the seizin and possession of said land; also a writ of possession, issued on said judgment, and the return of the officer thereon, showing that the writ had been duly executed.

The plaintiffs then gave evidence tending to prove that the action of ejectment in favor of Murray against Alpha Allyn, was commenced without Murray's knowledge; that he never recognized it, and that the judgment recovered therein was collusive, colorable and fraudulent. To the admission of this evidence the defendant objected, but the court overruled the objection.

The jury returned a verdict for the plaintiffs to recover one hundred acres of the lot in question, and the defendant excepted to the decision and charge of the county court.

REDFIELD, J.: The only remaining objection made to the proceedings in the court below is, that the plaintiffs were suffered to attack the judgment in favor of Charles Murray against Alpha Allyn collaterally, by showing that it was not bona fide, but colorable merely, got up by Allyn to shield himself and his tenant, the defendant—Murray having no knowledge of the proceedings. It is obvious, that as the plaintiffs, and those under whom they claim title, had

[a] Part of the statement of facts, the arguments of counsel and part of the opinion are omitted.

possession of the premises prior to Alpha Allyn, and were forcibly ousted by him, they can upon this first seizin only, recover of Allyn and all who have entered, either under him, or upon his possession, whether with or without his consent, unless they can shield themselves under a title older and better than that of the plaintiffs. This they attempted by force of the judgment in favor of Murray, the original proprietor, against Alpha Allyn, he being put out of possession and the present defendant and those under whom he claims title, being put in under color of this judgment. This judgment the plaintiffs were permitted to avoid, by proof addressed to the jury, in the manner above stated. As the plaintiffs were neither parties, nor privy to this judgment, and could have brought no process or suit whatever to reverse or set it aside, they must be permitted to avoid the effect of the judgment in this manner, if at all. The rule that a judgment of a court of competent jurisdiction is conclusive, until reversed or in some manner set aside and annulled, and that it can not be attacked collaterally, by evidence tending to show that it was irregularly or improperly obtained, only applies to parties and privies to the judgment, who may take proceedings for its reversal, and in no sense extends to strangers. It is obvious, if the facts found by the jury in this case are to be regarded, that the defendant is the tenant of Alpha Allyn, and has no more connection with the title of Murray than if he had attempted to show title from him, by means of a forged deed. And it is not, for a moment, to be tolerated, that the rights of parties to the title of lands, are to be shifted and postponed, to their juniors, by merely colorable proceedings of this character. This mode of redress has always been allowed to strangers or third persons. *Dutchess of Kingston's Case*, 11 State Tr. 230; *Crosby* v. *Leng*, 12 East, 409; *Lloyd* v. *Maddox*, Moore, 917, 11 State Tr. 262, 1 Stark Ev. (6th ed.) 259.[4]

The judgment of the county court is affirmed.

---

[4]A stranger to the record may impeach a judgment in a collateral proceeding, either on the ground of want of jurisdiction in the court to render it or of fraud or collusion between the parties in obtaining its entry, if, and only if, it injuriously affects his rights. *Warter* v. *Perry*, Cro. Eliz. 199 (1589); *Fermor's Case*, 3 Coke 77 (1601); *Veale* v. *Gatesdon*, W. Jones 91 (1625); *Randal's Case*, 2 Mod. 308 (1678); *Pierce* v. *Jackson*, 6 Mass. 242 (1810); *Griswold* v. *Stewart*, 4 Cow. (N. Y.) 457 (1825); *Vose* v. *Morton*, 58 Mass. 27 (1849); *Douglass* v. *Howland*, 24 Wend. (N. Y.) 35 (1840); *Downs* v. *Fuller*, 43 Mass. 135, 35 Am. Dec. 393 (1840); *Gurnsey* v. *Edwards*, 26 N. H. 224 (1853); *Vanderveer* v. *Gaston*, 24 N. J. L. 818 (1854); *Golahar* v. *Gates*, 20 Mo. 236 (1855); *Brunner's Appeal*, 47 Pa. 67 (1864); *Sidensparker* v. *Sidensparker*, 52 Maine 481, 83 Am. Dec. 527 (1864); *Annett* v. *Terry*, 35 N. Y. 256 (1866); *Lee* v. *Back*, 30 Ind. 148 (1868); *Meckley's Appeal*, 102 Pa. 536 (1883); *Biddle* v. *Tomlinson*, 115 Pa. 299, 8 Atl. 774 (1886); *Safford* v. *Weare*, 142 Mass. 231, 7 N. E. 730 (1886); *Smith* v. *Cuyler*, 78 Ga. 654, 3 S. E. 406 (1887); *Eureka Iron & Steel Wks.* v. *Bresnahan*, 66 Mich. 489, 33 N. W. 834 (1887); *McCanless* v. *Smith*, 51 N. J. Eq. 505, 25 Atl. 211 (1893); *Roberts* v. *Yancy*, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. 357 (1893); *Sager* v. *Mead*, 164 Pa. 125, 30 Atl. 284 (1894); *Shamlin* v. *Hall*, 123 Ala. 541, 26 So. 285 (1898); *Safe Deposit Co.* v. *Wright*, 105 Fed. 155 (1900); *Brownwell* v. *Snyder*, 122 App. Div. 246, 106 N. Y. S. 771 (1907); *Sache* v. *Wallace*, 101 Minn. 169, 112 N. W. 386 (1907); *Harpold* v. *Doyle*, 16 Idaho 671, 102 Pac. 158 (1908); *Wick* v. *Rea*, 54 Wash. 424, 103 Pac. 1462 (1909); *Northern Pac. R. Co.* v. *Boyd*, 177 Fed. 804 (1910); *Hall* v. *Hall*, 139 N. Y. App. Div. 120,

CANDEE *v.* LORD AND OTHERS

COURT OF APPEALS OF NEW YORK, 1848

2 *N. Y.* 269

Appeal from the late Court of Chancery. The complainant Candee recovered judgment for $1,142.90 against Russel Lord on March 29, 1844, on a demand which existed prior to the judgments hereafter mentioned. After execution issued and returned unsatisfied, Candee filed this bill against the judgment debtor, Henry Lord and William Champlin, averring that in August, 1843, Russel Lord, without consideration and to defraud his creditors had confessed a judgment to Henry Lord for $1,400 upon which certain real estate had been sold by the sheriff and purchased by Henry Lord; that in the same month another fraudulent judgment had been confessed to William Champlin for $1,250 on which other real estate was sold and purchased by Champlin and another; that the sums bid on the sales belonged to Lord's creditors and claiming that the defendants Lord and Champlin should account therefor. The answers of Champlin and Henry Lord insisted, among other things, that complainant's judgment was obtained in a suit brought against Russel Lord upon a forged endorsement of a promissory note, and this was insisted upon as a ground of defense to the bill, so far as they were concerned. The chancellor, reversing a previous order of the vice chancellor, awarded issues for trial by jury, one of which was whether the endorsement upon which the complainant obtained his judgment was a forgery. From this order the complainant appealed.[5]

---

123 N. Y. S. 1056 (1910). But he can not so attack it for mere irregularities. *Swiggart* v. *Harber*, 5 Ill. 364, 39 Am. Dec. 418 (1843); *Secrist* v. *Green*, 3 Wall. (U. S.) 744, 18 L. ed. 153 (1865); *Dean* v. *Thatcher*, 32 N. J. L. 470 (1865); *State* v. *Rogers*, 131 Ind. 458, 31 N. E. 199 (1891); *Milleisen* v. *Senseman*, 4 Pa. Super. Ct. 455 (1897); *Allred* v. *Smith*, 135 N. Car. 443, 47 S. E. 597 (1904); *Pullman Palace Car Co.* v. *Washburn*, 66 Fed. 790 (1895). Nor can a mere disseizor or volunteer collaterally attack a judgment to which he is a stranger. *Wellington* v. *Gale*, 13 Mass. 483 (1816); *Baugh* v. *Baugh*, 37 Mich. 59, 26 Am. Rep. 495 (1877).

Generally, the right or interest prejudiced, to come within the rule must have accrued prior to the rendition of the judgment attacked. *Doe* v. *Derby*, 1 Ad. & El. 783 (1834); *Hunt* v. *Haven*, 52 N. H. 162 (1872); *Freydewall* v. *Baldwin*, 103 Ill. 325 (1882); *Hogg* v. *Link*, 90 Ind. 346 (1883); *Strayer* v. *Johnson*, 110 Pa. 21, 1 Atl. 222 (1885); *Peterson* v. *Weissbein*, 80 Cal. 38, 22 Pac. 56 (1889); *Chase* v. *Kaynor*, 78 Iowa 449, 43 N. W. 269 (1889); *Dull* v. *Blackman*, 169 U. S. 243, 42 L. ed. 733 (1898); *Bennett* v. *Wilson*, 133 Cal. 379, 65 Pac. 880, 85 Am. St. 207 (1901); *Hudkins* v. *Crim*, 72 W. Va. 418, 78 S. E. 1043 (1913). Thus, where land is conveyed subject to a judgment and the judgment debtor fails to have the judgment opened or stricken off in proceedings brought for that purpose, the grantee can not in a subsequent action of ejectment collaterally attach the judgment as against one deriving title through a sheriff's sale under the judgment. *Ross* v. *Dewey*, 215 Pa. 526, 64 Atl. 674 (1906). Accord: *Johns* v. *Pattee*, 55 Iowa 665, 8 N. W. 663 (1881).

[5]The statement of facts is abridged and the arguments of counsel and part of the opinion of the court are omitted.

GARDINER, J.: The most important question in this cause, is whether a judgment obtained without fraud or collusion, is conclusive evidence, in suits between creditors in relation to the property of the judgment debtor, of the indebtedness of the latter.

A debtor may be said to sustain two distinct relations to his property: that of owner, and quasi trustee for his creditors. As owner he may contract debts to be satisfied out of his property, confess judgments, create liens upon it, sell or give it to others at pleasure; and so far as he is personally concerned, will be bound by his own acts. But the law lays upon him an obligation to pay his debts, and holds him in behalf of his creditors to the exercise of good faith in all transactions relating to the fund upon which they must depend for payment. He can, therefore, neither create a debt, or do any of the things above mentioned *mala fide* to their prejudice. The common law, of which the English statute[6] and our own is but the exposition, declares that every such debt, judgment or assurance, contracted or given with the intent to hinder, delay or defraud his creditors, as against them, to be void. And equity in many cases holds the debtor and his confederates in the fraud as trustees for the parties aggrieved. The rights of creditors to the property of the debtor, are to be worked out through the different relations to which I have alluded.

In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others. First, because it is conclusive between the parties to the record who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences or conveyances made by him in good faith.[7] Any deed, judgment or assurance of the debtor, so far at least as they conclude him, must stop his creditors and all others. Consequently, neither a creditor nor stranger can interfere in the bona fide litigation of the debtor, or re-try his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor, does not arise until the latter has violated the tacit condition annexed to the debt; that he has done, and will do nothing to defraud his creditors.

Where, however, fraud is established, the creditor does not claim through the debtor, but adversely to him, and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped.[8] It follows

[6]Statute of 13 Eliz. ch. 5 (1571). See *Twyne's Case*, 3 Coke 80 (1602); 1 Smith's Leading Cases, 1 and note.

[7]*Pabst Brewing Co.* v. *Jensen*, 68 Minn. 293, 71 N. W. 384 (1897); *Mengel* v. *Connecticut Fire Ins. Co.*, 5 Pa. Super Ct. 491 (1897); *Newark City Nat. Bank* v. *Crane*, 60 N. J. Eq. 121, 45 Atl. 975 1900); *Comer* v. *Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. 78 (1900).

[8]"A judgment which has been procured by the fraudulent contrivance of the debtor or the collusion of both parties is subject to collateral attack by any one a stranger to the judgment who has been injuriously affected there-

from the principles suggested, that a judgment obtained without fraud or collusion, and which concludes the debtor; whether rendered upon default, confession, or after contestation, is upon all questions affecting the title to his property, conclusive evidence against his creditors, to establish first, the relation of creditor and debtor between the parties to the record, and second, the amount of the indebtedness. This principle is assumed in our statute in relation to creditor's bills, 2 R. S. 174, section 38, and decided in *Rogers* v. *Rogers,* 3 Paige, 599; 2 Greenlf. Ev. 531; *Marsh* v. *Pier,* 4 Rawle, 288, 9.

It is immaterial whether the debt was created prior or subsequent to the fraudulent lien, or conveyance, which was sought to be removed. The right of the creditor to impeach the assurance of the debtor, arises out of the relation which exists between them at the commencement of the suit for that purpose, and does not depend upon the time when the fraud was consummated. Hence a conveyance made with intent to defraud subsequent creditors is void at their election. And the fraudulent grantee would not be permitted to allege, in bar of the action against him, that the parties seeking relief were not creditors prior to, or at the time of the conveyance. *Walker* v. *Burrows,* 1 Atkyns, 94; *Stillman* v. *Asdown,* 2 Atkyns 481, 512; *Seward* v. *Jackson,* 8 Cowen 431, 441; *Hind* v. *Longworth,* 11 Wheaton, 209; 1 Story's Eq., section 356; *Jackson* v. *Myers,* 18 John R. 425; 20 John R. 472. The only difference in the two cases is found in the degree of evidence necessary to establish the fraud. In this case, the defendants have not alleged that the judgment of the complainant was not obtained in good faith. But they insist that there was error in the suit in which it was obtained, in the determination of a question of fact; and that they are not concluded by the defense of the debtor, because they are not in privity with him. We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and to pay them, made him to this extent the representative of all his creditors who should seek the satisfaction of their demands out of his property; so far at least they are in privity with, and claim under their debtor. If, as the defendants insist, they hold the property in question by a title derived under a valid judgment, prior to that of the complainant, their rights can not be affected by this evidence. If, however, as the bill alleges, their judgment was fraudulent, the complainant, as a creditor, can repudiate it, and claim the property as that of his debtor, his acts to the contrary notwithstanding, and

---

by." *Northern Pac. R. Co.* v. *Boyd,* 177 Fed. 804 (1910). Accord: *Earl of Brandon* v. *Becher,* 3 Cl. & F. 479 (1835); *Townsend* v. *Kerns,* 2 Watts (Pa.) 180 (1834); *Hammock* v. *McBride,* 6 Ga. 178 (1849); *Parkhurst* v. *Summer,* 23 Vt. 538, 56 Am. Dec. 94 (1851); *Raymond* v. *Whitney,* 5 Ohio St. 201 (1855); *Hackett* v. *Manlove,* 14 Cal. 85 (1859); *Sidensparker* v. *Sidensparker,* 52 Maine 481, 83 Am. Dec. 527 (1864); *Streety* v. *McCurdy,* 104 Ala. 493, 16 So. 686 (1894); *Cook* v. *Morris,* 66 Conn. 137, 33 Atl. 594 (1895); *Brownell* v. *Snyder,* 122 App. Div. 246, 106 N. Y. S. 771 (1907); *Nixon* v. *Loundes* (1909), 2 Irish Rep. K. B. 1.

hold his confederates in the fraud accountable as trustee for his benefit.

My brethren concur in the conclusions above stated (but) a majority of the court are of opinion that the decision of the chancellor was upon a question of practice, which is not a proper subject of review in this court, and for that reason the appeal should be dismissed.

Appeal dismissed.[9]

(b) Proceedings in Rem.

SCOTT *v.* SHEARMAN

COURT OF COMMON BENCH, 1775

2 W. Bl. 977

Trespass against five custom house officers for breaking and entering the house of the plaintiff at Harwich, and searching and rummaging the same, and taking away certain of his goods. On Not Guilty pleaded, the cause was tried at Chelmsford assizes in Lent, 1774, and a verdict found for the plaintiff, damages 100*l.* on this special case reserved.

The defendants, who are all known to be custom house officers, on the 24th of August, 1773, entered the plaintiff's house in the day time, in the company of the plaintiff, under pretence of an information against run goods, and demanded of the plaintiff and his wife their keys, which they refused to deliver, and desired to see their information; which Shearman refused to produce, and threatened,

---

[9]Accord: *Voorhees* v. *Seymour*, 26 Barb. (N. Y.) 569 (1857); *Burgess* v. *Simonson*, 45 N. Y. 225 (1871); *Decker* v. *Decker*, 108 N. Y. 128, 15 N. E. 307 (1888); *Bensimer* v. *Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. 774 (1891); *McCanless* v. *Smith*, 51 N. J. Eq. 505, 25 Atl. 211 (1893); *Ledoux* v. *Bank of America*, 24 App. Div. 123, 48 N. Y. S. 771 (1897); *Railroad Equipment Co.* v. *Blair*, 145 N. Y. 607, 39 N. E. 962 (1895); *Nicholas* v. *Lord*, 193 N. Y. 388 (1908). Compare *Second Workingmen's Bldg. &c. Assn.* v. *Wickers*, 83 N. J. Eq. 397, 91 Atl. 897 (1914).

In *Thompson's Appeal*, 57 Pa. St. 175 (1868), upon distribution of the proceeds of a sheriff's sale it was held error for the auditor, at the instance of junior judgment creditors, to postpone the lien of a prior judgment against the debtor, on the ground that the bond and warrant upon which such judgment had been entered, had been obtained by false representations. The court said: "Judgment creditors may attack a judgment collaterally when it is a fraud upon them, as when there has been collusion between the debtor and the creditor; but they can not set it aside merely because it is a fraud upon the debtor." Accord: *Dougherty's Estate*, 9 Watts & S. 189, 42 Am. Dec. 326 (1844); *Drexel's Appeal*, 6 Pa. St. 272 (1847); *Lewis* v. *Rogers*, 16 Pa. 18 (1851); *Swihart* v. *Shawm*, 24 Ohio St. 432 (1873); *Miners' Trust Co.* v. *Roseberry*, 81 Pa. St. 309 (1876); *Second Nat. Bank's Appeal*, 85 Pa. St. 528 (1877); *McAlpine* v. *Sweetser*, 76 Ind. 78 (1881); *Zug* v. *Searight*, 150 Pa. St. 506, 24 Atl. 746 (1892); *Safe Deposit &c. Co.* v. *Wright*, 105 Fed. 155, 44 C. C. A. 421 (1900); *Stewart Lumber Co.* v. *Downs*, 142 Iowa 420 (1909); *Blau* v. *Bernagozzi*, 54 Pa. Super. Ct. 111 (1913).

if they would not give up their keys, he would break open the locks; and accordingly got a constable, to whom he produced his writ of assistance, and broke open the locks of the chambers, closets and drawers; and took away twenty pints of Geneva in one case bottle, and ten pints with rue steeped therein in another case bottle, which was brought that morning at five o'clock from on board the plaintiff's vessel (which was just arrived from Flushing where she had sold a cargo of fish), and was part of the ship's stores. The defendants gave in evidence a copy of the record of condemnation of the same Geneva in the Court of Exchequer, Michaelmas Term, 1773: And that the said Geneva, when seised, was immediately lodged in the King's storehouse.[10]

BLACKSTONE, J.: The only possible ground that the plaintiff can rely on in the present case, which is unaccompanied with misbehavior, or any unwarrantable violence, is, that the goods were not in truth liable to be seised by the laws of the customs; although, by the plaintiff's default, they have been condemned in the Exchequer. But I take this condemnation to be conclusive evidence to all the world, that the goods were liable to be seised; and that therefore this action will not lie.[11]

1. Because of the implicit credit which the law gives to any judgment in a court of record, having competent jurisdiction of the subject-matter. The jurisdiction in this case of the Court of Exchequer is not only competent, but sole and exclusive. And though it be said, that no notice is given to the owner in person, and that therefore he is not bound by the condemnation, not being a party to the suit;—yet the seisure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seised by a revenue officer. He knew they were carried to the King's warehouse. He knew, or might have known, that by the course of law, the validity of that seisure would come on to be examined in the Court of Exchequer, and could be examined nowhere else. He had notice by the two proclamations according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where

---

[10] Part of the statement of facts and opinion of the court are omitted.

[11] "Judgments or decrees as to the status of the *res*, in proceedings strictly *in rem*, are conclusive against all the world as to that status; while such judgments as to the rights of parties, whatever may be the point adjudicated, not being as to status, are only conclusive between parties and privies to suit." Per Mayfield, J., in *McCann* v. *Ellis*, 172 Ala. 60, 55 So. 303 (1911); *Makin's Produce Co.* v. *Callison*, 67 Wash. 434, 121 Pac. 837 (1912). While it is generally said that a judgment *in rem* binds all the world perhaps it is more accurate to say that such a judgment is conclusive against all persons having any interest in the thing in controversy in any subsequent proceeding where the grounds of the adjudication, or the fact of its rendition, or its legal consequences are relevant. 2 Black on Judgments (2d ed.), § 795; Freeman on Judgments (4th ed.), § 617; *The Mary*, 9 Cranch 126, 3 L. ed. 678 (1815); *Castrique* v. *Imrie*, L. R. 4 H. L. 414 (1870); *Bailey* v. *Sundberg*, 49 Fed. 583, 1 C. C. A. 387 (1892); *Ballantyne* v. *Mackinnon*, L. R. (1896), 2 Q. B. 455. *Ex parte Kenmore Shoe Co.*, 50 S. Car. 140, 27 S. E. 682 (1897); *Simon's Estate*, 20 Pa. Super. Ct. 450 (1902); *Sorensen* v. *Sorensen*, 68 Neb. 490 (1903). Compare *Durant* v. *Abendorth*, 97 N. Y. 132 (1884).

the goods were detained. And having neglected this opportunity of putting in his claim, and trying the point of forfeiture, it was his own laches, and he shall forever be concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it would be nugatory, to debar him from recovering directly the identical goods that are condemned, if he is allowed to recover obliquely damages equivalent to their value.

2. Because, the property of the goods being changed, and irrevocably vested in the Crown by the judgment of condemnation (as is clear beyond any dispute and conceded on the part of the plaintiff) it follows as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seisure. The spirituous liquors that were seised were therefore, at the time of the seisure, the goods and chattels of his Majesty, and not of the plaintiff, as in his declaration he has (necessarily) declared them to be; since neither trespass nor trover will lie for taking of goods, unless at the time of the taking, the property was in the plaintiff.

This reasoning is supported by authorities expressly in point. In Gilbert's Treatise of the Exchequer, ch. 13, it is clearly shown, in what manner these informations *in rem*, which were instituted in order to give the Crown possession of its ancient prerogative revenues of wrecks, deodands, estrays and the like, by degrees came afterward to be applied to the forfeitures enacted by the statute law, for offenses against the laws of the customs and excise. And it is expressly laid down, page 186, that "the very seising of the goods is notice to the claimer, and an undertaking to proceed to condemnation according to the rules of the court."

The retrospect or relation backward in these informations was the same as in the inquests of office. And there is in Keilw. 68, b. in the King's Bench, 21 H. 7, a remarkable case of retrospect in the case of a deodand. The king's officer had seised the instrument of death immediately after the accident; but no inquisition was had till a year afterward, when the goods were found to be a deodand. Upon trespass brought against the officer for seising the goods, the court held, that the inquisition related back to the death, that the seisure therefore was lawful, and no action of trespass would lie.

The case also of fugitive's goods is a strong instance to show how conclusive the law esteems the judgment of forfeiture to be, when pronounced by a legal and competent tribunal. If the coroner's inquest finds a man guilty of homicide, and that he fled for it; though he may traverse the crime, and be acquitted of the felony, yet he can not traverse the flight, by which his goods are forfeited to the king. 8 Ed. 4. 4.; 1 Hal. P. C. 416; 2 Hal. P. C. 64. And therefore, though the petty jury expressly acquit him of both the felony and the flight, their verdict as to the flight shall be void; for they ought not to inquire of the flight, after it has been once found, and the forfeiture vested in the Crown by the coroner's inquest. Fitz. Abr. Forfeiture 35, Staundf. P. C. 183, and Prerog.

46; Dyer 238 b.; 2 Hal. P. C. 301. The reason given in some of the books why this inquest is not traversable, like other inquests of office, is because of the notoriety of the coroner's inquest *super visum corporis,* at which the inhabitants of all the neighboring vills are bound to attend; and so the finding of the flight is but in effect recording the absence of the party. There is surely as much notoriety of the information in the Exchequer against uncustomed goods; and the absence or default of the party shall be equally conclusive against him.

But the legal decision of this question does not rest on theory or analogy only. It hath been determined over and over in the very point. *Vanderburg* v. *Blake,* Tr. 13 Car. 2. In the Exchequer, Hardr. 194, it was held the seisure and proclamation are sufficient notice to the owner; and that neither trover, nor action for malicious information, nor other action which may blow off the judgment by a sidewind, will lie after a condemnation in the Exchequer. *Elkins* v. *Smith,* M. 31 Car. 2. In the Exchequer, Raym. 335, and cited *per cur.* Carth. 327. After condemnation the property is altered, so as neither trespass, nor trover will lie for the proprietor against the person that seiseth them. *Martin* v. *Wilsford,* T. 6 W. & M. In the Exchequer, Carth. 323. After judgment upon an information of seisure, the property is altered thereby, so as neither trover nor trespass will lie for him who was the owner, and it is not reasonable that a judgment should be subverted by a collateral action. And in *Robinson qui tam.* v. *Verfelt et al.,* Tr. 2 Geo. 2, in the Exchequer (according to a note of Sir Thomas Parker, late C. B.) Pengelly, C. B., held, that if a stranger claims property on the information and on the trial a forfeiture is found, by the condemnation the property is altered against the right owner, though he be not the claimer on record. The general doctrine has been recognized in the King's Bench in 1705, in the case of *Stafford* v. *Stevens,* and in 1731, in that of *Butley* v. *Walter,* according to notes furnished by the custom house books, and in a variety of *nisi prius* cases from the same quarter; to which may be added two instances from Viner, tit. Evidence, p. 95, where the same point was ruled by Price, B., in 1716, and King, Chief Justice, in 1719.

Judgment for the defendants.[12]

De Grey, C. J., Gould, J., and Nares, J., concurred.

---

[12]Accord: *Cooke* v. *Sholl,* 5 T. R. 255 (1793); *King* v. *Matthews,* 5 Price 202 (1797); *Buchannan* v. *Biggs,* 2 Yeates (Pa.) 232 (1797); *Hart* v. *McNamara,* 4 Price, 154n (1817); *Gelston* v. *Hoyt,* 3 Wheat. (U. S.) 246, 4 L. ed. 381 (1818), affg. 13 Johns. 561; *Whitney* v. *Walsh,* 55 Mass. 29, 48 Am. Dec. 590 (1848); *Averill* v. *Smith,* 84 U. S. 82, 21 L. ed. 613 (1872); *Windsor* v. *McVeigh,* 93 U. S. 274, 23 L. ed. 914 (1876); *McGuire* v. *Winslow,* 26 Fed. 304 (1886); *In re Gottesfeld,* 245 Pa. 314, 91 Atl. 494 (1914).

"A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state or condition, of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be." Per Hall, J., in *Woodruff* v. *Taylor,* 20 Vt. 65 (1847). "If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body,

FREEMAN *v.* ALDERSON

SUPREME COURT OF THE UNITED STATES, 1886

119 *U. S.* 185

The following was the case as stated by the court.

This was an action of trespass to try the title to certain land in Texas brought in the United States Circuit Court.

The plaintiffs in error, defendants below, claimed the land under a deed to their grantor, executed by the sheriff of McLennan County, in that state, upon a sale under an execution issued on a judgment in a state court for costs, rendered against one Henry Alderson, then owner of the property, but now deceased.

The defendants in error, plaintiffs below, asserted title to the land as heirs of Alderson, contending that the judgment, under which the alleged sale was made was void, because it was rendered

---

or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to or possession of a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*." Per Holmes, C. J., in *Tyler* v. *Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433 (1900). See also *Mankin* v. *Chandler*, 2 Brock. 125, Fed. Cas. No. 9030 (1823); *Hamner* v. *Griffith*, 1 Gr. Cas. (Pa.) 193 (1854); *Lord* v. *Chadbourne*, 42 Maine 429, 66 Am. Dec. 290 (1856); *McClurg* v. *Terry*, 21 N. J. Eq. 225 (1870); *State* v. *Central Pacific R. Co.*, 10 Nev. 47 (1875), p. 80; *Martin* v. *King*, 72 Ala. 354 (1882); *Cross* v. *Armstrong*, 44 Ohio St. 613, 10 N. E. 160 (1887); *Holly River C. Co.*, v. *Howell*, 36 W. Va. 489, 15 S. E. 214 (1892); *Francis Times & Co.* v. *Carr*, 82 L. T. 698 (1900).

To formulate a test, the application of which, in every instance, will determine whether a particular judgment is *in rem* is difficult, because the nature and purpose of the proceeding and scope of the remedy are determining factors in the instances in which adjudications are binding upon all, and they rest on ancient practice or positive legislation rather than on logical analysis. The following are examples: Condemnations or forfeitures for breach of the excise or revenue laws, cases cited in principal case and *supra;* decrees in admiralty, *Transportation Co.* v. *Fitzhugh*, 1 Black (U. S.) 574 (1861); *The Cella*, L. R. 13 P. D. 82 (1888); *Ballantyne* v. *Mackinnon*, L. R. (1896), 2 Q. B. 455; *Minna Craig S. Co.* v. *Chartered M. Bank*, L. R. (1897), 1 Q. B. 460; decrees of prize courts, *Hughes* v. *Cornelius*, 2 Shower, 232 (1682); *Penhallow* v. *Doane*, 3 Dall. 54 (1795); *Geyer* v. *Aguilar*, 7 T. R. 681 (1778); *Wheelwright* v. *Depeyster*, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345 (1806); judgments establishing highways, *Millcreek Tp.* v. *Reed*, 29 Pa. St. 195 (1857); *Wakefield* v. *Cooke*, L. R. (1904), A. C. 31; orders of naturalization, *McCarthy* v. *Marsh*, 5 N. Y. 263 (1851); *Commonwealth* v. *Simpson*, 7 Phila. (Pa.) 84 (1868); *State* v. *Hoeflinger*, 35 Wis. 393 (1874); decrees adjudging a debtor a bankrupt, *Shawhan* v. *Wherritt*, 48 U. S. 627 (1849); *Michaels* v. *Post*, 88 U. S. 398, 22 L. ed. 520 (1874), p. 428; *Mount* v. *Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726 (1886); *Brown* v. *Smart*, 69 Md. 320, 14 Atl. 468, 17 Atl. 1101 (1888); orders establishing the status and settlement of a pauper, *West Buffalo* v. *Walker Tp.*, 8 Pa. 177 (1848); *Jennison* v. *West Springfield*, 79 (Mass.) 544 (1859); *Uxbridge Union* v. *Winchester Union*, 91 L. T. 533 (1904); a sentence of expulsion from college, *Rex* v. *Grundon*, 1 Cowp. 315 (1775).

against him without personal service of citation, or his appearance in the action.

The material facts of the case, as disclosed by the record, are briefly these: On the 16th of July, 1855, a tract of land comprising one-third of a league was patented by Texas to Alderson, who had been a soldier in its army. One undivided half of this tract was claimed by D. C. Freeman and G. R. Freeman, and they brought an action against him for their interest. The pleadings in that action are not set forth in the transcript, but from the record of the judgment therein, which was produced, we are informed that the defendant was a nonresident of the state, and that the citation to him was made by publication. There was no personal service upon him, nor did he appear in the action. The judgment, which was rendered on the 1st of October, 1858, was of a threefold character. It first adjudged that the plaintiffs recover one undivided half of the described tract. It then appointed commissioners to partition and divide the tract, and set apart, by metes and bounds, one-half thereof, according to quantity and quality, to the plaintiffs; and to make their report at the following term of the court. And finally, it ordered that the plaintiffs have judgment against the defendant for all costs in the case, but stayed execution until the report of the commissioners should be returned and adopted and a final decree entered.

At the following term, the commissioners made a report showing that they had divided the tract into two equal parcels. The report was confirmed, and on the 31st of March, 1859, the court adjudged that the title to one of these parcels was divested from Alderson and vested in the plaintiffs, the two Freemans, and that they recover all costs in that behalf against him, which were $61.45, and that execution issue therefor. Execution therefor was issued to the sheriff of McLennan County on the 30th of May, directing him to make the amount out of "the goods, chattels, lands and tenements" of the defendant. It was levied on the other half of the divided tract, which remained the defendant's property. On the 5th of July, 1859, this half was sold by the sheriff to one James E. Head for $66.79, being the costs mentioned and his fees for the levy and for his deed, which was executed to the purchaser. In September following, Head conveyed the premises to D. C. Freeman, for the alleged consideration of $178. On the trial, the defendants, to show title out of the plaintiffs, offered in evidence the judgment for the costs, the execution issued thereon, and the sheriff's deed; to the introduction of which the plaintiffs objected, on the ground that the judgment for costs was a judgment *in personam*, and not *in rem*, and was ordered against the defendant, who was a nonresident of the state, without his appearance in the action or personal service of citation upon him, but upon a citation by publication only, and therefore constituted no basis of title in the purchaser under the execution.

The court sustained the objection and excluded the documents from the jury; and the defendants excepted to the ruling. No

other evidence of title being produced by the defendants, a verdict was found for the plaintiffs, and judgment in their favor was entered thereon; to review which the case is brought to this court on a writ of error.

FIELD, J.: Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.

There is, however, a large class of cases which are not strictly action *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.[13]

The state has jurisdiction over property within its limits owned by nonresidents, and may, therefore, subject it to the payment of demands against them of its own citizens.[14] It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the nonresident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the nonresident possesses no property in the state, there is nothing upon which its tribunals can act. *Pennoyer* v. *Neff*, 95 U. S. 714. They can not determine the validity of any demand beyond that which is satisfied by the property. For any further adjudication, the defendant must be personally served with citation or voluntarily appear in the action. The laws of the state have no operation out-

[13] "It is better to distinguish between proceedings *in rem* and proceedings *quasi in rem*. The latter are assimilated to the former in some particulars,—as in respect to the manner of acquiring jurisdiction,—but are not always attended by the same consequences—in respect, for example, to the persons bound by the adjudication." 2 Black Judgments (2d ed.), § 793.

[14] *Clark* v. *Smith*, 13 Pet. 195, 10 L. ed. 123 (1839); *Parker* v. *Overman*, 18 How. (U. S.) 137, 15 L. ed. 318 (1855); *United States* v. *Fox*, 94 U. S. 315, 24 L. ed. 192 (1876); *Huling* v. *Kaw Valley R. &c. Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045 (1889); *Olmsted* v. *Olmsted*, 216 U. S. 386 (1909).

side of its territory, except so far as may be allowed by comity; its tribunals can not send their citation beyond its limits and require parties there domiciled to respond to proceedings against them; and publication of citation within the state can not create any greater obligation upon them to appear. So, necessarily, such tribunals can have no jurisdiction to pass upon the obligation of nonresidents, except to the extent and for the purpose mentioned.[15]

This doctrine is clearly stated in *Cooper* v. *Reynolds*, 10 Wall. 308, where it became necessary to declare the effect of a personal action against an absent party without the jurisdiction of the court, and not served with process or voluntarily appearing in the action, and whose property was attached, and sought to be subjected to the payment of the demand of the resident plaintiff. After stating the general purpose of the action, and the inability to serve process upon the defendant, and the provision of law for attaching his property in such cases, the court, speaking by Mr. Justice Miller, said: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, can not proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

To this statement of the law it may be added, what, indeed, is a conclusion from the doctrine, that whilst the costs of an action may properly be satisfied out of the property attached, or otherwise

---

[15] *Kilburn* v. *Woodworth*, 5 Johns. (N. Y.) 37, 4 Am. Dec. 321 (1809); *Borden* v. *Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225 (1818); *Ewer* v. *Coffin*, 55 Mass. 23, 48 Am. Dec. 587 (1848); *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165, 13 L. ed. 648 (1850); *Bischoff* v. *Wethered*, 9 Wall. (U. S.) 812, 19 L. ed. 829 (1869); *Thompson* v. *Whitman*, 85 U. S. 457, 21 L. ed. 897 (1873); *Hewitson* v. *Fabre*, L. R. 21 Q. B. Div. 6 (1888); *Wetmore* v. *Karrick*, 205 U. S. 141, 51 L. ed. 745 (1906); *Brown* v. *Fletcher's Estate*, 210 U. S. 82, 52 L. ed. 966 (1907).

brought under the control of the court, no personal liability for them can be created against the absent or nonresident defendant; the power of the court being limited, as we have already said, to the disposition of the property, which is alone within its jurisdiction.

The pleadings in the case in which judgment was rendered for costs against Alderson are not before us. We have only the formal judgment, from which it should seem that the action was to recover an undivided interest in the property, and then to obtain a partition of it, and have that interest set apart in severalty to the plaintiffs—a sort of mixed action to try the title of the plaintiffs to the undivided half of the property, and to obtain a partition of that half. Such action, though dealing entirely with realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property. The service of citation by publication may suffice for the exercise of the jurisdiction of the court over the property so far as to try the right to its possession, and to decree its partition; but it could not authorize the creation of any personal demand against the defendant, even for costs, which could be satisfied out of his other property.

The judgment is for all the costs in the case, and no order is made that they shall be satisfied out of the property partitioned. Had satisfaction been thus ordered, no execution would have been necessary. The execution, also, is general in its direction, commanding the sheriff to make the costs out of any property of the defendant.

The judgment, as far as the costs are concerned, must, therefore, be treated as a judgment *in personam*, and, for the reason stated, it was without any binding obligation upon the defendant; and the execution issued upon it did not authorize the sale made, and, of course, not the deed of the sheriff. Were the conclusion otherwise, it would follow, as indeed it is claimed here, that a joint owner of real property might sue a nonresident cotenant for partition, and, having had his own interest set apart to himself, proceed to sell out on execution the interest of his cotenants for all the costs.

The judgment of the court below must be affirmed.[16]

---

[16] "Proceedings in partition or to quiet title are not strictly proceedings *in rem*, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings *in rem sub modo*, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction and constructive service may be substituted." Per Fuller, C. J., in *Meyer* v. *Kuhn*, 65 Fed. 705, 13 C. C. A. 298 (1895). Accord: *Pillsbury* v. *Dungan*, 9 Ohio, 118 (1839); *Dillon* v. *Heller*, 39 Kans. 599, 18 Pac. 693 (1888); *Arndt* v. *Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918 (1889); *Allred* v. *Smith*, 135 N. Car. 443, 47 S. E. 597, 65 L. R. A. 924 (1904).

Proceedings regarded as *quasi in rem* include: Actions commenced by attachment of property, *Childs* v. *Digby*, 24 Pa. 23 (1854); *Gleason* v. *Wilson*, 48 Kans. 500, 29 Pac. 698 (1892); *Soulard* v. *Vacuum Oil Co.*, 109 Ala. 387,

(c) Probate and Administration

JONE NOELL *v.* WELLS

COURT OF KING'S BENCH, 1668

1 *Levinz* 235[17]

Debt by the plaintiff as executrix to her husband—the defendant pleads *never executrix*—and on a trial the plaintiff produced the probate of the will in evidence—the defendant said, that the will was not true, but a forged will. And the chief justice, before whom it was tried, was of opinion, that he could not give such evidence directly contrary to the seal of the Ordinary in a matter within his jurisdiction, whereupon a case was made for the opinion of the court, and a verdict taken for the plaintiff, but judgment to be staid if the court should be of opinion, that such evidence might be given; and upon motion the whole court held, that it could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia*, for those confess and avoid the seal. But he can not give in evidence that another was executor; or that the testator was *non compos mentis*,[18] for those falsify the proceedings of the Ordinary in cases of which he is judge. But those are to be remedied by appeal.[19]

---

19 So. 414 (1895); *Oil Well Supply Co.* v. *Koen*, 64 Ohio St. 422, 60 N. E. 603 (1901); *Glenny* v. *Boyd*, 26 Pa. Super. Ct. 380 (1904); inquisitions of lunacy, *Den* v. *Clark*, 10 N. J. L. 217, 18 Am. Dec. 417 (1828); *Rogers* v. *Walker*, 6 Pa. St. 371, 47 Am. Dec. 470 (1847); *Van Deusen* v. *Sweet*, 51 N. Y. 378 (1873); *Hughes* v. *Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Ann. St. 386 (1889); foreclosure of liens, *White* v. *Williams*, 3 N. J. Eq. 376 (1836); *Delaney* v. *Gault*, 30 Pa. St. 63 (1858); *Williams* v. *Ives*, 49 Ill. 512 (1869); *Lehman* v. *Hinton*, 44 W. Va. 1, 29 S. E. 984 (1897); *Smith* v. *Moore*, 112 Iowa 60, 83 N. W. 813 (1900). As to divorce compare *Bater* v. *Bater*, L. R. (1906) P. D. 209, with *Haddock* v. *Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867 (1905); as to marriage, *Meadows* v. *Kingston*, Amb. 756 (1775); *Duchess of Kingston Case*, 20 How. St. Tr. 355 (1776).

[17] S. C. 1 Sid. 359, where the action is reported as trover and conversion.

[18] Accord: *Commonwealth* v. *Mateer*, 16 Serg. & R. (Pa.) 416 (1827); *Colton* v. *Ross*, 2 Paige, Ch. (N. Y.) 396, 22 Am. Dec. 648 (1831); *Vermont Baptist State Convention* v. *Ladd*, 59 Vt. 5, 9 Atl. 1 (1886); *Clapp* v. *Vatcher*, 9 Cal. App. 462, 99 Pac. 549 (1908), at least as to those entitled to be heard in the probate proceedings, *Sly* v. *Hunt*, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680 (1892); distinguishing *Brigham* v. *Fayerweather*, 140 Mass. 411, 5 N. E. 265 (1886), where on bill to set aside A's deed to a stranger, the probate of A's will was held inadmissible as evidence of A's sanity. See also *Brown* v. *Brown*, 209 Mass. 388, 95 N. E. 796 (1911). As to refusal of probate, compare *Arnold* v. *Arnold*, (Ky.) 16 S. W. 585 (1891); *In re Goldsticker*, 192 N. Y. 35, 84 N. E. 581 (1908), with *McCay* v. *Clayton*, 119 Pa. St. 133, 12 Atl. 860 (1888).

Where no appeal has been taken from the probate of a will within the time required by law, a gift thereunder can not be impeached on the ground that testator was not of age when he executed the will. *Stout* v. *Young*, 217 Pa. 427, 66 Atl. 659 (1907).

[19] Accord: *Plume* v. *Beale*, 1 Peere, Wm. 388, 2 Eq. Ca. Abr. 421 (1717); *Kerrick* v. *Bransby*, 7 Bro. P. C. 358 (1727); *Allen* v. *Dundas*, 3 T. R. 125

(1789); *Jones* v. *Jones*, 7 Price 663 (1819); *Moore* v. *Tanner*, 5 T. B. Mon. (Ky.) 42 (1827); *Fry* v. *Taylor*, 1 Head (Tenn.) 594 (1858). On indictment for forging a will, compare *Rex* v. *Vincent*, 1 Str. 481 (1722), with *Rex* v. *Buttery*, R. & R. 341 (1819). It is generally held that the probate of a will can not be impeached collaterally for fraud, *Archer* v. *Mosse*, 2 Vern. 8 (1686); *Allen* v. *McPherson*, 1 H. L. Ca. 191 (1845); *Bowen* v. *Allen*, 113 Ill. 53, 55 Am. Rep. 398 (1885); *McCambridge* v. *Walraven*, 88 Md. 379, 41 Atl. 928 (1898); *Vincent* v. *Vincent*, 70 N. J. Eq. 272, 62 Atl. 700 (1905); *Del Campo* v. *Camarillo*, 154 Cal. 647, 98 Pac. 1049 (1908). But *semble* contra: *Orphans' Court* v. *Groff*, 14 Serg. & R. (Pa.) 181 (1826); *Tebbets* v. *Tilton*, 24 N. H. 120 (1851); *Well's Estate*, 7 Pa. C. C. 354 (1889); *Covington* v. *Chamberlin*, 156 Mo. 574, 57 S. W. 728 (1900), and see *Phelps* v. *Benson*, 161 Pa. St. 418, 29 Atl. 86 (1894).

The judgment or decree of a court of probate, acting within the scope of its peculiar and limited jurisdiction, is conclusive upon parties and privies, and, in so far as it is *in rem* upon all persons, until reversed or set aside. *Blackham's Case*, 1 Salk. 290 (1708); *Dublin* v. *Chadbourn*, 16 Mass. 433 (1820); *McPherson* v. *Cunliff*, 11 Serg. & R. (Pa.) 422 (1824); *Roach* v. *Martin*, 1 Harr. (Del.) 548 (1835); *Cecil* v. *Cecil*, 19 Md. 72, 81 Am. Dec. 626 (1862); *Caujolle* v. *Ferrie*, 13 Wall. (U. S.) 465, 20 L. ed. 507 (1871); *Willet's Appeal*, 50 Conn. 330 (1882); *Liginger* v. *Field*, 78 Wis. 369, 47 N. W. 613 (1890); *Commonwealth* v. *McDonald*, 170 Pa. St. 221, 32 Atl. 410 (1895); *King* v. *Ross*, 21 R. I. 413, 45 Atl. 146 (1899); *May* v. *Boyd*, 97 Maine 398, 54 Atl. 938, 94 Am. St. 509 (1903); *Burgess* v. *Stribling*, 134 Mich 33, 95 N. W. 1001 (1903). So, a decree of probate is conclusive as to the formal validity of a will. *Potter* v. *Webb*, 2 Maine 257 (1823); *Poplin* v. *Hawke*, 8 N. H. 124 (1835); *Carpenter* v. *Cameron*, 7 Watts (Pa.) 51 (1838); *Woodruff* v. *Taylor*, 20 Vt. 65 (1847); *Vanderpoel* v. *Van Valkenburg*, 6 N. Y. 190 (1852); *Greenwood* v. *Murray*, 26 Minn. 259, 2 N. W. 945 (1879); *Loring* v. *Arnold*, 15 R. I. 428, 8 Atl. 335 (1887); *Wohlgemuth's Will*, 110 App. Div. 644, 97 N. Y. S. 367 (1906); *In re Hasselbrook*, 128 App. Div. (N. Y.) 874 (1908).

At common law, the probate of a will was not conclusive as to real estate, as to which the ecclesiastical courts had no jurisdiction. *Montgomery* v. *Clark*, 2 Atk. 378 (1745); *Doe* v. *Calvert*, 2 Campb. 387 (1810); *Tompkins* v. *Tompkins*, 1 Story C. Ct. 547 (1841); *Den* v. *Ayres*, 13 N. J. L. 153 (1832); *Perry* v. *Sweeny*, 11 App. D. C. 404 (1897). But in many jurisdictions, by statute, probate is conclusive as to real estate, unless contested within the time allowed by law. *Judson* v. *Lake*, 3 Day (Conn.) 318 (1809); *Parker* v. *Parker*, 65 Mass. 519 (1853); *Folmar's Appeal*, 68 Pa. St. 482 (1871); *Norvell* v. *Lesseur*, 33 Grat. (Va.) 222 (1880); *Cochran* v. *Young*, 104 Pa. St. 333 (1883); *Wettach* v. *Horn*, 201 Pa. 201, 50 Atl. 1001 (1902), see act of June 25, 1895, P. L. 305; *Newby* v. *Blakely*, 90 Atl. (N. J.) 318 (1913). Or, at least, *prima facie* evidence of title. *Allaire* v. *Allaire*, 37 N. J. L. 312 (1875), see Act of 1898, § 20, N. J. Comp. Stat. (1910), vol. 3, p. 3819; *Thomas* v. *Williamson*, 51 Fla. 332, 40 So. 831 (1906); New York Code Civil Procedure, §§ 2625, 2653a; *Lewis* v. *Cook*, 150 N. Y. 163, 44 N. E. 778 (1896); *Henriques* v. *Yale University*, 28 App. Div. 354, 51 N. Y. S. 284 (1898); *In re Clyne*, 72 Misc. 593, 131 N. Y. S. 1090 (1911); *Beardsley* v. *Beardsley*, L. R. 1 Q. B. 746 (1899). As to foreign wills, see *Opp* v. *Chess*, 204 Pa. 401, 54 Atl. 354 (1903); *Dibble* v. *Winter*, 247 Ill. 243, 93 N. E. 145 (1910).

The question whether an appointment by will is revoked by the marriage of the donee of the power, does not involve the validity of the will, and is not affected by the terms of the decree admitting the will to probate. *Paine* v. *Price*, 184 Mass. 350 (1903). See also *Washbon* v. *Cope*, 144 N. Y. 287, 39 N. E. 388 (1895).

THOMAS *v.* PEOPLE

SUPREME COURT OF ILLINOIS, 1883

107 *Ill.* 517

An action was brought in the name of the state to the use of John Joiner against Charles W. Thomas on his official bond as master in chancery. It appeared that Joiner had left his home and not having been heard from for more than seven years, his brother applied to the county court for administration on his estate, which was granted. Thomas then upon the demand of the administrator paid over the proceeds of a sale in partition of real estate belonging to Joiner. Joiner subsequently turned up alive and sued Thomas to recover this fund and recovered judgment, from which Thomas appealed. One of the contentions of Thomas was, that the decision of the court granting administration could not be collaterally attacked.[20]

MULKEY, J.: It must be conceded that if the probate court had authority to act at all in the particular case before it, then its adjudication, like that of any other court, became binding and conclusive upon all parties to the proceeding, until reversed or otherwise set aside. The real question therefore is, whether the court had any authority to act at all. The contention of appellant is, "that the jurisdiction of the probate court did not depend upon the death of Joiner, but upon the fact that that court was set in motion by the application for an administrator, and having been so set in motion, its jurisdiction to investigate and decide was complete, and its decision can not be collaterally attacked as to anything the court was called upon to decide." This proposition, in the light of the facts as confessed upon the record before us, we regard as fundamentally erroneous. Jurisdiction, in the general and most appropriate sense of that term, as applied to the subject-matter of a suit at law or in equity, is always conferred by law, and it is a fatal error to suppose the power to decide in any case rests solely upon the averments in a pleading. It is true that a court is not permitted, on its own motion, to institute a suit between the parties to a controversy. As claimed by appellant, there must be a properly framed complaint or other pleading showing a cause of action within the jurisdiction of the court, before it can lawfully proceed to adjudicate. But behind all this there must be power in the court, conferred by law, to act in a real case of the character of the one supposed by the pleading or complaint, and if there is not, the whole proceedings, and all acts done under it, will be inoperative and void.

The position of appellant is well met by the case of *Griffith* v. *Frazier*, 8 Cranch, 23, where the question in hand came under consideration. Chief Justice Marshall, speaking for the court, said in that case: "To give the Ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of

[20] The facts are abridged and the arguments and part of the opinion of the court omitted.

administration must be granted to some person by the Ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead? The act, all will admit, is totally void. Yet the Ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the Ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate,—it was not one committed to him by the law; and although one of the points occurs in all cases proper for his tribunal, yet that point can not bring the subject within his jurisdiction."

The general proposition that under our system of government no one can be deprived of his life, liberty or property without due process of law, is not denied or questioned, and as John Joiner was in no sense a party to the proceeding before the probate court when letters on his estate were granted, on what principle can he be said to be bound by the action of the court in making the grant? The general rule unquestionably is, that no one is bound by an adjudication of which he had no notice or to which he was not a party. Testing the present case by this rule, appellee is not clearly bound.[21]

Judgment affirmed.

[21]Accord: *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896 (1893); *Cunnius* v. *Reading School Dist.*, 198 U. S. 458, 49 L. ed. 1125 (1904), affirming 206 Pa. 469 (1903) and *Blinn* v. *Nelson*, 222 U. S. 1 (1911), affirming 197 Mass. 279 are distinguishable upon the terms of the state statutes. Generally, the action of a court of probate in granting administration can not be attacked in another court in a collateral proceeding. *Ormsbee* v. *Piper*, 123 Mich. 265, 82 N. W. 36 (1900); *McCooey* v. *N. Y., &c., R. Co.*, 182 Mass. 205, 65 N. E. 62 (1902); *Ziegler* v. *Storey*, 220 Pa. 471, 69 Atl. 894 (1908); *Connors* v. *Cunard S. Co.*, 204 Mass. 310, 90 N. E. 601 (1910); *Baccelli* v. *Del. & H. Co.*, 138 N. Y. App. Div. 623, 122 N. Y. S. 849 (1910). But the granting of letters of administration is, at the best, no more than *prima facie* evidence of the death of the intestate. And, if he is not in fact dead, the probate court is without jurisdiction and the letters are invalid. *Allen* v. *Dundas*, 3 T. R. 125 (1789); *Thompson* v. *Donaldson*, 3 Esp. 63 (1800); *Clayton* v. *Gresham*, 10 Ves. Jr. 287 (1804); *Moons* v. *De Bernales*, 1 Russ. 301 (1826); *Newman* v. *Jenkins*, 27 Mass. 515 (1830); *French* v. *Frasier*, 7 J. J. Mar. (Ky.) 425 (1832); *Duncan* v. *Stewart*, 25 Ala. 408, 60 Am. Dec. 527 (1854); *English* v. *Murray*, 13 Tex. 366 (1855); *Morgan* v. *Dodge*, 44 N. H. 255, 82 Am. Dec. 213 (1862); *Jochumsen* v. *Bank*, 85 Mass. 87 (1861); *Tisdale* v. *Connecticut M. L. Co.*, 26 Iowa 170 (1868); *Cunningham* v. *Smith*, 70 Pa. 450 (1872); *Mutual L. Co.* v. *Tisdale*, 91 U. S. 238, 23 L. ed. 314 (1875); *Lancaster* v. *Washington L. Ins. Co.*, 62 Mo. 121 (1876); *Epping* v. *Robinson*, 21 Fla. 36 (1884); *Melia* v. *Simmons*, 45 Wis. 334, 30 Am. Rep. 746 (1878).

Roderigas v. *East River Savings Inst.*, 63 N. Y. 460, 20 Am. Rep. 555 (1875), *contra*, approved in *Plume* v. *Howard Savings Inst.*, 46 N. J. L. 211 (1884) is overruled. *Matter of Killan*, 172 N. Y. 547 (1902); *Marks* v. *Emigrant I. S. Bank*, 122 App. Div. (N. Y.) 661, 107 N. Y. S. 491 (1907); *Williams* v. *Post*, 158 App. Div. (N. Y.) 818, 143 N. Y. S. 1027 (1913).

HEFNER *v.* ALBRIGHT

SUPREME COURT OF PENNSYLVANIA, 1911

231 *Pa.* 396.

Scire facias to revive lien of judgment. The court directed a verdict for the plaintiff. Defendant appealed.

PER CURIAM: This was a *scire facias* to revive and continue the lien of a judgment entered in the common pleas, upon the filing of a certified transcript from the orphans' court, showing a balance due by executors to the widow of the decedent. At the trial, offers of testimony were made, to show that before the adjudication of the orphans' court one of the executors had sold the widow six houses under a verbal agreement with her that he, and his coexecutor "were to take of such moneys as might come into their hands" as executors, the amount of the purchase price of the houses that was unpaid. The purpose of the offer, as stated by counsel, was to prove that long prior to the adjudication, the amount the widow was found to be entitled to, had by the agreement mentioned, been paid her, and that nothing was then due her by the executors. The assignments of error relate to the overruling of these offers and the direction of a verdict for the plaintiff.

In settling the accounts of executors, administrators and guardians the jurisdiction of the orphans' court is exclusive, and in a proceeding on its transcript in the common pleas, no defenses but payment after the adjudication and *nul tiel* record are available. *Bernhardt* v. *Taylor*, 223 Pa. 307.

If the agreement attempted to be set up could, as argued, be considered an equitable assignment of an amount sufficient to pay the balance of the purchase money of the houses, it was, in effect, a payment *pro tanto* by the executor to the widow. The adjudication was conclusive of the amount due by the former to the latter, and that matter could not be inquired into by the common pleas.

The judgment is affirmed.[22]

---

[22]The final settlement of the account of an executor or administrator, after due notice, is generally conclusive upon all matters coming directly before the court. *Sparhawk* v. *Buell*, 9 Vt. 41 (1837); *Sever* v. *Russell*, 58 Mass. 513, 50 Am. Dec. 811 (1849); *Parcher* v. *Bussell*, 65 Mass. 107 (1853); *Shoemaker* v. *Brown*, 10 Kans. 383 (1872); *Bulkley* v. *Andrews*, 39 Conn. 523 (1873); *Jones* v. *Chase*, 55 N. H. 234 (1875); *Hutton* v. *Williams*, 60 Ala. 107 (1877); *Simmons* v. *Goodell*, 63 N. H. 458, 2 Atl. 897 (1885); *Holden* v. *Lathrop*, 65 Mich. 652, 32 N. W. 879 (1887); *Succession of Rabasse*, 50 La. Ann. 746, 23 So. 910 (1898); *Mulcahey* v. *Dow*, 131 Cal. 73, 63 Pac. 158 (1900); *Bonner* v. *Gorman*, 71 Ark. 480, 77 S. W. 602 (1903); *Piper's Estate*, 208 Pa. 636, 57 Atl. 1118 (1904); *Wyckoff* v. *O'Niel*, 71 N. J. Eq. 681, 63 Atl. 982 (1906); *Alexander's Estate*, 214 Pa. 369, 63 Atl. 799 (1906); *Sinnickson* v. *Perkins*, 231 Ill. 492, 83 N. E. 194 (1907); *Webber Hospital Assn.* v. *McKenzie*, 104 Maine 320, 71 Atl. 1032 (1908); *Harris* v. *Harris*, 82 Vt. 199 (1909); *Connor* v. *Gibbons*, 228 Pa. 617, 77 Atl. 1009 (1910); *Goodman* v. *Griffith*, 155 Mo. App. 574, 134 S. W. 1051 (1910); *Doane's Estate*, 64 Wash. 303 (1911). As to New York see Code of Civil Procedure, §§ 2742,

SECTION 7. RES JUDICATA

(a) Merger

WORK *v.* PRALL

SUPERIOR COURT OF PENNSYLVANIA, 1904

26 Superior Court 104.

Appeal by defendant from an order of the court of common pleas of Washington County discharging a rule to open judgment in the case of W. A. Work to use of Crouch Brothers against Lydia M. Prall and H. L. Prall.[23]

HENDERSON, J.: The defendants gave their judgment promissory note to the plaintiff on March 21, 1902. A judgment was entered thereon by virtue of the warrant of attorney which the note contained, on March 22, 1902, and on the 24th of the same month the judgment was assigned to the use plaintiffs. The note was payable in three months from date and no notice of the assignment of the judgment was given to the defendants until about five months after the same became due. The defendants' evidence, taken on the rule to open judgment, was uncontradicted and would warrant a jury in finding that payments had been made by Lydia M. Prall sufficient in amount to discharge the debt before the defendants had notice that the judgment had been assigned. These payments were made to one Richardson, a partner of the plaintiff to whom a note for a similar amount had been given by the defendants for a like consideration.

As between the plaintiff and the defendants the latter showed a sufficient cause to entitle them to have the judgment opened. Unless therefore, the equitable plaintiffs have a better position than the payee of the note, the relief asked for should be granted.

2743; *In re Randall,* 152 N. Y. 508, 46 N. E. 945 (1897); *In re Halsted,* 41 Misc. 606, 85 N. Y. S. 301 (1903); *Chester* v. *Buffalo Car Mfg. Co.,* 183 N. Y. 425, 76 N. E. 480 (1906); *Bower's Estate,* 240 Pa. 388, 87 Atl. 711 (1913). The allowance or rejection of a claim by the probate court is usually held to have the force of a judgment as to immediate parties and their privies. *McKinney v. Davis,* 6 Mo. 501 (1840); *Dooley* v. *Watkins,* 5 Ark. 705 (1843); *Stone* v. *Wood,* 16 Ill. 177 (1854); *Moerchen* v. *Stoll,* 48 Wis. 307, 4 N. W. 352 (1879); *Snelling* v. *Kroger,* 89 Iowa 247, 56 N. W. 446 (1893); *High's Estate,* 136 Pa. St. 222, 20 Atl. 421, 423 (1890); *Lewis* v. *Welch,* 47 Minn. 193, 48 N. W. 608, 49 N. W. 665 (1891); *Wilcox* v. *Gilchrist,* 85 Hun 1, 32 N. Y. S. 608 (1895); *Matter of Clapp,* 30 Misc. 395, 63 N. Y. S. 1096 (1900); *Yocum* v. *Commercial Nat. Bank,* 195 Pa. St. 411, 46 Atl. 94 (1900); *Estate of Richmond,* 9 Cal. App. 413, 99 Pac. 558 (1908); *Matter of Guaranty Trust Co.,* 131 App. Div. 658, 116 N. Y. S. 147 (1909); *Wood* v. *Sharp,* 159 Ky. 46, 166 S. W. 787 (1914). Contra: *State* v. *Bowen,* 45 Miss. 347 (1871); *Levering* v. *Levering,* 64 Md. 399, 20 Atl. 1 (1885); *Havermale* v. *Houck,* 122 Md. 82 (1910).

[23] The arguments of counsel and part of the opinion of the court are omitted.

By the confession of judgment the plaintiffs' cause of action became merged in the judgment. The original claim having served its purpose as evidence upon which a judgment was obtained, expended its force and the warrant of attorney authorizing the judgment was exhausted. Black on Judgments, section 674; *Ries* v. *Rowland*, 11 Fed. 657; *Schuler* v. *Israel*, 27 Fed. 851. The note does not survive as a cause of action. In the very nature of the case the inferior obligation evidenced by the note has been changed into a matter of record and the remedy of the payee is on the judgment. The judgment obtained thereon does not possess the qualities of a negotiable note.

The assignee of a judgment takes the same subject to existing equities between the parties thereto and has no better position than would the judgment creditor have occupied if he had not executed an assignment. *Filbert* v. *Hawk*, 8 Watts, 443; *Noble* v. *Thompson Oil Co.*, 79 Pa. 354; Black on Judgments, section 953. In order to avoid the effect of the payment by the defendant to the plaintiff it was the duty of the assignee to give the former notice of the assignment. "It is impossible to conceive upon what principle of justice a debtor should be prejudiced by an assignment of which he knows nothing. If the party whose interest and duty it is to give him notice so that he can regulate his conduct according to the new relation, fails to do so he should certainly not be compelled to suffer." *Gaullagher* v. *Caldwell*, 22 Pa. 300; *Noble* v. *Thompson Oil Co.*, 79 Pa. 354; *Lee* v. *Delehanty*, 25 Hun 197; *May* v. *Newingham*, 17 Pa. Super. Ct. 469; Black on Judgments, section 950. This rule applies to the assignment of a mortgage. *Foster* v. *Carson*, 159 Pa. 477. The entry of the assignment on the records in the court of common pleas was not notice to the defendants. The judgment docket was not for their benefit and they are not required to examine it. *Henry* v. *Brothers*, 48 Pa. 70; *Horstman* v. *Gerker*, 49 Pa. 282.

Order reversed.[24]

[24] "The general rule is, that by a judgment at law or a decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. By the judgment of the court, it loses all of its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining legal liability is transferred to the judgment or decree. Once becoming merged in the judgment, no further action at law or suit in equity can be maintained on the instrument." *Wayman* v. *Cochrane*, 35 Ill. 152 (1864). "The original contract is drowned in the judgment." *Biddleson* v. *Whitel*, 1 W. Bl. 506 (1764). Accord: *Thatcher* v. *Gammon*, 12 Mass. 268 (1815); *Owens* v. *Bowie*, 2 Md. 457 (1852); *Peters* v. *Sanford*, 1 Den. (N. Y.) 224 (1845); *Pike* v. *McDonald*, 32 Maine 418, 54 Am. Dec. 597 (1851); *Mitchell* v. *Mayo*, 16 Ill. 83 (1854); *Temple* v. *Scott*, 3 Minn 419 (1859); *North* v. *Mudge*, 13 Iowa 496, 81 Am. Dec. 441 (1862); *Barnes* v. *Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210 (1865); *Blystone* v. *Blystone*, 51 Pa. 373 (1865); *Ober* v. *Gallagher*, 93 U. S. 199, 23 L. ed. 829 (1876); *Connecticut M. L. Co.* v. *Jones*, 8 Fed. 303 (1880); *Cooksey* v. *Kansas City R. Co.*, 74 Mo. 477 (1881); *Grant* v. *Burgwyn*, 88 N. Car. 95 (1883); *Brown* v. *West*, 73 Maine 23 (1881); *Davies* v. *New York Mayor, Aldermen and Commonalty* of N. Y., 93 N. Y. 250 (1883); *Brown* v. *Darrah*, 95 Ind. 86 (1883); *Price* v. *Bank*, 62 Kans. 735, 64 Pac. 637 (1901); *Rossiter* v. *Merriman*, 80 Kans. 739, 104 Pac. 858 (1909); *Scherl* v. *Flamm*, 133 App. Div. (N. Y.) 274 (1909); *Rohrbacher* v. *Walsh*, 170 Mich. 59, 135 N. W. 907 (1912); *Harper* v. *Daniels*, 211 Fed. 57 (1914).

PETER MEMMER AND ANOTHER *v.* WILLIAM N. CAREY

SUPREME COURT OF MINNESOTA, 1883

30 *Minn.* 458.

Appeal by defendant from a judgment of the municipal court of St. Paul.

BY THE COURT: There was a running account between plaintiffs and defendant, for butcher's meat sold by the former to latter from time to time, between January 1 and October 6, 1882; the balance remaining unpaid at the latter date being something over $160. On October 19th, plaintiffs recovered judgment in a justice's court for $100 of this balance, having commenced suit therefor on October 11th. There being no evidence in the case at bar having any reasonable tendency to show that the meat was furnished upon any agreement for credit, the price of it was due upon delivery, and hence plaintiffs might have brought suit for the whole balance at the time when they sued for the $100. In the present action plaintiffs seek to recover the remainder of the balance mentioned. But the judgment of the justice is well pleaded in bar as a former recovery upon the same cause of action; for it is a general rule (in the absence of special facts to create an exception) that an indebtedness of his customer to a retail dealer, upon a running account, furnishes one entire cause of action, and if such cause of action is split, and a recovery had upon a part of it, the judgment is a bar to any further recovery thereupon. *Am. Button Hole, etc. Co.* v. *Thornton,* 28 Minn. 418; *Guernsey* v. *Carver,* 8 Wend. 492; *Secor* v. *Sturgis,* 16 N. Y. 548.

Judgment is reversed.[25]

---

[25] "An entire claim, arising either upon a contract or from a wrong, can not be divided and made the subject of several suits; and if several suits be brought for different parts of such claim the pendency of the first may be pleaded in abatement of the others and a judgment upon the merits in either will be available as a bar in the other suits. But it is entire claims only which can not be divided within this rule, those which are single and indivisible in their nature. The rule does not prevent, nor is their any principle which precludes the prosecution of several actions upon several causes of action." Per Strong, J., in *Secor v. Sturgis,* 16 N. Y. 548 (1858). Accord: *Girling* v. *Aldas,* 2 Keb. 617, 1 Vent. 73 (1670); *Johnson* v. *Long,* 1 Ld. Raym. 370 (1697); *Smith* v. *Jones,* 15 Johns. (N. Y.) 229 (1818); *Bates* v. *Quattlebom,* 2 N. & McC. (La.) 205 (1819); *Willard* v. *Sperry,* 16 Johns. (N. Y.) 121 (1819); *Ingraham* v. *Hall,* 11 Serg. & R. (Pa.) 78 (1824); *Hite* v. *Long,* 6 Rand. (Va.) 457, 18 Am. Dec. 719 (1828); *Bagot* v. *Williams,* 3 B. & C. 235 (1824); *Miller* v. *Covert,* 1 Wend. (N. Y.) 487 (1828); *Goodrich* v. *Yale,* 97 Mass. 15 (1867); *McIntosh* v. *Lown,* 49 Barb. (N. Y.) 550 (1867); *Gibbs* v. *Cruikshank,* L. R. 8 C. P. 454 (1873); *Burritt* v. *Belfrey,* 47 Conn. 323, 36 Am. Rep. 79 (1879); *Sykes* v. *Gerber,* 98 Pa. St. 179 (1881); *Law* v. *McDonald,* 62 How. Pr. (N. Y.) 340 (1881); *Buck* v. *Wilson,* 113 Pa. 423, 6 Atl. 97 (1886); *Vanuxem* v. *Burr,* 151 Mass. 386, 24 N. E. 773, 32 Am. St. 458 (1890); *Hill* v. *Joy,* 149 Pa. 243, 24 Atl. 293 (1892); *Willoughby* v. *Atkinson,* 96 Maine 372, 52 Atl. 756 (1902); *Welch* v. *Buchans Soap Corp.,* 56 Misc. 689, 107 N. Y. S. 616 (1907); *Johnson* v. *Herold,* 161 Fed. 593 (1908); *Warren* v. *Sheehan,* 156 Mich. 432, 120 N. W. 810 (1909); *Kennedy* v. *New York City,* 196 N. Y.

BRANNENBURG *v.* INDIANAPOLIS, PITTSBURGH & CLEVELAND RAILROAD CO.

SUPREME COURT OF INDIANA, 1859

13 *Ind.* 103[36]

HANNA, J.: This was an action, commenced before a justice of the peace, for the value of a mare killed by the cars of the company, at a place where the road was not fenced. Answer filed. Trial; and judgment for the plaintiff for one hundred dollars. Defendants appealed to the circuit court, where the plaintiff filed a demurrer to the first paragraph of the answer, which was overruled, and judgment for defendants.

19, 89 N. E. 360 (1909); *Pomeroy* v. *Prescott*, 156 Maine 401 (1910); *Burt* v. *Trust Co.*, 45 Pa. Super. Ct. 320 (1911); *Spier* v. *Locust Laundry*, 56 Pa. Super. Ct. 323 (1914); *Sharp* v. *McBride*, 134 La. 250 (1914). The principle is generally applicable to actions on running accounts. *Phillips* v. *Berick*, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299 (1819); *Avery* v. *Fitch*, 4 Conn. 362 (1822); *Guernsey* v. *Carver*, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60 (1832); *Stevens* v. *Lockwood*, 13 Wend. 644, 28 Am. Dec. 492 (1835); *Bendernagle* v. *Cocks*, 19 Wend. (N. Y.) 207 (1838); *Oliver* v. *Holt*, 11 Ala. 574, 46 Am. Dec. 228 (1847); *Logan* v. *Caffrey*, 30 Pa. 196 (1858); *Lucas* v. *LeCompte*, 42 Ill. 303 (1866); *Hayward* v. *Clark*, 50 Vt. 612 (1878); *Corey* v. *Miller*, 12 R. I. 337 (1879); *Manley* v. *Tufts*, 59 Kans. 660, 54 Pac. 683 (1898); *De Graff* v. *Mayper*, 63 Misc. 568, 118 N. Y. S. 571 (1909). Contra: *Badger* v. *Titcomb*, 32 Mass. 409, 26 Am. Dec. 611 (1834); *King* v. *Sheriff*, 1 B. & Ad. 672 (1831), and see *Pennebaker* v. *Parker*, 33 Pa. Super. Ct. 458 (1907). The rule does not apply to items accruing or becoming due after suit brought. *McLaughlin* v. *Hill*, 6 Vt. 20 (1834); *Sterner* v. *Grover*, 3 W. & S. 136 (1842); *Beck* v. *Devereaux*, 9 Nebr. 109, 2 N. W. 365 (1879); *Jacoby* v. *Peck*, 23 Cal. App. 363 (1913). On breach of contract of employment by wrongful discharge it is generally held that but a single cause of action arises, a recovery in which is a bar to a subsequent suit on the same contract. *Booge* v. *Pacific Railroad*, 33 Mo. 212, 82 Am. Dec. 160 (1862); *Colburn* v. *Woodworth*, 31 Barb. (N. Y.) 381 (1860); *Rosenmueller* v. *Lampe*, 89 Ill. 212 (1878); *Richardson* v. *Eagle M. W.*, 78 Ind. 422, 41 Am. Rep. 584 (1881); *Smith* v. *Gilbert Lock Co.*, 4 N. J. L. 312 (1881); *Keedy* v. *Long*, 71 Md. 385, 395, 18 Atl. 704, 5 L. R. A. 759 (1889); *Lichtenstein* v. *Brooks*, 75 Tex. 196, 12 S. W. 975 (1889); *Kahn* v. *Kahn*, 24 Nebr. 709, 40 N. W. 135 (1888); *Omstead* v. *Bach*, 78 Md. 132 (1893); *James* v. *Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1886); *Monarch Cycle Mfg. Co.* v. *Mueller*, 83 Ill. App. 359 (1898); *Alie* v. *Nadeau*, 93 Maine 282, 44 Atl. 891, 74 Am. St. 346 (1899); *Waldron* v. *Hendrickson*, 40 App. Div. 7, 57 N. Y. S. 561 (1899); *Howay* v. *Going-Northrup Co.*, 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 48, 49 (1901); *Ornstein* v. *Yahr, &c., Drug Co.*, 119 Wis. 429, 96 N. W. 826 (1903); *James* v. *Parsons*, 70 Kans. 156, 78 Pac. 438 (1904); *Livingston* v. *Klaw*, 137 App. Div. 639, 122 N. Y. S. 264 (1900); *Willingham* v. *Buckeye C. O. Co.*, 13 Ga. App. 253, 79 S. E. 496 (1913); *Menihan* v. *Hopkins*, 129 Tenn. 24, 164 S. W. 775 (1914). Elsewhere, where wages are payable in installments, separate suits may be maintained upon each installment as it falls due, but all installments actually due must be included in one action. *Jenkins* v. *Scranton*, 205 Pa. 598, 55 Atl. 788 (1903); *Strauss* v. *Meertief*, 64 Ala. 299, 38 Am. Rep. 8 (1879); *Isaacs* v. *Davies*, 68 Ga. 169 (1881); *McEvoy* v. *Buck*, 37 Minn. 402 (1887); *Williams* v. *Luckett*, 77 Miss. 394, 26 So. 967 (1899); *Stradley* v. *Bath P. Co.*, 228 Pa. 108, 77 Atl. 242 (1903). See also *Bernard* v. *Hoboken*, 27 N. J. L. 412 (1859); *Flanders* v. *Canada A. P. S. S. Co.*, 161 Fed. 378 (1908); *Webb* v. *Depew*, 152 Mich. 698, 116 N. W. 560 (1908).

[36] Part of the opinion is omitted.

The said paragraph is, in substance, that if the animal, etc., was injured, etc., it was at the same time and place at which another horse was injured, for which said plaintiff brought suit before said justice for one hundred dollars, upon which issue was joined, and upon the trial judgment was recovered by said plaintiff against said defendants for one hundred dollars, etc.

The question argued by counsel, is, whether the pleadings show but one trespass, and if so, whether a separate suit can be maintained for each animal killed.

We think the paragraph of the answer sufficiently avers, that at the same time and place, and by the same act, two horses of the plaintiff were killed by the cars of the defendants, and that the plaintiff had sued and recovered a judgment for the value of one of said animals.

We are of opinion that, under the circumstances disclosed in this case, the plaintiff could not bring a separate suit for each animal killed.

It is not necessary for us to decide whether, in a case where animals by one act destroyed are of a greater value than one hundred dollars, the owner can abandon any attempt to recover except for a part, within the jurisdiction of a justice, or not. What we do decide, is, that one substantive and complete cause of action, arising out of the same tort, can not be divided into several suits. If A should shoot into a flock of sheep of B, and kill half a dozen, we can not think that half a dozen rights of action would thereby accrue to B; he would be entitled to recovery in one suit for the whole damage done, and if he failed to bring his action for the whole injury sustained, it would be his own fault.

Judgment affirmed.[27]

---

[27]Accord: *Fetter* v. *Beale*, 1 Salk. 11 (1700); *Farrington* v. *Payne*, 15 Johns. 432 (1818), where it is said by the court: "Suppose a trespass or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" *Cook* v. *Cook*, 2 Brev. (S. C.) 349 (1810); *Thompson* v. *Rogers*, 2 Brev. (S. C.) 410 (1810); *Hodsoll* v. *Stallebrass*, 11 Ad. & El. 301 (1840); *Whitney* v. *Clarendon*, 18 Vt. 252 (1846); *The Kalamazoo*, 9 Eng. L. & Eq. 557 (1851); *Cunningham* v. *Morris*, 19 Ga. 583, 65 Am. Dec. 611 (1856); *Marble* v. *Keyes*, 75 Mass. 221 (1857); *Herriter* v. *Porter*, 23 Cal. 385 (1863); *McCaffrey* v. *Carter*, 125 Mass. 330 (1878); *Foster* v. *Napier*, 73 Ala. 595 (1883); *Tidwell* v. *Witherspoon*, 21 Fla. 359, 58 Am. Rep. 665 (1885); *Bethlehem G. Co.* v. *Yoder*, 112 Pa. 136, 4 Atl. 42 (1886); *Knowlton* v. *N. Y. & N. E. R. Co.*, 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625 (1888); *Beronio* v. *Southern Pacific R. Co.*, 86 Cal. 415, 24 Pac. 1093, 21 Am. St. 57 (1890); *Skeen* v. *Springfield E. Co.*, 42 Mo. App. 158 (1890); *Thisler* v. *Miller*, 53 Kans. 515, 36 Pac. 1060, 42 Am. St. 302 (1894); *Robinson* v. *Penna. R. Co.*, 6 Pa. Super. Ct. 383 (1898); *Packham* v. *Fire Ins. Co.*, 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. 461 (1900); *Stern* v. *Riches*, 111 Wis. 591, 87 N. W. 555, 87 Am. St. 892 (1901); *Barnard* v. *Devine*, 34 Misc. 182, 68 N. Y. S. 859 (1901); *Burage* v. *Kelchner*, 66 Kans. 642, 72 Pac. 232 (1903); *Dills* v. *Justice*, 137 Ky. 822, 127 S. W. 472 (1910); *Cordner* v. *Hall*, 84 Conn. 117, 79 Atl. 55 (1911). Otherwise where the claim arises from several torts, *White* v. *Moseley*, 25 Mass. 356 (1829); *Friend* v. *Dunks*, 37 Mich. 25 (1877); *Rockwell* v. *Brown*, 36 N. Y. 207 (1867); *Amrhein* v. *Dye Works*, 197 Pa. 253 (1899); *Pantell* v. *Coal Co.*, 204 Pa. 158, 53 Atl. 751 (1902); *Harp* v. *Southern R.* Co., 150 Ky. 564, 150 S. W. 663 (1912); *McKnight* v. *Minneapolis S. R. Co.*, 149 N. W. 131, 127 Minn. 207 (1914).

REILLY *v.* SICILIAN ASPHALT PAVING CO.

COURT OF APPEALS OF NEW YORK, 1902

170 *N. Y.* 40.

CULLEN, J.: The appellant claimed that while driving in Central Park in the city of New York both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts in the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the Supreme Court (to which under the Constitution the action was transferred), it was held that the plaintiff's right of action was merged in the judgment recovered in the district court and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division and an appeal has been taken to this court by allowance.

The rule is that a single or entire cause of action can not be subdivided into several claims and separate actions maintained thereon. *Secor* v. *Sturgis*, 16 N. Y. 548; *Nathans* v. *Hope*, 77 N. Y. 420. As to this principle there is no dispute. Therefore, the question presented by this appeal is whether from the defendant's negligence and the injury occasioned thereby to the plaintiff in his person and his property there arose a single cause of action or two causes of action, one for the injury to his person and the other for injury to his property.[28] * * *

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the Court of Appeals, Lord Coleridge, Chief Justice, dissenting,[29] that

---

Where an injury is of such a nature as to be abatable, the law will not presume the continuance of the wrong. Hence a recovery is for damages accruing before action brought, and successive actions may be brought for the continuance of the wrong. *Ballantine* v. *Public Service Corp.*, 86 N. J. L. 331, 9 Atl. 95 (1914); *Staple* v. *Spring*, 10 Mass. 72 (1813); *Chattanooga* v. *Dowling*, 101 Tenn. 342, 47 S. W. 700 (1898); *Sanitary District* v. *Ray*, 199 Ill. 63, 64 N. E. 1048, 93 Am. St. 102 (1902); *Ganster* v. *Metropolitan E. Co.*, 214 Pa. 628, 64 Atl. 91 (1906); *Kuhn* v. *Ill. C. R. Co.*, 111 Ill. App. 323 (1903). Otherwise where the injury is permanent, *Mansfield* v. *Tenny*, 202 Mass. 312, 88 N. E. 892 (1909); *Risher* v. *Acken C. Co.*, 147 Iowa 459, 124 N. W. 764 (1910); *Vanderslice* v. *Irondale E. Co.*, 232 Pa. 435, 81 Atl. 445 (1911); *Phila. B. & W. R. Co.* v. *Karr*, 38 App. D. C. (1912); *Chesapeake & O. R. Co.* v. *Blankenship*, 158 Ky. 270, 164 S. W. 943 (1914).

[28] Part of the opinion is omitted.

[29] Lord Coleridge, C. J., dissenting: "It seems to me a subtlety not warranted by law to hold that a man can not bring two actions, if he is injured

damages to the person and to property though occasioned by the same wrongful act give rise to different causes of action, *Brunsden* v. *Humphrey*, L. R. 14 Q. B. Div. 141; while in Massachusetts, Minnesota and Missouri the contrary doctrine has been declared. *Doran* v. *Cohen*, 147 Mass. 342; *King* v. *Chicago, M. & St. P. Ry. Co.*, 82 N. W. Rep. 1113; *Von Fragstein* v. *Windler*, 2 Mo. App. 598. The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." *Brunsden* v. *Humphrey*, *supra*. I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise, one in favor of the person injured and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property that makes it impracticable, or, at least, very inconvenient in the administration of justice to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that for injury to the property not till the lapse of six years. The plaintiff can not assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. * * *

While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice Bowen in the Brunsden case has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods or *vice versa*.

---

in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn." See further, *MacDougall* v. *Knight*, L. R. 25 Q. B. Div. 1 (1890), at p. 8.

It is true that at common law the necessity of bringing two suits could at the election of the plaintiff be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close and alleging in aggravation thereof an assault upon his person.[30] (See Waterman on Trespass, 205, 406.) Still, in such a case there would be but a single cause of action, to wit, the trespass upon the close, and if the defendant justified this trespass it would be a complete defense to the action, the personal assault being merely a matter of aggravation. *Carpenter* v. *Barber*, 44 Vt. 441.

Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.[31]

Judgment reversed and new trial granted.

BROWN *v.* FIRST NATIONAL BANK OF NEWTON, KANS.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1904

132 Fed. 450.[32]

SANBORN, J.: This is an action brought by William E. Brown, the plaintiff in error, against the First National Bank of Newton, Kans., to recover $7,500 alleged damages for the wrongful release of a judgment which Brown had pledged to the bank as collateral security for the payment to it of a note for $3,366.75,

---

[30] *Doyle* v. *American W. Co.*, 60 App. Div. (N. Y.) 525, 69 N. Y. S. 952 (1901); *Vock* v. *Anterbourn*, 67 N. Y. Misc. 168, 122 N. Y. S. 233 (1910).

[31] A cause of action may be regarded as resulting from the injury inflicted rather than the act causing the injury. *Brunsden* v. *Humphrey*, L. R. 14 Q. B. Div. 141 (1884) (rev. 11 Q. B. Div. 712, 51 L. T. (N. S.) 529, 33 Am. L. Reg. 369 and note); *Boerum* v. *Taylor*, 19 Conn. 122 (1848); *Peake* v. *B. & O. R. Co.*, 26 Fed. 495 (1886); *Watson* v. *Texas & P. R. Co.*, 8 Tex. Civ. App. 144, 27 S. W. 924 (1894); *Lamb* v. *Harbaugh*, 105 Cal. 680, 39 Pac. 56 (1895); *Ochs* v. *Public Service R. Co.*, 81 N. J. L. 661, 80 Atl. 495 (1911) (rev. 80 N. J. L. 148). On the other hand the majority of American decisions regard a single act causing injury as giving rise to a single cause of action, although the result is injury to the person and to property. *Howe* v. *Peckham*, 10 Barb. (N. Y.) 656 (1851); *Seger* v. *Barkhamstad*, 22 Conn. 290 (1853); *Baltimore & O. R. Co.* v. *Ritchie*, 31 Md. 191 (1869); *Hodge* v. *Bennington*, 43 Vt. 450 (1871); *Lamb* v. *St. Louis, C. & W. R. Co.*, 33 Mo. App. 489 (1888); *Doran* v. *Cohen*, 147 Mass. 342, 17 N. E. 647 (1888); *Bliss* v. *New York C. & H. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504 (1894); *Braithwaite* v. *Hall*, 168 Mass. 38, 46 N. E. 398 (1897); *Owensborough & H. G. Co.* v. *Coons*, 20 Ky. L. Rep. 1678, 49 S. W. 966 (1899); *King* v. *Chicago, M. & S. R. Co.*, 80 Minn. 83, 82 N. W. 1113, 81 Am. St. 238, 50 L. R. A. 161 and note (1900); *Birmingham S. R. Co.* v. *Lintner*, 141 Ala. 420, 38 So. 363, 109 Am. St. 40 (1904); *Kimball* v. *Louisville & N. R. Co.*, 94 Miss. 396, 48 So. 230 (1908); *Howell* v. *Fuller*, 151 N. Car. 315, 66 S. E. 131 (1909). Compare *Underwriter's A. L. I. Co.* v. *Vicksburg T. Co.*, 63 So. 453, 106 Miss. 244 (1913). See also *Henry* v. *Lilley*, 42 Pa. Super. Ct. 565 (1909).

[32] Part of the opinion is omitted.

made by Brown as principal and Cora E. Brown and T. J. Norton as sureties. The court below instructed the jury to return a verdict for the defendant because in an action on the note, which had been brought by the bank, Brown had recouped or set off so much of the damages which were caused by the release as were necessary to pay and defeat the claim upon the note. The writ of error challenges the judgment upon the verdict rendered pursuant to this instruction.

In the action upon the note for $3,366.75, Brown and his sureties pleaded, and introduced evidence in support of, other defenses besides that based upon the release of the pledged judgment, so, that, although the record in the case before us establishes the fact that there was evidence that the jury applied a portion of Brown's claim for damages on account of that release in payment of the note, it fails to disclose what portion of that claim was thus applied. In this state of the record the charge of the court below was based upon the rule of law that one may not split his cause of action; that if, by an action or defense he avails himself of a part of a single claim or obligation, he thereby estops himself from enforcing the remainder of it; and that, as Chief Justice Shaw felicitously expresses it, "he can not use the same defense first as a shield and then as a sword." *O'Connor* v. *Varney,* 10 Gray 231; *Britton* v. *Turner,* 6 N. H. 481, 495, 26 Am. Dec. 713; *Batterman* v. *Pierce,* 3 Hill 171; *Machine Co.* v. *Farmer,* 27 Minn. 428, 430, 8 N. W. 141; *Bolen Coal Co.* v. *Brick Co.,* 52 Kans. 747, 749, 35 Pac. 810; *Lucas* v. *Le Compte,* 42 Ill. 303, 305; Sutherland on Damages, sections 186, 187, 189; Freeman on Judgments, sections 277, 224; 2 Van Fleet's Former Adjudication, p. 867; *Desha's Exrs.* v. *Robinson,* 17 Ark. 245.[33]

The plaintiff does not dispute this general rule of practice, but he insists that his case is not governed by it, because the release of the judgment constitutes a payment of the note, and he was compelled to present that release as a defense to the action upon the note, or to entirely lose all benefit of it. But was the plaintiff required to set up his claim for damages from the release of the judgment as a defense to the action upon the note and under penalty of a loss of all remedy upon it? The contract of the bank, the pledgee, was to exercise reasonable diligence to collect the judgment and to apply the proceeds of it to the payment of the note for $3,366.75. The claim of Brown was that, without his consent, and in violation of this agreement, the bank released the judgment which was collectible, without collecting it, to his damage in the sum of $7,500. These facts appear to present an affirmative cause of action for breach of the contract of pledge, which was perfectly available to the plaintiff in an independent action, regardless of the proceedings of the bank upon the note. They undoubtedly constituted a tort and a cause of action for conversion (Colebrook on Collateral Securities, section 131.) But the pledger had the option to waive the tort, and to sue for breach of the contract. The plaintiff held this cause of action against the

[33]Compare *Davis* v. *Hedges,* L. R. (1871) 6 Q. B. 687, and see also 2 Black. Judgments (2d ed.) § 768.

bank when the latter brought its action against him and his sureties upon his note. His cause of action for breach of the contract of the pledge exceeded in amount the sum due upon his note. His claim for damages was not only an affirmative cause of action against the bank, but it also constituted, at his option, a good reason why the bank was not entitled to recover upon the note, a good defense of payment of the note to the action upon it. *Brown* v. *First National Bank*, 112 Fed. 901, 904, 50 C. C. A. 602, 605, 56 L. R. A. 876; Colebrook on Collateral Securities (2d ed.), section 114. If the facts which condition this claim of Brown had constituted a defense to the action upon the note, and nothing more, he would have been required to present them in that action at his peril, and, if he failed to do so, a judgment on the note would have rendered his claim upon them res adjudicata. Inasmuch, however, as they presented an affirmative cause of action against the plaintiff as well as a good defense of payment to the action of the bank upon the note, the choice was his to interpose them as a defense or to reserve them and maintain an independent action upon them for all the damages which he had sustained. A failure of a defendant in an action to plead or prove facts purely defensive renders such matters res adjudicata after judgment and conclusively estops him from again presenting them.[34] 1 Van Fleet on Former Adjudication, section 198. But where the facts which establish his defense also constitute an affirmative cause of action against the plaintiff, he has the option to interpose them as a defense, or to reserve them for an independent or cross action. If he refrains from presenting them as a defense, the judgment in the action against him does not bar or adjudicate his affirmative cause of action upon them, and he is free to subsequently maintain it. 1 Freeman on Judgments, sections 277, 224; 2 Van Fleet on Former Adjudication, section 436; *Cook* v. *Moseley*, 13 Wend. 277; 1 Sutherland on Damages, section 187; *Batterman* v. *Pierce*, 3 Hill 171, 174; *Britton* v. *Turner*, 6 N. H. 481, 495, 26 Am. Dec. 713; *Barth* v. *Burt*, 43 Barb. 628; *Mimnaugh* v. *Partlin*, 67 Mich. 391, 34 N. W. 717. The reason for this rule is that the damages resulting from the plainintiff's wrongful act may be indeterminate, or may not have entirely accrued, when he brings his action, and it might be unjust or inequitable to permit him to determine the time when the defendant must present and prove his claim for the damages which he has suffered from the breach of the plaintiff's contract.

The application of this rule of law to the facts of the case in hand seems to strongly indicate that the plaintiff had an indivisible affirmative cause of action against the bank for the wrongful surrender of the judgment, that he elected to use a portion of it in defense to the bank's action upon his note, and that he thereby con-

[34] *Loring* v. *Mansfield*, 17 Mass. 394 (1821); *Broughton* v. *McIntosh*, 1 Ala. 103 (1840); *Binck* v. *Wood*, 43 Barb. (N. Y.) 315 (1864); *Gilson* v. *Bingham*, 43 Vt. 410, 5 Am. Rep. 289 (1871); *Ahl's Assigned Estate*, 169 Pa. 609, 32 Atl. 621 (1895); *Weiser* v. *Kling*, 38 App. Div. 266, 57 N. Y. S. 48 (1899); *Weinman* v. *Salit*, 85 Misc. 456, 147 N. Y. S. 758 (1914).

clusively estopped himself from maintaining an action for any part of it.[85]

Judgment affirmed.

TAYLOR *v.* CLAYPOOL

SUPREME COURT OF INDIANA, 1841

5 *Blackf.* (*Ind.*) 557

Error to the Franklin Circuit Court.

BLACKFORD, J.: Taylor brought an action of assumpsit against William H. Moseley and William W. Claypool, on a joint promissory note. The writ was returned *non est inventus* as to Moseley. Claypool appeared and pleaded as follows: That the plaintiff heretofore, etc., impleaded the defendant and Moseley, etc., for not performing the same promises, etc.; and that the plaintiff in that suit (it being suggested that the writ had been served on Moseley and not on Claypool) obtained a judgment against Moseley for the amount due, etc. General demurrer to the plea, and judgment for the defendant.

This is a joint action against Moseley and Claypool; and, to support it, the plaintiff must have joint cause of action against the

---

[85]Accord: *Eastmure* v. *Laws*, 5 Bing. (N. Car.) 444 (1839); *Good* v. *Good*, 9 Watts (Pa.) 567 (1840); *Sargent* v. *Fitzpatrick*, 70 Mass. 511 (1855); *Baker* v. *Stinchfield*, 57 Maine 363 (1869); *Inslee* v. *Hampton*, 11 Hun (N. Y.) 156 (1877); *Jennings* v. *Hare*, 104 Pa. St. 489 (1883); *Wright* v. *Anderson*, 117 Ind. 349, 20 N. E. 247 (1888); *Clement* v. *Field*, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. ed. 244 (1893); *Greenwood Drug Co.* v. *Bromonia Co.*, 81 S. Car. 516, 62 S. E. 840, 128 Am. St. 929 (1908); *Jones* v. *Charles Warner Co.*, 25 Del. 566, 83 Atl. 131 (1912); *Nernst Lamp Co.* v. *Hill*, 243 Pa. 448, 90 Atl. 137 (1914). So, where a judgment is recovered on a claim, it is no longer available as a counterclaim in a pending action. *Rosenfeld* v. *Solomon*, 61 Misc., 238, 113 N. Y. S. 723 (1908); *Townsend* v. *Niles*, 210 Mass. 524, 96 N. E. 1035 (1912). Generally, where a defendant has a set-off or counterclaim he may use it or not at his option, and if he does not use it he is not precluded from maintaining a separate action. *Morton* v. *Bailey*, 2 Ill. 213, 27 Am. Dec. 767 (1835); *Judah* v. *Brandon*, 5 Blackf. (Ind.) 506 (1841); *Gilmore* v. *Reed*, 76 Pa. St. 462 (1874); *Tomlinson* v. *Quigley*, 5 Houst. (Del.) 168 (1876); *Longstreet* v. *Phile*, 39 N. J. L. 63 (1876); *Dewsnap* v. *Davidson*, 18 R. I. 98, 26 Atl. 902 (1892); *New England Mortgage Security Co.* v. *Fry*, 143 Ala. 637, 42 So. 57, 111 Am. St. 62 (1904); *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 54 L. ed. 179 (1909), affirming *Kirven* v. *Virginia-Carolina Chemical Co.*, 77 S. Car. 493, 58 S. E. 424; *Kaufman* v. *Cooper*, 39 Mont. 146, 101 Pac. 969 (1909); *Steel* v. *Holtzer*, 144 N. Y. S. 643 (1913); *Secor* v. *Siver*, 165 Iowa 673, 146 N. W. 845 (1914). A fortiori where the claim was unavailable as a defense in the former action. *De Graef* v. *Wyckoff*, 118 N. Y. 1, 22 N. E. 1118 (1889); *Thropp* v. *Susquehanna Mut. Fire Ins. Co.*, 125 Pa. St. 427, 17 Atl. 473, 11 Am. Rep. 909 (1889).

By statute, a counterclaim is sometimes barred unless set up in the action brought against the party in whose favor it exists. *Brosnan* v. *Kramer*, 135 Cal. 36, 66 Pac. 979 (1901); *Douglas* v. *First Nat. Bank of Hastings*, 17 Minn. 35 (1871). So, in actions before justices of the peace. *Henry* v. *Milham*, 13 N. J. L. 266 (1832); *Herring* v. *Adams*, 5 Watts & S. (Pa.) 459 (1843); *Lathrop* v. *Hayes*, 57 Ill. 279 (1870).

defendants. The plea shows that the plaintiff has no such cause of action; because it shows that he had previously obtained judgment against Moseley on the note now sued on. The note, at least so far as Moseley is concerned, was merged in the judgment; and any suit in which he is defendant, founded on the note, must be barred by that judgment. It is true that, by our statute, if a suit on a joint contract be brought against two, and one only can be found, judgment can be taken against him alone on whom process has been served. R. S. 1838, p. 446. But still as the action is against both, a judgment against the one served with process can not be obtained, unless the plaintiff can show that he has then subsisting a good cause of action against both. The case of *Sheehy* v. *Mandevill et al.*, 6 Cranch 253, seems to be opposed to the plea, before us; but that case, as shown in *Robertson* v. *Smith*, 18 Johns. 459, can not be supported.

Judgment affirmed.[86]

SESSIONS *v.* JOHNSON

SUPREME COURT OF THE UNITED STATES, 1877

95 *U. S.* 347

Error to the Circuit Court of the United States for the District of Massachusetts.

Kane, Sprague & Co., on April 5, 1870, mortgaged their stock, tools and fixtures to W. W. Sprague, to secure him as their indorser, and he assigned the mortgage to the defendant below as security for a debt. On October 12th, the same mortgagors gave a second mortgage on the same and other property to E. A. Goodnow for $4,000, which sum he paid to W. W. Sprague, who used it

[86] Accord: *Philson* v. *Bampfield*, 1 Brev. (S. Car.) 202 (1803); *Ward* v. *Johnson*, 13 Mass. 148 (1816); *Williams* v. *McFall*, 2 Serg. & R. (Pa.) 280 (1816); *Robertson* v. *Smith*, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227 (1821); *Smith* v. *Black*, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686 (1822); *Wann* v. *McNulty*, 7 Ill. 355, 43 Am. Dec. 58 (1845); *Henderson* v. *Reeves*, 6 Blackf. (Ind.) 101 (1841); *Moale* v. *Hollins*, 11 Md. 11, 33 Am. Dec. 684 (1839); *Peters* v. *Sanford*, 1 Den. (N. Y.) 224 (1845); *King* v. *Hoare*, 13 M. & W. 494 (1844); *Ferrall* v. *Bradford*, 2 Fla. 508, 50 Am. Dec. 293 (1849); *Sloo* v. *Lea*, 18 Ohio, 279 (1849); *Candee* v. *Clark*, 2 Mich. 255 (1851); *Thompson* v. *Emmert*, 15 Ill. 415 (1854); *Suydam* v. *Barber*, 18 N. Y. 468, 75 Am. Dec. 254 (1858); *Brady* v. *Reynolds*, 13 Cal. 31 (1859); *Mason* v. *Eldred*, 6 Wall. (U. S.) 231, 18 L. ed. 783 (1867), overruling *Sheehy* v. *Mandeville*, 6 Cranch (U. S.) 254 (1810); *Kingsley* v. *Davis*, 104 Mass. 178 (1870); *Reynolds* v. *Pittsburgh &c. R. Co.*, 29 Ohio St. 602 (1876); *Kendall* v. *Hamilton*, L. R. 4 App. Cas. 504 (1879); *Lauer* v. *Bandow*, 48 Wis. 638, 4 N. W. 774 (1879); *Robinson* v. *Snyder*, 74 Ind. 110 (1881); *Jansen* v. *Grimshaw*, 125 Ill. 468, 17 N. E. 850 (1888); *Wilson* v. *Buell*, 117 Ind. 315, 20 N. E. 231 (1888); *Hammond* v. *Schofield*, L. R. (1891), 1 Q. B. 453; *Heckmann* v. *Young*, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. 655 (1892); *O'Hanlon* v. *Scott*, 89 Hun 44, 35 N. Y. S. 31 (1895); *Davison* v. *Harmon*, 65 Minn. 402, 67 N. W. 1015 (1896); *Beshears* v. *Vandalia Banking Assn.*, 73 Mo. App. 293 (1897) *Capital City Dairy Co.* v. *Plummer*, 20 Ind. App. 408, 49 N. E. 963 (1898); *Coles* v. *McKenna*, 80 N. J. L. 48, 76 Atl. 344 (1910); *Almand* v. *Hatticock*, 140 Ga.

in part to pay notes given by the mortgagors upon which both mortgagees were liable. On October 12th, the whole property covered by the mortgages was sold, the purchaser giving $6,000 in notes, of which $3,555.60 were delivered to Goodnow and $2,444.40 to the defendant, and both mortgages were released. Bankruptcy proceedings were commenced against Kane, Sprague & Co. on November 2d in the same year, and the plaintiffs below were appointed assignees of the bankrupt estate. The assignees sued Goodnow to recover the value of the property covered by his mortgage and obtained judgment, by agreement, for $4,000. They also brought another suit against Goodnow to recover the preference he obtained through the payment of the notes upon which he was an indorser. This suit was settled for $2,000 and a release given him of all claims against him. The assignees then brought suit against the defendant to recover back the proceeds of the $2,444.40 in notes, given to the defendant on the release of the first mortgage, on the ground that they had been obtained in fraud of the bankruptcy act.

On the trial in the district court a verdict was rendered for the plaintiff for $2,786.56 and judgment thereon affirmed by the circuit court. On error the defendant contended that the plaintiffs were estopped by their previous suit.[37]

CLIFFORD, J.: Even without satisfaction, a judgment against one of two joint contractors is a bar to an action against the other, within the maxim transit in rem judicatum; the cause of action being changed into matter of record, which has the effect to merge the inferior remedy in the higher. *King* v. *Hoare*, 13 Mees. & W. 504.[38]

26, 78 S. E. 345 (1913); *Rycman* v. *Manerud*, 68 Ore. 350, 136 Pac. 826 (1913); Otherwise where the defendant in the second suit was beyond the jurisdiction of the court at the time of the first suit. *Olcott* v. *Little*, 9 N. H. 259, 32 Am. Dec. 357 (1838); *Yoho* v. *McGovern*, 42 Ohio St. 11 (1884); *Cox* v. *Maddux*, 72 Ind. 206 (1880); *Finch* v. *Galigher*, 181 Ill. 625, 54 N. E. 611 (1899); *Bradley Engineering &c. Co.* v. *Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910), but as to partnerships in Illinois see *Fleming* v. *Ross*, 225 Ill. 149, 80 N. E. 92 (1907), and see *Blessing* v. *McLinden*, 81 N. J. L. 379, 79 Atl. 347 (1911).

In a number of states the common-law rule is no longer in full force, statutes having either declared joint contracts to be joint and several, or provided for further proceedings against co-obligors joined but not served in the first action. See N. Y. Code Civ. Proc., §§ 1278, 1932, 1937; *Hofferberth* v. *Nash*, 191 N. Y. 446, 84 N. E. 400 (1908); Mass. Rev. L. (1902), ch. 170, § 14; *Odom* v. *Denny*, 82 Mass. 114 (1860); Penna. Act, April 6, 1830, P. L. 277, §1; *Lewis v. Williams*, 6 Whart. (Pa.) 264 (1840); cf. *Coughenor* v. *Suhre*, 71 Pa. St. 462 (1872); N. J. Prac., Act of 1912, March 28, P. L. 377, § 20; *Bonesteel* v. *Todd*, 9 Mich. 371, 80 Am. Dec. 90 (1861); *Dill* v. *White*, 52 Wis. 456, 9 N. W. 404 (1881); *Westheimer* v. *Craig*, 76 Md. 399, 25 Atl. 419 (1892); *Cahoon* v. *McCullock*, 92 Va. 177, 23 S. E. 225 (1895); *Bute* v. *Brainerd*, 93 Tex. 137, 53 S. W. 1017 (1899); *Sherburne* v. *Hyde*, 185 Ill. 580, 57 N. E. 776 (1900); *Ingwaldson* v. *Olson*, 79 Minn. 252, 82 N. W. 579 (1900); *Middleton* v. *Nibling* (Tex.), 142 S. W. 968 (1912).

[37] The facts are summarized from the opinion of the court, part of which is omitted.

[38] *Todd* v. *Stewart*, 9 Ad. & El. (N. S.) 759 (1846); *Stewart* v. *Todd*, 9 Ad. & El. (N. S.) 767 (1846); *Ex parte Fewings*, L. R. 25 Ch. Div. 338 (1883). But the judgment does not extinguish any remedy except the particular cause of action in respect of which it was recovered, and the creditor is not precluded from enforcing any collateral security he may have taken. *Drake* v.

Judgment in such case is a bar to a subsequent action against the other contractor, because, the contract being merely joint, there can be but one recovery; and consequently the plaintiff, if he proceeds against one only of two joint promisors, loses his security against the other, the rule being that by the recovery of the judgment the contract is merged and higher security substituted for the debt. *Robertson* v. *Smith*, 18 Johns. (N. Y.) 477; *Ward* v. *Johnson*, 13 Mass. 149; *Cowley* v. *Patch*, 120 Mass. 138; *Mason* v. *Eldred*, 6 Wall. (U. S.) 231.

But the rule is otherwise where the contract or obligation is joint and several, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally;[39] but even in that case the rule is subject to the limitation, that, if the plaintiff obtains a joint judgment, he can not afterward sue them separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy.[40]

Different modifications of the rule also arise where the controversy grows out of the tortious acts of the defendants. Where a trespass is committed by several persons, the party injured may sue any or all of the wrongdoers, but he can have but one satisfaction for the same injury, any more than in an action of assumpsit for a breach of contract.

Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrongdoers jointly, or he may sue them all or any of them separately; but if he sues them all jointly, and has judgment, he can not afterward sue any one of them separately; or, if he sues any one of them separately, and has judgment, he can not afterward seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy.[41]

Mitchell, 3 East 251 (1803); *Wegg Prosser* v. *Evans*, L. R. (1895), 1 Q. B. 108; *Economic Life Assur. Soc.* v. *Usborne*, L. R. (1902), A. C. 147; *White* v. *Smith*, 33 Pa. St. 186, 75 Am. Dec. 589 (1859); *Steele* v. *Lord*, 28 Hun (N. Y.) 27 (1882). So also, a judgment on the collateral does not merge the principal debt. *Ackley* v. *Westervelt*, 86 N. Y. 448 (1881); *Vanuxem* v. *Burr*, 151 Mass. 386, 24 N. E. 773, 21 Am. St. 458 (1890). See also, note to preceding case as to statutory modifications of common-law rule.

[39] *Simonds* v. *Center*, 6 Mass. 18 (1809); *Townsend* v. *Riddle*, 2 N. H. 448 (1822); *Clinton Bank* v. *Hart*, 5 Ohio St. 34 (1855); *People* v. *Harrison*, 82 Ill. 84 (1876); *Davis* v. *Schmidt*, 126 Wis. 461, 106 N. W. 119, 110 Am. St. 938 (1906); *Taylor* v. *Sartorious*, 130 Mo. App. 23, 108 S. W. 1089 (1907).

[40] *Ex parte Rowlandson*, 3 P. Wms. 405 (1735); *Bangor Bank* v. *Treat*, 6 Greenl. (Maine) 207, 19 Am. Dec. 210 (1829); *McDivitt* v. *McDivitt*, 4 Watts. (Pa.) 384 (1835); *United States* v. *Price*, 50 U. S. 83, 13 L. ed. 56 (1850); *Fay* v. *Jenks*, 78 Mich. 312, 44 N. W. 380 (1889); *Scanlon* v. *People*, 95 Ill. App. 348 (1900). Contra: *Kirkpatrick* v. *Stingley*, 2 Ind. 269 (1850); but compare *United Oil &c. Co.* v. *Alberson*, 43 Ind. App. 626, 88 N. E. 359 (1908).

[41] *Livingston* v. *Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330 (1806); *Ammonett* v. *Harris*, 1 H. & M. (Va.) 488 (1807); *Smith* v. *Rines*, Fed. Cas. No. 13100, 2 Sumn. 338 (1836); *Cameron* v. *Kanrich*, 201 Mass. 451, 87 N. E. 605 (1909). Compare *Davis* v. *Caswell*, 50 Maine 294 (1862); *Gilbreath* v.

Where the injury is tortious, the remedy may be joint or several; but the rule in this country is that a judgment against one without satisfaction is no bar to an action against any one of the other wrongdoers. *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, 2 Cliff. (U. S.) 196; *Livingston* v. *Bishop*, 1 Johns. (N. Y.) 290; *Drake* v. *Mitchell*, 3 East. 258.[42]

Separate mortgages were held by the defendant and the other mortgagee, of different dates, and it appears that they were given for entirely different considerations. Of course, the respective mortgagees held the property subject to an equity of redemption in the mortgagors; and the case shows that the mortgagors sold the respective equities of redemption, and distributed the proceeds of the sale between the respective mortgagees. Throughout, the relations of the mortgagees to the insolvent debtors were entirely separate. They never held any joint claim against the insolvent mortgagors, nor did the mortgagees ever receive any joint security from the insolvent debtors for their respective claims. Instead of that, the respective equities of redemption remained in the mortgagors, and the conceded facts show that they sold the equities and distributed the proceeds between the respective mortgagees, showing to a demonstration that there never was any joint contract relation between the mortgagees and the insolvent debtors.

Even the proceeds of the sale of the equities of redemption, as distributed between the respective mortgagees, were entirely sepa-

---

Jones, 66 Ala. 129 (1880); *Moore* v. *Chattanooga Electric R. Co.*, 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978 (1907). In *Allen* v. *Liggett*, 81 Pa. St. 486 (1876), the summons was in trespass q. c. f. against two, one of whom was not served. A judgment against the one served remaining unsatisfied, it was held a second action could be maintained against the tort feasor not served.

[42]Accord: *Wright* v. *Lathrop*, 2 Ohio 33, 15 Am. Dec. 529 (1825); *Sprague* v. *Waite*, 36 Mass. 455 (1837); *Fox* v. *Northern Liberties*, 3 Watts & S. (Pa.) 103 (1841); *Kennedy* v. *Philipy*, 13 Pa. St. 408 (1850); *Brooks* v. *Ashburn*, 9 Ga. 297 (1851); *Blann* v. *Crocheron*, 19 Ala. 647, 54 Am. Dec. 203 (1851); *Savage* v. *Stevens*, 128 Mass. 254 (1880); *Albright* v. *McTighe*, 49 Fed. 817 (1892); *Russell* v. *McCall*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807 (1894); *Cleveland* v. *Bangor*, 87 Maine 259, 32 Atl. 892, 47 Am. St. 326 (1895); *Roodhouse* v. *Christian*, 158 Ill. 137, 41 N. E. 748 (1895); *Vincent* v. *McNamara*, 70 Conn. 332, 39 Atl. 444 (1898); *Cushing* v. *Hederman*, 117 Iowa 637, 91 N. W. 940, 94 Am. St. 320 (1902); *Johnston* v. *McKenna*, 73 N. J. Eq. 1, 67 Atl. 395 (1907) (affd. 74 N. J. Eq. 448, 70 Atl. 312); *Tandrup* v. *Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852 (1908); *Squire* v. *Ordemann*, 194 N. Y. 394, 87 N. E. 435 (1909); *Cole* v. *Roebling Const. Co.*, 156 Cal. 443, 105 Pac. 255 (1909); *Nelson* v. *Illinois Cent. R. Co.*, 98 Miss. 295, 53 So. 619, 31 L. R. A. (N. S.) 689 (1910); *Berg* v. *Bates*, 153 App. Div. 12, 137 N. Y. S. 1032 (1912); *Lommis* v. *Loomis*, 148 Wis. 653, 135 N. W. 125 (1912); *Charles E. Johnson Co.* v. *Philadelphia*, 236 Pa. 510, 84 Atl. 1014 (1912); *Renfrow* v. *Condor*, 153 Ky. 701, 156 S. W. 385 (1913). In England a judgment without more against one torfeasor is a bar to any further proceedings against his co-trespassers. *Buckland* v. *Johnson*, 15 C. B. 145 (1854); *Brown* v. *Wootton*, Cro. Jac. 73 (1605); *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584 (1871) (affd. L. R. 7 C. P. 547) (1872), and this rule is followed in a few American decisions, *Hunt* v. *Bates*, 7 R. I. 217, 82 Am. Dec. 592 (1862); *Petticolas* v. *Richmond*, 95 Va. 456 (1897); *Staunton Tel. Co.* v. *Buchanan*, 108 Va. 810, 62 S. E. 928 (1908); and in Canada, *Longmore* v. *McArthur*, 43 Can. Sup. Ct. 640 (1910) (affg. 19 Manitoba 641).

rate; nor would it make any difference if the mortgagees, in receiving their respective portions of those proceeds, had acted jointly, as it is well-settled law that where the tort is joint the injured party may have a joint or several remedy, the rule being that a judgment against one wrongdoer without satisfaction is no bar to action against any one of the other joint tort-feasors. *Lovejoy* v. *Murray, supra.*

Joint wrongdoers may be sued separately; and the plaintiff may prosecute the same until the amount of the damages is ascertained by verdict, but the injured party can have only one satisfaction, the rule being that he may make his election de melioribus damnis, which, when made, is conclusive in all subsequent proceedings. *Heydon's Case,* 11 Colo. 50; *White* v. *Philbrick,* 5 Greenl. (Maine) 147; *Knickerbocker* v. *Colver,* 8 Cow. (N. Y.) 111; *O'Shea* v. *Kirker,* 4 Bosw. (N. Y.) 120.[43]

Without more, these remarks are sufficient to show that the theory of estoppel can not be maintained, and that the first two errors assigned must be overruled, for two reasons: 1. Because the relation of joint contractors never subsisted between the insolvent debtors and the mortgagees, to whom the proceeds of the equities of redemption were distributed by the insolvent mortgagors. 2. Because the mortgagees acted separately in accepting certain portions of the proceeds of that sale; nor would it have made any difference if they had acted jointly, as it is settled by all the authorities that when several persons have been jointly concerned in the commission of a wrongful act they may all be charged jointly as principals, or the plaintiff may sue any one of the parties separately, torts being in their nature several, even when the wrongful act was jointly committed. Ad. Torts (3d ed.), 939.

Suppose that is so, still it is insisted by the defendant that the

---

[43] *Duane* v. *Miercken,* 4 Yeates (Pa.) 437 (1870); *Thomas* v. *Rumsey,* 6 Johns. (N. Y.) 26 (1810); *Dexter* v. *Broat,* 16 Barb. (N. Y.) 337 (1853); *Karr* v. *Barstow,* 24 Ill. 580 (1860); *Wright* v. *London General Omnibus Co.,* L. R. 2 Q. B. Div. 271 (1877); *Putney* v. *O'Brien,* 53 Iowa 117, 4 N. W. 891 (1880); *Luce* v. *Dexter,* 135 Mass. 23 (1883); *Seither* v. *Philadelphia Tr. Co.,* 125 Pa. St. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. 905 (1889); *Spurr* v. *North Hudson &c. R. Co.,* 56 N. J. L. 346, 28 Atl. 582 (1894); *Dicken* v. *Balbach,* 9 Pa. Dist. 449 (1900); *Fitzgerald* v. *Union Stock Yards Co.,* 89 Nebr. 393, 131 N. W. 612, 33 L. R. A. (N. S.) 983n (1911). See also, *Taylor* v. *Hollard,* L. R. (1902), 1 K. B. 676. A few American cases hold that the mere issuing of an execution will be regarded as an election to consider the execution defendant alone responsible. *White* v. *Philbrick,* 5 Greenl. (Maine) 147, 17 Am. Dec. 214 (1827); *Smith* v. *Singleton,* 2 McMull (S. Car.) 184, 39 Am. Dec. 122 (1842); *Boardman* v. *Acer,* 13 Mich. 77, 87 Am. Dec. 736 (1865); *Fleming* v. *McDonald,* 50 Ind. 278, 19 Am. Rep. 711 (1875); *Rendall* v. *School Dist.,* 75 Maine 358 (1883). But the majority hold that actual satisfaction is required to constitute a bar. *Sheldon* v. *Kibbe,* 3 Conn. 214, 8 Am. Dec. 176 (1819); *Osterhout* v. *Roberts,* 8 Cow. (N. Y.) 43 (1827); *Floyd* v. *Browne,* 1 Rawle (Pa.) 121, 18 Am. Dec. 602 (1829); *Blann* v. *Crocheron,* 20 Ala. 320 (1852); *Page* v. *Freeman,* 19 Mo. 421 (1854); *Lovejoy* v. *Murray,* 3 Wall. (U. S.) 1, 18 L. ed. 129 (1865); *Griffie* v. *McClung,* 5 W. Va. 131 (1872); *Gittleman* v. *Feltman,* 122 App. Div. 385, 106 N. Y. S. 839 (1907); *McVey* v. *Manatt,* 80 Iowa 132, 45 N. W. 548 (1890); *Norfolk Lumber Co.* v. *Simmons,* 2 Marv. (Del.) 317, 2 Hurl. & Colt. 717, 43 Atl. 163 (1897); *Squire* v. *Ordemann,* 194 N. Y. 394, 87 N. E. 435 (1900).

plaintiff can not, in any proper view of the facts, recover more than the difference between the amount paid by the other mortgagee and the value of the property distributed. What the plaintiffs claim is the amount the defendant received from the insolvent debtors as part of the proceeds of the sale of the equities of redemption. Abundant proof is exhibited that he received $2,444.40, and it is conceded that the whole of that amount remains in the hands of the defendant.

Two sums, amounting in the whole to $6,000, were received by the plaintiffs of the second mortgagee before the present suit was instituted. Four thousand dollars of the amount was recovered by the judgment in favor of the plaintiffs. They also instituted a second suit against the same party, to recover the amount received by him in payment of the notes upon which he was liable as indorser, which action was compromised by the payment to the assignees of $2,000, as appears by the agreed statement of facts. Such payment being made, the assignees executed a release to the defendant in that suit of all claims and demands which they, as such assignees, has against him on that account.

Judgments bind parties and privies, but they do not bind strangers; and it is clear that the present defendant was neither a party nor a privy to the action in the first suit, nor had he anything to do with the compromise of the second suit between those parties.

Enough appears in the evidence to establish that theory; but if any possible doubt could otherwise arise in respect to the conclusion, the matter is set entirely at rest by the verdict of the jury. They were told by the court that if the plaintiffs had once received full satisfaction for the proceeds of the sale from the other mortgagee, "then they can recover nothing from the defendant"; and it follows from the verdict that they did not recover in the suits against the other mortgagee anything for the portion of notes taken for the sale of the equities which was distributed to the defendant in the present suit. All that he received remains in his hands; and in as much as the assignees are not estopped by the proceedings against the second mortgagee from prosecuting their claim against the defendant for the portion of the proceeds of the equities of redemption which was distributed to him by the insolvent debtors, it follows that the assignee may recover the whole amount of that portion without regard to the antecedent proceedings against the second mortgagee, which is all that need be said in response to the third assignment of error.

Judgment affirmed.[44]

---

[44]A cause of action whether *ex contractu* or *ex delicto* is not merged or extinguished by the recovery and satisfaction of a judgment against a stranger not in privity with or joined in liability with the defendant. *Mathews* v. *Lawrence*, 1 Denio (N. Y.) 212, 43 Am. Dec. 665 (1845); *Ellis* v. *State*, 2 Ind. 262 (1850); *Atlantic Dock Co.* v. *New York*, 53 N. Y. 64 (1873); *Bennett* v. *Field*, 13 R. I. 139, 43 Am. Rep. 17 (1880); *Hawley* v. *Dawson*, 16 Ore. 344, 18 Pac. 592 (1888). See also, *Bertrand* v. *Bingham*, 13 Tex. 266 (1855); *Grafton* v. *Hinkley*, 111 Wis. 46, 86 N. W. 859 (1901). So also, where the judgment is in favor of the stranger. *Scott* v. *Hartog*, 75 Misc. 126, 132 N. Y. S. 846 (1912); *McGillvray* v. *Employers' Liability Assur. Corp.*, 214 Mass. 484, 102 N. E. 77 (1913).

(b) Estoppel

PHILLIPS *v.* WARD

COURT OF EXCHEQUER, 1863

2 H. & C. 717

Declaration.—For money payable by the defendants to the plaintiff, for work, etc., done by the plaintiff as attorney and solicitor of and otherwise for the defendants, upon their retainer, and for fees due in respect thereof, and for materials, etc., provided, and for money lent, money paid, and on accounts stated.

Plea.—That the plaintiff ought not to be admitted to say that any money is payable by the defendants to the plaintiff for the causes of action in the declaration mentioned; because they say that the said retainer was a joint retainer by the defendants in this action and one John Bazalgette; . . . and that before this suit the plaintiff brought action against the said John Bazalgette in the court of common pleas for the same causes of action as in the declaration mentioned; and such proceedings were thereupon had in an action that afterward and before this suit it was considered by the judgment of the said court in the said action that the plaintiff should take nothing by his writ for or in respect of the said causes of action; and the said judgment still remains in force; and this the defendants are ready to verify. Wherefore they pray judgment if the plaintiff ought to be admitted to say that any money is payable by the defendants to the plaintiff for the causes in the action in the declaration mentioned.

Demurrer, and joinder therein.

Hayes, Serjt., in support of the demurrer. A plaintiff who has failed in an action against one of several joint contractors is not thereby estopped from suing the others. An estoppel would arise in another action between the same parties for the same cause, but it is a novel plea that, because the plaintiff has sued the wrong party, he is estopped from suing the right one. *King* v. *Hoare,* 13 Mees. & W. 494, is the converse of this case. There it was held that a judgment (without satisfaction) recovered against one of two joint debtors was a bar to an action against the other. But that decision proceeded on the ground that a judgment changes the cause of action into matter of record, and the inferior remedy is merged in the higher. It is like the case of a judgment against one of several joint tort-feasors, which, of itself, without execution, is a bar to an action against the others for the same cause. In an action of contract against A, he can not plead in abatement the pendency of another action for the same cause against B, *Henry* v. *Goldney,* 15 Mees. & W. 494; but the proper course is to plead the non-joinder of the contractor in abatement. This plea merely says that the judgment in the former action was that the plaintiff should take nothing by his writ; but that may have been on the ground of a

personal discharge, as by bankruptcy or insolvency, or upon some ground which would not affect the merits of this case. BRAMWELL, B.: It may have been on the ground that the plaintiff had not delivered a signed bill as required by the 6 & 7 Vict. ch. 73, section 37. PIGOTT, B.: Or on the ground of infancy. CHANNELL, B., referred to *Buckland* v. *Johnson*, 15 C. B. 145 (E. C. L. R., vol. 80).

Bompas, in support of the plea. The plea discloses good matter of estoppel, for it shows that the plaintiff's claim has been adjudicated upon in an action against a co-contractor. That is the distinction between *King* v. *Hoare* and *Henry* v. *Goldney*. In the former case judgment had been recovered, and the matter had passed in rem judicatam; but in the latter there was merely the pendency of another action for the same cause against another party. The court, having already pronounced judgment as to the validity of the plaintiff's claim, will not again adjudicate upon it in successive actions against each co-contractor.[45]

POLLOCK, C. B.: We are all of opinion that the plea can not be sustained. This is an action against persons who are joint debtors with another person not now sued; and because he was fortunate enough to succeed by some plea or other in an action brought by the plaintiff against him for the same cause, the defendants seek to avail themselves of his immunity. Now, for anything which appears on the face of this plea, he may have succeeded on matter of defense, which, though good with respect to him, is not open to his co-debtors. The consequence is that the plea is bad, and the plaintiff entitled to judgment.

BRAMWELL, B.: I am also of opinion that the plea is bad. No doubt if a person jointly liable with others succeeds in an action against him alone by pleading a release or payment, that would afford a good defense to an action against the other joint debtors—whether pleaded in bar or by way of estoppel seems unimportant—for a release to one is a release to all, and payment by one is a discharge of all. Therefore, in some cases, a judgment recovered by one of several joint debtors may be pleaded in an action against the others. But this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors; but only that the court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency. Then it is said that the plaintiff should have replied specially showing how it was that he could maintain this action though he had failed in the other. But in my opinion that is not so. The plea ought to state a complete defense, and not call upon the plaintiff to answer matter imperfectly pleaded.

CHANNELL, B.: I am of the same opinion. The defendants plead a judgment recovered by a joint debtor in a former action for the same cause; and I think it incumbent on the defendants to show by their plea that the judgment in that action is inconsistent with their liability in this action. But, so far as this plea states, the judgment for the defendant in the former action may have pro-

[45]Part of the argument of counsel is omitted.

ceeded on a ground which, though affording a perfect defense as regards him, does not affect the liability of the present defendants.

PIGOTT, B.: I am of the same opinion. This plea is in form a plea in estoppel; but, whether it be considered in substance as a plea in estoppel or a plea in bar, I think it bad, for it is perfectly consistent with every allegation in it that, though the defendant in the other action recovered judgment against the plaintiff, the defendants in this action are still liable. It is said that the plaintiff ought to have replied specially, but I am of opinion that the defendants ought by their plea to show that the judgment in the former action proceeded on a ground which operated as a discharge of all the joint debtors.

Judgment for the plaintiff.[46]

OLD DOMININON COPPER MIN., ETC., CO. *v.* BIGELOW

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1909

203 Mass. 159

Two bills in equity were filed by the plaintiff against the defendant, who was one of the two promoters who planned and affected the organization of the plaintiff company, to compel, after rescission by the plaintiff, the restitution of the consideration received by the promoters for property alleged to have been sold at a large profit without a full disclosure of material facts, or to compel an accounting for the secret profits, and for damages for breach of trust. After demurrers to the bill had been overruled, the defendant was permitted to file supplemental answers setting up, as a bar to the plaintiff's claim, a judgment of the Circuit Court of the United States for the Southern District of New York in a suit like one of the present suits in all particulars except that it was prosecuted against the executors of the will of Lewisohn, the defendant's fellow promoter, in which the defendant's demurrer to the bill had been sustained and a decree entered dismissing the bill, which had been

---

[46]Accord: *Hunt* v. *Terrill*, 7 J. J. Marsh. (Ky.) 67 (1831); *McLelland* v. *Ridgeway*, 12 Ala. 482 (1847); *Ferguson* v. *State Bank*, 11 Ark. 512 (1851); *Nevill* v. *Hancock*, 15 Ark. 511 (1855); *Brown* v. *Johnson*, 13 Grat. (Va.) 644 (1857); *Cowley* v. *Patch*, 120 Mass. 137 (1876). A judgment for one is no bar in an action against a co-contractor not within the jurisdiction at time of first suit. *Larison* v. *Hager*, 44 Fed. 49 (1890). A judgment in favor of joint defendants will not *per se* bar a several action, *vice versa*. *Detroit* v. *Houghton*, 42 Mich. 459, 4 N. W. 171, 287 (1880); *McLean* v. *Hansen*, 37 Ill. App. 48 (1890); *McCormack* v. *Barton*, 19 Misc. 625, 44 N. Y. S. 393 (1897); *Roby* v. *Rainsberger*, 27 Ohio St. 674 (1875); *Reynolds* v. *Pittsburgh C. & St. L. R. Co.*, 29 Ohio St. 602 (1876). So also, a judgment in favor of one joint and several promisor is no bar to an action against another unless it is shown that the first judgment was rendered upon a defense which would be an extinguishment of the cause of action. *Townsend* v. *Riddle*, 2 N. H. 448 (1822); *Hill* v. *Morse*, 61 Maine 541 (1873); *Spencer* v. *Dearth*, 43 Vt. 98 (1870). See also *Mann* v. *Edwards*, 34 Ill. App. 473 (1889).

affirmed by the circuit court of appeals and the Supreme Court of the United States.[47] It was contended that the matter was res judicata as to Bigelow. On the supplemental answers a hearing was had before a single justice, who reserved this among other questions arising thereon for the consideration of this court.[48]

RUGG, J.: The liability of the defendant, as has been pointed out, according to the law of this commonwealth, is one arising ex delicto. The wrong committed was a tort, in which the defendant and Lewisohn acted in concert. The finding of the single justice, supported by the evidence, is in substance that they were joint tort-feasors. The inquiry then is, whether one of several joint tort-feasors can plead a judgment in favor of his joint tort-feasor against a plaintiff claiming to have been injured by their joint act as an estoppel in suit by the same plaintiff against himself.

This can hardly be regarded as an open question in this commonwealth. In *Sprague* v. *Oakes,* 19 Pick. (Mass.) 455, which was an action for trespass quare clausum fregit, it was said, respecting such a defense, "The defendant was neither a party nor privy to that judgment, was not bound by it, nor could he take advantage of it." This case has never been overruled or questioned, and must be regarded as stating the law of this commonwealth. There are other authorities to the same point. *Lansing* v. *Montgomery,* 2 Johns. (N. Y.) 382; *Marsh* v. *Berry,* 7 Cow. (N. Y.) 344; *Moore* v. *Tracy,* 7 Wend. (N. Y.) 229; *Gittleman* v. *Feltman,* 122 App. Div. (N. Y.) 385; *Atlantic Dock Co.* v. *Mayor and Aldermen of New York,* 53 N. Y. 64; *Tyng* v. *Clarke,* 9 Hun (N. Y.) 269; *Calkins* v. *Allerton,* 3 Barb. (N. Y.) 171, 174; *Goble* v. *Dillon,* 86 Ind. 327; *Thompson* v. *Chicago, St. Paul, etc., R. Co.,* 71 Minn. 89; *Three States Lumber Co.* v. *Blanks,* 118 Tenn. 627.

The reason upon which these decisions rest is that there can be no estoppel arising out of a judgment, unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties. It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendants would not have fixed liability upon the present defendant. Hence there can be no estoppel under our law or under the general principles of jurisprudence, because it is not mutual. *Brigham* v. *Fayerweather,* 140 Mass. 141, 415; *Dallinger* v. *Richardson,* 176 Mass. 77, 83; *Worcester* v. *Green,* 2 Pick. (Mass.) 425, 429; *Biddle & Smart Co.* v. *Burnham,* 91 Maine 578; *Moore* v. *Albany,* 98 N. Y. 396. "Estoppels to be good must be mutual." *Litchfield* v. *Goodnow,* 123 U. S. 549, 552; *Nelson* v. *Brown,* 144 N. Y. 384, 390. Bigelow could not have appeared as of right and made a defense in that suit. No judgment can be regarded as res

---

[47] *Old Dominion Copper Min. &c. Co.* v. *Lewisohn,* 210 U. S. 206, 52 L. ed. 1025 (1907).

[48] The facts, as summarized, relate to but one of the questions considered, and only so much of the opinion of the court as refers to this question is printed. Hammond, J., dissenting on the merits, concurred on this point with the majority of the court. Knowlton, C. J., and Morton, J., dissenting on the merits expressed no opinion on this branch of the defense.

judicata as to any matter where the rights in the subject matter arise out of mutuality, and not by succession, unless the party could, as matter of right, appear and defend, even though he may have knowledge of the suit. Otherwise, he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice. *Brabrook* v. *Boston Five Cents Sav. Bank,* 104 Mass. 228, 233. There is no privity between joint wrongdoers, because all are jointly and severally liable. *Corey* v. *Havener,* 182 Mass. 250; *Feneff* v. *Boston & Maine R. Co.,* 196 Mass. 575, 581; *Pinkerton* v. *Randolph,* 200 Mass. 24, 28. There is no right of contribution between joint wrongdoers, where they are in pari delicto with each other. *Churchill* v. *Holt,* 127 Mass. 165. They are equally culpable, and the wrong complained of results from their joint effort. The right of recovery over by a municipality against a person whose wrong created a defect in the highway, *Holyoke* v. *Hadley Co.,* 174 Mass. 424, is no exception to this rule, because the tort committed by each of the wrongdoers is diverse in character, and rests upon a different basis of liability, and there is a right of indemnity in favor of the municipality. *Lowell* v. *Glidden,* 159 Mass. 317, 319. We are aware of no instance of joint participation in a common tortious enterprise where there is any right of contribution. One comprehensive definition of privies is such persons as are "privies in estate—as donor and donee, lessor and lessee and joint tenants; or privies in blood—as heir and ancestor; or privies in representation—as executor and testator or administrator and intestate; or privies in law—where the law without privity in blood or estate casts land upon another, as by escheat." *Buckingham* v. *Ludlum,* 37 N. J. Eq. 137; *Douglass* v. *Howland,* 24 Wend. (N. Y.) 35, 53. Joint tort-feasors come within none of the classes thus described. The definition in Greenl. Ev., section 535, adopted by the Supreme Court of the United States, in *Litchfield* v. *Goodnow,* 123 U. S. 549, 551, namely, "Mutual or successive relationship to the same rights of property" equally fails to include joint tort-feasors. If we turn to the law of privity as illustrated in actions against partnerships and joint debtors, the soundness of this conclusion is confirmed. It has been repeatedly decided that an administrator of a decedent in one jurisdiction is not in privity with an administrator of the same estate appointed in another jurisdiction, and that a judgment against one such administrator is not res judicata to the other. *Ingersoll* v. *Coram,* 211 U. S. 335, and cases cited; *Johnson* v. *Powers,* 139 U. S. 156. In *Chase* v. *Henry,* 166 Mass. 577, it was held that discharge in insolvency in this commonwealth did not bar the debt of a copartnership, one member of which was a nonresident, although two were residents and the copartnership had a regular place of business here. It has been several times held that judgment against one surviving partner upon a claim against the partnership was not admissible in evidence against the executors of a deceased partner, although the existence of the partnership was not disputed. *Buckingham* v. *Ludlum,* 37 N. J. Eq. 137; *Moores' Appeals,* 34 Pa. St. 411; *Sturgess* v. *Beach,* 1 Conn. 507; *Larison* v. *Hager,* 44 Fed. 49. The converse, which is exactly parallel to the

present case, namely, that a judgment in favor of one partner or joint and several debtor will not avail his associate in liability, has often been decided. *Townsend* v. *Riddle,* 2 N. H. 448; *McLelland* v. *Ridgeway,* 12 Ala. 482; *State Bank* v. *Robinson,* 13 Ark. 214, 221; *Detroit* v. *Houghton,* 42 Mich. 459, 560. It is difficult to conceive of persons more closely identified with their common business than joint debtors and partners, and if judgments against one do not bind his associate, we do not see how persons occupying the less intimate relation to each other, which Bigelow and Lewisohn did, can be bound as privies. See also *Williams* v. *Bankhead,* 19 Wall. 563, 570.

Apart from authority and on principle the same result seems necessary. Joint tort-feasors act in unison respecting a common wrongful enterprise. It is one of the penalties, which the common law (differing in this respect from the civil law) inflicts upon those who jointly engage in intentional violation of the rights of others, that each shall be left to bear the natural results of his conduct. Courts will not lend their aid in adjusting the conflicting claims of wrongdoers touching their own turpitude.

An injured party is given the right to pursue his remedy, either singly or together, against those who thus cause injury, and may proceed to judgment against all in separate actions. He is barred only by a satisfaction. An inevitable corollary of these generally undisputed propositions and one consonant with a fundamental sense of justice is that a party has a right to try his case against everybody who has done him a wrong by immediate and direct culpable action. He is not precluded by a failure against one alleged joint wrongdoer from attempting to pursue another. He is entitled to his day in court against a particular adversary. We believe there are no exceptions to this rule stated in this form. The cases where judgment in favor of an active agent or servant avails a passive principal or master, *Portland Gold Min. Co.* v. *Stratton's Independence,* 158 Fed. 63 and cases cited, or where the relation of indemnitor and indemnitee exists, *Port Jervis* v. *First Nat. Bank of Port Jervis,* 96 N. Y. 550, do not constitute exceptions to this rule, but stand on a different ground.

For another reason the New York judgment in favor of Lewisohn seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there was a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewisohn's executors and Bigelow. *Elva* v. *Edwards,* 13 Allen (Mass.) 48; *Merrill* v. *New England Ins. Co.,* 103 Mass. 245, 249; *Thompson* v. *American Surety Co.,* 170 N. Y. 109. It can not be said that the plaintiff has elected to pursue his remedy against the estate of Lewisohn to the exclusion of his rights against Bigelow. As between joint tort-feasors the doctrine of election has no application, and moreover the plaintiff sought the New York forum voluntarily only in the sense of being compelled to go there that a court might acquire jurisdiction of those defendants.

The determination that the relation between Lewisohn and Bigelow was that of joint tort-feasors respecting a cause of action arising ex delicto disposes also of the argument pressed by the defendant, that Lewisohn was trustee, agent or representative of Bigelow to such an extent that he was in privity with him. See *Bigelow* v. *Old Dominion Copper Min., etc., Co.*, 74 N. J. Eq. 457.

The conclusion is, therefore, that the matters set up in the supplemental answers do not preclude the plaintiff from continuing the prosecution of the present suits.[49]

CROMWELL *v.* COUNTY OF SAC.

SUPREME COURT OF THE UNITED STATES, 1876

94 *U. S.* 351[50]

FIELD, J.: This was an action on four bonds of the county of Sac, in the state of Iowa, each for $1,000, and four coupons for interest, attached to them, each for $100. The bonds were issued in 1860, and were made payable to bearer, in the city of New York, in

---

[49]The prevailing rule is that a judgment in favor of one of the joint tort feasors will not bar a separate action against another. *Lansing* v. *Montgomery*, 2 Johns. (N. Y.) 382 (1807); *Sprague* v. *Waite*, 36 Mass. 455 (1837); *Atlantic Dock Co.* v. *New York*, 53 N. Y. 64 (1873), *semble; Goble* v. *Dillon*, 86 Ind. 327, 44 Am. Rep. 308 (1882); *Thompson* v. *Chicago, St. P. &c. R. Co.*, 71 Minn. 89, 73 N. W. 707 (1898); *Three States Lumber Co.* v. *Blanks*, 118 Tenn. 627, 102 S. W. 79 (1907); *Staunton Mut. Tel. Co.* v. *Buchanan*, 108 Va. 810, 62 S. E. 928 (1908), *semble; Sutter* v. *Kansas City*, 138 Mo. App. 105, 119 S. W. 1084 (1909); *Louisville, H. & St. L. R. Co.* v. *Linton*, 43 Ind. App. 709, 88 N. E. 532 (1909); *Nelson* v. *Illinois Cent. R. Co.*, 98 Miss. 295, 53 So. 619 (1910). Contra: *People* v. *Stephens*, 51 How. Pr. (N. Y.) 235 (affd. 71 N. Y. 527) (1876); *Jenkins* v. *Atlantic Coast Line R. Co.*, 89 S. Car. 408, 71 S. E. 1010 (1911).

"The general rule that one many not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way, is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel even though he would not have been bound by it had it been the other way." *Portland Gold Min. Co.* v. *Stratton's Independence*, 158 Fed. 63 (1907); *Ferrers* v. *Arden*, Cro. Eliz. 668 (1598); *Biggs* v. *Benger*, 2 Ld. Raym. 1372 (1724); *King* v. *Chase*, 15 N. H. 9, 41 Am. Dec. 675 (1844); *Emery* v. *Fowler*, 39 Maine 326, 63 Am. Dec. 627 (1855); *Williams* v. *McGrade*, 13 Minn. (Gil. 39) 46 (1868); *Hill* v. *Bain*, 15 R. I. 75, 23 Atl. 44 (1885); *Featherston* v. *Newburgh & C. Turnpike*, 71 Hun 109, 24 N. Y. S. 603, 54 N. Y. St. 71 (1893); *Doremus* v. *Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649 (1901); *Anderson* v. *Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119 (1902); *Anderson* v. *West Chicago St. R. Co.*, 200 Ill. 320, 65 N. E. 717 (1902); *McGinnis* v. *Chicago R. I. & P. R. Co.*, 200 Mo. 347, 98 S. W. 590 (1906); *Muntz* v. *Algiers & G. S. R. Co.*, 116 La. 235, 40 So. 688 (1906); *Williford* v. *Kansas City M. &c. Co.*, 154 Fed. 514 (1907); *Logan* v. *Atlanta & C. A. Co.*, 82 S. Car. 518, 64 S. E. 515 (1909). Contra: *Ill. Cent. R. Co.* v. *Clarke*, 85 Miss. 691, 38 So. 97 (1904).

[50]Part of the opinion of the court and the dissenting opinion are omitted.

the years 1868, 1869, 1870 and 1871, respectively, with annual interest at the rate of ten per cent. a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence[51], the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law upon any ground whatever.[52]

---

[51] As to evidence compare *Smith* v. *Whiting*, 11 Mass. 445 (1814); *Estate of Harrington*, 147 Cal. 124, 86 Pac. 546, 109 Am. St. Rep. 118 (1905); *Roney* v. *Westlake*, 216 Pa. 374, 65 Atl. 807 (1907), with *Cole* v. *Nashville*, 6 Cold. (Tenn.) 639 (1868); *Lewis* v. *Davis*, 8 Daly (N. Y.) 185 (1878); *Alabama G. S. R. Co.* v. *Blivens*, 92 Ga. 522, 17 S. E. 836 (1893); *Damren* v. *American Light & Power Co.*, 95 Maine 278, 49 Atl. 1092 (1906).

[52] *Ferrer's Case*, 6 Coke 7, Cro. Eliz. 668 (1598); *Anderson* v. *Campbell*, 3 Wils. C. P. 304 (1772); *Duchess of Kingston's Case*, 20 How. St. Tr. 355 (1776); *Outram* v. *Morewood*, 3 East 346 (1803); *Stafford* v. *Clark*, 2 Bingh. 377 (1824); *Wood* v. *Jackson*, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603 (1831); *Doty* v. *Brown*, 4 N. Y. 71, 53 Am. Dec. 350 (1850); *Mervine* v. *Parker*, 18 Ala. 241 (1850); *Sawyer* v. *Woodbury*, 73 (7 Gray) Mass. 499, 66 Am. Dec.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.[52a]

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus in the case of *Outram* v. *Morewood*, 3 East 346, the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because in a previous action for a similar trespass, they had set up the same title, and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: "It is not recovery, but the matter alleged by the party, upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they

---

518 (1856); *Hargus* v. *Goodman*, 12 Ind. 629 (1859); *Gray* v. *Gillilan*, 15 Ill. 453, 60 Am. Dec. 761 (1854); *Walker* v. *Chase*, 53 Maine 258 (1865); *Jamaica Pond Aqueduct Corp.* v. *Chandler*, 121 Mass. 1 (1876); *Schwan* v. *Kelly*, 173 Pa. St. 65, 33 Atl. 1107 (1896); *Grunert* v. *Spalding*, 104 Wis. 193, 80 N. W. 589 (1899); *Wooster* v. *Cooper*, 59 N. J. Eq. 204, 45 Atl. 381 (1899); *King* v. *Ross*, 21 R. I. 413, 45 Atl. 146 (1899); *Bacon* v. *Hunt*, 72 Vt. 98, 47 Atl. 394 (1900); *Mershon* v. *Williams*, 63 N. J. L. 398, 44 Atl. 211 (1899); *Lockyer* v. *Ferryman*, L. R. (1877) 2 App. Cas. 519; *Sly* v. *Hunt*, 159 Mass. 151, 34 N. E. 187 (1893); *Penny* v. *British & American Mortgage Co.*, 132 Ala. 357, 31 So. 96 (1901); *Allen* v. *International Text B. Co.*, 201 Pa. 579, 51 Atl. 323, 88 Am. St. 834 (1902); *Hawkshurst* v. *Asbury Park*, 65 N. J. Eq. 496, 56 Atl. 697 (1903); *McKinnon* v. *Johnson*, 59 Fla. 332, 52 So. 288 (1910); *Gould* v. *Randal*, 232 Pa. 612, 81 Atl. 809 (1911); *Mound City* v. *Castleman*, 187 Fed. 92 (1911); *Pratt* v. *Griffin*, 223 Ill. 349, 79 N. E. 102 (1906); *Bleakley* v. *Barclay*, 75 Kans. 462, 89 Pac. 906 (1907); *Corbett* v. *Craven*, 196 Mass. 319, 82 N. E. 37 (1907); *People's Trust Co.* v. *Ehrhart*, 56 Pa. Super. Ct. 101 (1914). The principle applies whether the first adjudication is in a court of law or equity. *Mutual Life Ins. Co.* v. *Newton*, 50 N. J. L. 571, 14 Atl. 756 (1888); *United Oil & Gas Co.* v. *Ellsworth*, 43 Ind. App. 670, 88 N. E. 362 (1908); *Spink* v. *Philadelphia Hydro-Electric Co.*, 245 Pa. 143, 91 Atl. 609 (1914). But see *Vicksburg* v. *Henson*, 231 U. S. 259, 58 L. ed. 209 (1913).

[52a] *Hibshman* v. *Dulleban*, 4 Watts (Pa.) 183 (1835); *Christian* v. *Penn*, 7 Ga. 434 (1849); *Lentz* v. *Wallace*, 17 Pa. St. 412, 55 Am. Dec. 569 (1851); *Duncan* v. *Holcomb*, 26 Ind. 378 (1866); *Lindsey* v. *Danville*, 46 Vt. 144 (1873); *Spurlock* v. *Missouri Pac. R. Co.*, 76 Wis. 67 (1882); *Wiggins Ferry Co.* v. *Ohio & M. R. Co.*, 142 U. S. 396, 35 L. ed. 1055 (1892); *Stokes* v. *Foote*, 172 N. Y. 327, 65 N. E. 176 (1902); *Stroup* v. *Pepper*, 69 Kans. 241, 76 Pac. 825 (1904); *Lim Jew* v. *United States*, 196 Fed. 736 (1912); *Grider* v. *Groff*, 202 Fed. 685 (1912); *Chapman* v. *Propp*, 125 Minn. 447, 147 N. W. 442 (1914); *Whitaker* v. *Garren*, 167 N. Car. 658, 83 S. E. 759 (1914).

are privy in estate or law, has been, on such issue joined, solemnly found against them." And in the case of *Gardner* v. *Buckbee,* 3 Cow. (N. Y.) 120, it was held by the Supreme Court of New York that a verdict and judgment in the marine court of the city of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the court of common pleas. The rule laid down in the celebrated opinion in the case of the Duchess of Kingston was cited, and followed: "That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea at bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel.

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action can not be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.[53] The declaration may contain different statements of the cause of action in different counts.

[53] "That a judgment by default has an operation by estoppel can not be denied; but the ground and extent of that estoppel must, in my opinion, be found on the face of the judgment itself, and can not be inferred or deduced from the pleading of the party who has obtained the judgment, when the de-

It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau* v. *Rutlin*, 2 Exch. 665, 681; *Hughes* v. *Alexander*, 5 Duer 493.

If, now, we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith, that the county of Sac, by a vote of its people, authorized the issue of bonds to the amount of $10,000, for the erection of a court house; and bonds to that amount were issued by the county judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court house; that immediately upon receipt of the bonds the contractor gave one of them as a gratuity to the county judge; and that the court house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become, before their maturity, the holder of twenty-five coupons, which had been attached to the bonds; but there was no finding that he had ever given any value for them. The court below held, upon these findings, that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show that he had given value for the coupons; and, not having done so, the judgment was affirmed. Reading the record of the lower court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever the illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a bona fide holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from

---

fendant has said nothing, and done nothing and has merely allowed the judgment to go by default." Per Fitz. Gibbon, L. J., in *Irish Land Commission* v. *Ryan*, L. R. (1900), 2 Ir. 565; *Frost* v. *Koon*, 30 N. Y. 428 (1864); *Hanham* v. *Sherman*, 114 Mass. 19 (1873); *Lawson* v. *Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. 17 (1892).

making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.[54]

Judgment reversed.

Clifford, J., dissented.

---

[54]Accord: *Nesbit* v. *Riverside Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. ed. 562 (1892); *Crandall* v. *Gallup*, 12 Conn. 365 (1837); *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214 (1876); *Watts* v. *Watts*, 160 Mass. 464, 36 N. E. 479 (1894); *Kapp* v. *Shields*, 17 Pa. Super. Ct. 524 (1901); *Callan* v. *Anderson*, 131 Ala. 228, 31 So. 427 (1901); *Stokes* v. *Foote*, 172 N. Y. 327, 65 N. E. 176 (1902); *Hartman* v. *Pittsburgh Inclined Plane Co.*, 23 Pa. Super. Ct. 360 (1903); *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954 (1905); *Northern P. R. Co.* v. *Slaight*, 205 U. S. 122, 51 L. ed. 738 (1907); *Virginia-Carolina Chemical Co.* v. *Kirven*, 215 U. S. 252, 54 L. ed. 179 (1909); *United States* v. *Naldrett*, 214 Fed. 895 (1914). "Only material, relevant and necessary facts decided in a former action are conclusively determined thereby. The judgment does not operate as an estoppel as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided." *Stannard* v. *Hubbell*, 123 N. Y. 520, 25 N. E. 1084 (1890); *Geneva N. Bk.* v. *Independent School Dist.*, 25 Fed. 629 (1885); *Unglish* v. *Marvin*, 128 N. Y. 380, 28 N. E. 634 (1891); *Taylor* v. *Hutchinson*, 61 N. J. L. 440, 39 Atl. 664 (1898); *Burlen* v. *Shannon*, 99 Mass. 200, 96 Am. Dec. 733 (1868). Where a judgment in a former suit is relied on as conclusive, it may be shown by evidence *aliunde* not inconsistent with the record that the particular point was not adjudicated, if in law the judgment could have been rendered on any other point. *Seddon* v. *Tutop*, 6 T. R. 607 (1796); *Packet Co.* v. *Sickles*, 72 U. S. 580 (1866); *Coleman's Appeal*, 62 Pa. St. 252 (1869); *Follansbee* v. *Walker*, 74 Pa. St. 306 (1873); *Lewis* v. *Ocean N. P. Co.*, 125 N. Y. 341, 26 N. E. 301 (1891); *Susquehanna Mut. Fire Co.* v. *Mardorf*, 152 Pa. 22, 25 Atl. 234 (1892); *Nashua & L. R. Corp.* v *Boston & L. R. Corp.*, 164 Mass. 222, 41 N. E. 268, 49 Am. St. 454 (1895); *Embden* v. *Lisherness*, 89 Maine 578, 36 Atl. 1101, 56 Am. St. 442 (1897); *Pennebaker* v. *Parker*, 33 Pa. Super. Ct. 458 (1907); *Clark* v. *Scovill*, 198 N. Y. 279, 91 N. E. 800 (1910). In *Bigelow* v. *Windsor*, 67 Mass. 299 (1854), it is said by Shaw, C. J.: "To ascertain whether a past judgment is a bar to another suit, we are to consider, first, whether the subject-matter of legal controversy, which is proposed to be brought before any court for adjudication, has been drawn in question, and within the issue of a former judicial proceeding which has terminated in a regular judgment on the merits, so that the whole question may have been determined by that adjudication; secondly, whether the former litigation was between the same parties, in the same right or capacity litigating in the subsequent suit, or their privies respectively, claiming through or under them, and bound and estopped by that which would bind and estop those parties, and thirdly, whether the former adjudication was had before a court of competent jurisdiction to hear and decide on the whole matter of controversy, embraced in the subsequent suit."

In *Mershon* v. *Williams*, 63 N. J. L. 401, 44 Atl. 211 (1899), it is said: "A matter is not *res judicata* unless there be (1) identity of the thing sued for, (2) of the cause of action, (3) of the persons and parties, (4) and of the quality of the persons for and against whom the claim is made." Bouv. Law Dic. tit. *res judicata; Benz* v. *Hines*, 3 Kans. 390 (1866). As to the last two, they may be admitted. But as to the first two, it has been pointed out the decisions frequently fail to observe the difference between a judgment set up as a bar, when there must be identity in the cause of action, and a judgment offered as evidence of a particular question when all that is necessary is that the issue raised in the second suit must be identical with the issue in the

ROBINSON *v.* ROBINSON

COURT OF KING'S BENCH, 1603

Cro. Jac. 15[55]

Debt, as executor of J. S. The defendant pleaded quod auterfoit he brought an action as administrator of J. S. for this debt, and was therein barred; and prayed judgment, whether the present action was maintainable. The truth was, that the plaintiff and another were made executors, and he, not knowing thereof, took out administration, and brought debt as administrator; to which action it was pleaded in abatement, that another was made executor who had proved the will and administered; and upon this plea he was barred. Having now proved the will, and the other executor being dead, he brought the present action as executor; and the defendant pleaded against him the former bar.

THE COURT adjudged that it was no bar; for although once a bar in a personal action is a bar perpetual, that is to be understood when it is a bar to the right, but here it was not any bar; but by the misconceiving of his action, the action abated, wherefore it is not any bar in a new action. And it was adjudged accordingly.[56]

WILBUR *v.* GILMORE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1838

38 Mass. 250

Trespass quare clausum. The action was submitted to referees under a rule of court. They awarded to the plaintiff the sum of $5, as the actual value of wood and timber cut and carried away by the defendant, and submitted to the determination of the court the legal questions arising in the case.

---

first. Freeman on Judgments (4th ed.), §§ 252-256; Black on Judgments (2d ed.), §§ 610, 611, 23 Cyc. 1298. *Ferhinger* v. *F. H. Martin Drug Co.*, 56 Colo. 445, 138 Pac. 1107 (1914); *Chicago Terminal R. Co.* v. *Winslow*, 216 Ill. 166, 74 N. E. 815 (1905); *Robinson & Co.* v. *Marr*, 181 Ill. App. 605 (1913); *Coyle* v. *Due*, 149 N. W. 122, 28 N. Dak. 400 (1914).

[55] S. C. *Robinson's Case*, 5 Coke 33, where the earlier cases are referred to.

[56] Accord: *Fleming* v. *Insurance Co. of Pennsylvania*, 12 Pa. St. 391 (1849); *Jordan* v. *Seifert*, 126 Mass. 25 (1878); *Hill* v. *Huckabee*, 70 Ala. 183 (1881); *Atkins* v. *Anderson*, 63 Iowa 739, 19 N. W. 323 (1884); *Garrett* v. *Greenwell*, 92 Mo. 120, 4 S. W. 441 (1887); *Jerico* v. *Underhill*, 67 Vt. 85, 30 Atl. 690, 48 Am. St. 804 (1894); *In re Wrisley*, 126 Mich. 109, 85 N. W. 456 (1901); *Succession of Jones*, 120 La. 986, 45 So. 965 (1908); *Lyons* v. *Hammond Elevator Co.*, 139 Ill. App. 495 (1908). Hence, where a foreign corporation fails in an action because it has not registered in compliance with a state law, it is not debarred from bringing a second action after complying with the law. *Pittsburgh Construction Co.* v. *Westside Belt R.*, 227 Pa. 90, 75 Atl. 1029 (1910). And a judgment given because of misjoinder or

The trespass was committed in the lifetime of the plaintiff's testator. In the year 1835, the plaintiff commenced a suit against the defendant for the same cause of action. To that suit there was a general demurrer and joinder in the court of common pleas, and judgment was there rendered that the declaration was bad and that the defendant recover his costs. The defendant insisted that those proceedings were a bar to the present action.[57]

MORTON, J.: The general rule undoubtedly is, that the judgment in one action shall bar all other suits between the same parties and for the same cause of action. Interest republicae ut sit finis litium. But this rule is limited to judgments rendered on the merits. If the plaintiff be nonsuit for want of proof, or because his allegata and probata do not agree, or for any other cause, he may commence another action. 1 Chitty Pl. (5th ed.) 227; Gould Pl. 478. Even a judgment of nonsuit on the merits, or on an agreed statement of facts, has been holden to be no bar to another action. *Knox* v. *Waldoborough*, 5 Greenl. (Maine) 185; *Bridge* v. *Sumner*, 1 Pick. (Mass.) 371.[58] So if the plaintiff mistake the form of his action, as if he bring trespass instead of trover, and his writ be adjudged bad on demurrer, the judgment will not bar an action of trover. 1 Chitty Pl. (5th ed.) 227; Gould Pl. 478, section 6. So if the plaintiff mistake his cause of action and the defendant demur and have judgment, this will not preclude the plaintiff from commencing a fresh action correctly setting forth the right cause. So also if the declaration be demurred to, or a bad plea be pleaded and demurred to, and a judgment be rendered against the plaintiff for the insufficiency of his declaration, it will not estop the plaintiff from bringing another action to enforce the same right; because the case as stated in the last declaration was not tried in the first. In all these cases, if

---

nonjoinder of parties or because of want of capacity in a party to sue or be sued establishes nothing but such defect or incapacity and will not debar a subsequent suit where such objection does not exist. *Harris* v. *Columbia Water & Light Co.*, 114 Tenn. 328, 85 S. W. 897 (1904).

[57] The arguments of counsel and part of the opinion of the court are omitted.

[58] "A nonsuit is but like blowing out a candle, which a man at his own pleasure lights again." *Clapp* v. *Thomas*, 87 Mass. 158 (1862), citing March on Arbitrements, 215. Such a judgment is not final upon the merits. *Daggett* v. *Robins*, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752 (1831); *Brintnall* v. *Foster*, 7 Wend. (N. Y.) 104 (1831); *Bond* v. *McNider*, 3 Ired. (25 N. Car.) 440 (1843); *Foster* v. *Wells*, 4 Tex. 101 (1849); *Fisk* v. *Parker*, 14 La. Ann. 491 (1859); *Blair* v. *McLean*, 25 Pa. 77 (1855); *Holland* v. *Hatch*, 15 Ohio St. 464 (1864); *Beckett* v. *Stone*, 60 N. J. L. 23, 36 Atl. 880 (1897); *Honsinger* v. *Union Carriage &c. Co.*, 175 N. Y. 229, 67 N. E. 436 (1903); *Deneen* v. *Houghton County St. R. Co.*, 150 Mich. 235, 113 N. W. 1126 (1907); *Grats* v. *Parker*, 137 Wis. 104, 118 N. W. 637 (1908); *Zeller* v. *Ranson*, 140 Mo. App. 220, 123 S. W. 1016 (1909); *Buchanan* v. *James*, 134 Ga. 475, 68 S. E. 72 (1910). Contra: *Ordway* v. *Boston & M. R. Co.*, 69 N. H. 429, 45 Atl. 243 (1899); *Clow* v. *West*, 37 Nev. 267, L. R. A. 1916A, 696n, 142 Pac. 226 (1914); *McGuire* v. *Bryant Lumber and Shingle Mill Co.*, 53 Wash. 425, 102 Pac. 237 (1909); *Lewis* v. *Superior Court of Butte County*, 11 Cal. App. 483, 105 Pac. 763 (1909). The same rule applies where the dismissal of an action is equivalent to a nonsuit. *Woods* v. *Lindwall*, 48 Fed. 62 (1891); *McPherson* v. *Swift*, 27 S. Dak. 296, 130 N. W. 768 (1911); *County of Morrison* v. *Lyonburg*, 124 Minn. 495, 145 N. W. 380 (1914).

the defendant plead the former judgment in bar, the plaintiff may reply that it was not obtained on the merits. 1 Chitty Pl. (5th ed.) 227; Gould Pl. 478, section 45; Vin. Abr. Judgment (Q. 4); *Lampen* v. *Kedgewin*, 1 Mod. 207. In this last case, North, C. J., says: "There is no question but that if a man mistakes his declaration and the defendant demurs, the plaintiff may set it right in a second action."

It is apparent from the record that the former judgment between these parties was rendered upon the insufficiency of the declaration and not upon the merits of the case, and therefore can be no bar to the present action.[59]

---

[59] A judgment on demurrer, if upon the merits, is, in effect, as conclusive as if established by evidence submitted to a court or jury. *Lampen* v. *Kedgewin*, 1 Mod. 207 (1675); *Bouchand* v. *Dias*, 3 Denio (N. Y.) 239 (1846); *Robinson* v. *Howard*, 5 Cal. 428 (1855); *Vanlandingham* v. *Ryan*, 17 Ill. 25 (1855); *Aurora* v. *West*, 7 Wall. (U. S.) 82, 19 L. ed. 42 (1868); *Woolley* v. *Louisville Banking Co.*, 81 Ky. 527, 5 Ky. L. 562 (1883); *Coney* v. *Harney*, 53 N. J. L. 53, 20 Atl. 736 (1891); *Lutterell* v. *Reynolds*, 63 Ark. 254, 37 S. W. 1051 (1896); *Trainor* v. *Maverick T. Co.*, 92 Nebr. 821, 139 N. W. 666 (1913). But a demurrer based on formal and technical defects, or, which goes to the sufficiency of the complaint in point of form, while conclusive upon the point determined is not conclusive upon the merits. *Gilman* v. *Rives*, 10 Pet. (U. S.) 298, 9 L. ed. 432 (1836); *Gerrish* v. *Pratt*, 6 Minn. (Gil. 14) 53 (1861); *Birch* v. *Funk*, 2 Met. (Ky.) 544 (1859); *Stowell* v. *Chamberlain*, 60 N. Y. 272 (1875); *Detrick* v. *Sharrar*, 95 Pa. St. 521 (1880); *Kirsch* v. *Kirsch*, 113 Cal. 56, 46 Pac. 164 (1896); *Terre Haute & I. R. Co.* v. *State*, 159 Ind. 438, 65 N. E. 401 (1902); *Duke* v. *Postal Tel. Cable Co.*, 71 S. Car. 95, 50 S. E. 675 (1904). A judgment is not available as an estoppel unless upon the merits, that is, "When it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical or dilatory objections or contentions." Black on Judgments, § 694. Compare (on the merits) *Livermore* v. *Herschell*, 3 Pick. (Mass.) 33 (1825); *Stafford* v. *Clark*, 1 Car. & P. 403 (1824); *Hamilton B. Assn.* v. *Reynolds*, 5 Duer 671, 12 N. Y. Super. Ct. 671 (1856); *Follansbee* v. *Walker*, 74 Pa. St. 306 (1873); *Davie* v. *Davis*, 108 N. Car. 501, 13 S. E. 240, 23 Am. St. 71 (1891); *Besecher* v. *Flory*, 176 Pa. St. 23, 34 Atl. 926 (1896); *Lusk* v. *Chicago*, 211 Ill. 183, 71 N. E. 878 (1904); *In re Ward's Estate*, 152 Mich. 218, 116 N. W. 23 (1908); *Everett* v. *Williams*, 152 N. Car. 117, 67 S. E. 265 (1910), with (not on the merits) *Hitchin* v. *Campbell*, 2 Wm. Bl. 827 (1771); *Leonard* v. *Leonard*, 1 Watts & S. (Pa.) 342 (1841); *Carmony* v. *Hoober*, 5 Pa. St. 305 (1847); *Brackett* v. *Hoitt*, 20 N. H. 257 (1850); *Hurst* v. *Means*, 2 Sneed (Tenn.) 546 (1855); *Correia* v. *Supreme Lodge*, 218 Mass. 305, 105 N. E. 977 (1914); *Witcher* v. *Oldham*, 4 Sneed (Tenn.) 220 (1856); *Gage* v. *Holmes*, 78 Mass. (12 Gray) 428 (1859); *Reynolds* v. *Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449 (1886); *Weigley* v. *Coffman*, 144 Pa. St. 489, 22 Atl. 919 (1891); *Meredith Mechanic Assn.* v. *American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330 (1893); *Huffman* v. *Knight*, 36 Ore. 581, 60 Pac. 207 (1900); *Reid* v. *Caldwell*, 114 Ga. 676, 40 S. E. 712 (1901); *Johnson* v. *Amberson*, 140 Ala. 342, 37 So. 273 (1903); *Chicago Traction Co.* v. *Winslow*, 216 Ill. 166, 74 N. E. 815 (1905); *Mulcahy* v. *Dieudonne*, 103 Minn. 352, 115 N. W. 636 (1908); *Conant* v. *Boston Chamber of Commerce*, 201 Mass. 479, 87 N. E. 906 (1909); *Clark* v. *Scovill*, 198 N. Y. 279, 91 N. E. 800 (1910); *McDonald* v. *Hygenic Ice Co.*, 148 App. Div. (N. Y.) 539, 132 N. Y. S. 857; *Barrentine* v. *Henry Wrape Co.*, 113 Ark. 196, 167 S. W. 1115 (1914); *Baxter* v. *Buchholz-Hill E. Transp. Co.*, 227 U. S. 637 57 L. ed. 681 (1913); *Means* v. *Hoar*, 110 Maine 409, 86 Atl. 772 (1913); *Smith* v. *Armstrong*, 125 Minn. 59, 145 N. W. 617 (1914); *Epstein* v. *Soskin*, 85 Misc. 194, 148 N. Y. S. 323 (1914). An infant, prevailing on the plea of infancy, in an action on a promissory note, given by him for a chattel which

LITCHFIELD *v.* GOODNOW

SUPREME COURT OF THE UNITED STATES, 1887

123 *U. S.* 549

This suit was brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, in his lifetime, against Grace H. Litchfield, in her lifetime, to recover the amount of taxes for the years 1864 to 1871, both inclusive, paid by the Homestead Company on certain tracts of Des Moines river lands held and owned by her, by and through conveyances from the Des Moines Navigation and Railroad Company. For a general statement of the facts reference is made to *Stryker* v. *Crane,* 123 U. S. 527. The taxes were paid before the decree in *Homestead Co.* v. *Valley R. Co.,* 17 Wall. (U. S.) 153, and the assignment was made to Goodnow afterwards. As defenses to the action, the prior adjudication in that case was pleaded in bar, and also the statute of limitations based on the decision as to title in *Wolcott* v. *Des Moines Co.,* 5 Wall. (U. S.) 681, the same as in *Stryker* v. *Crane.*

Both these defenses were overruled by the Supreme Court of the state, and judgment was entered in that court for the amount of taxes paid and interest. *Goodnow* v. *Litchfield,* 63 Iowa 275. The defendant brought error.[60]

WAITE, C. J.: The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill, but neither she or any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the question involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision.[61] If it had been ad-

---

he had obtained by fraud and refused to deliver on demand, was held liable in an action of tort for the conversion of the chattel. *Walker* v. *Davis,* 67 Mass. (1 Gray) 506 (1854). But where a plaintiff has an election either to sue on an express contract or to treat that contract as rescinded and to sue on an implied contract, then, when the election has been made and the suit proceeds to judgment on the merits, such judgment is a bar to an action upon the other theory. *Maeder* v. *Wexler,* 98 N. Y. App. Div. 68 (1904). So also, where there is an election between tort and contract, *Burnett* v. *Smith,* 70 Mass. (1855); *Roberts* v. *Moss,* 32 Ky. L. R. 525 (1907).

[60] The statement of facts is from the opinion of the court.

[61] But compare: *Weld* v. *Clarke,* 209 Mass. 9, 95 N. E. 651 (1911); *Hostetter* v. *Pittsburgh,* 107 Pa. St. 419, (1884); *Burns* v. *Gavin,* 118 Ind. 320, 20 N. E. 799 (1888); *Roby* v. *Eggers,* 130 Ind. 415, 29 N. E. 365 (1891); *Lightcap* v. *Bradley,* 186 Ill. 510, 58 N. E. 221 (1900); *Confectioners Mach. &c. Co.* v. *Racine Engine &c. Co.,* 163 Fed. 914 (1908); *Ramsey* v. *Wilson,* 52 Wash. 111, 100 Pac. 177 (1909); *Lamberton* v. *Dinsmore,* 75 N. H. 574, 78 Atl. 620 (1910); *Ward* v. *Clendenning,* 245 Ill. 206, 91 N. E. 1028 (1910); *Bemis Car Box Co.* v. *J. G. Brill Co.,* 200 Fed. 749 (1912); *Heavrin* v. *Lack Malleable Iron Co.,* 153 Ky. 329, 155 S. W. 729 (1913); *Singer Mfg. Co.* v. *Cramer,* 109 Fed. 652 (1901).

verse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation.

Greenleaf, in his Treatise on the Law of Evidence, vol. 1, section 523, states the rule applicable to this class of cases thus: "Under the term parties in this connection, the law includes all who are directly interested in the subject matter, and had a right to make a defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity." The correctness of this statement has been often affirmed by this court; *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, 19; *Robbins* v. *Chicago City*, 4 Wall. (U. S.) 657, 673; and the principle has been recognized in many cases. Indeed, it is elementary. *Hale* v. *Finch*, 10 U. S. 261, 265; *Brooklyn City, etc., R. Co.* v. *Nat. Bank*, 102 U. S. 14, 22; *Butterfield* v. *Smith*, 101 U. S. 570.[62]

In the condition of parties to the record during the whole course of the litigation between the Homestead Company and those who were named as defendants, Mrs. Litchfield had no right to make a defense in her own name, neither could she control the proceedings, nor appeal from the decree. She could not in her own right adduce

[62]Accord: *Hunt* v. *Haven*, 52 N. H. 162 (1872); *Buckingham* v. *Ludlum*, 37 N. J. Eq. 137 (1883); *McDonald & Co.* v. *Gregory*, 41 Iowa 513 (1875); *Hart* v. *Moulton*, 104 Wis. 349, 80 N. W. 599, 76 Am. St. 881 (1899); *Smith* v. *Kessler*, 22 Idaho 589, 127 Pac. 172 (1912); *Foster* v. *Earl of Derby*, 1 Ad. & El. 783 (1834); Co. Litt. 352b. "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of suit." Freeman on Judgments, § 162; *Sampson* v. *Ohleyer*, 22 Cal. 200 (1863); *Moreland* v. *H. C. Frick Coke Co.*, 170 Pa. St. 33, 32 Atl. 634 (1895); *Gage* v. *Parker*, 178 Ill. 455, 53 N. E. 317 (1899); *Rieschick* v. *Klingelhoefer*, 91 Mo. App. 430 (1901).

testimony or cross-examine witnesses. Neither was she identified in interest with any one who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners. She was neither a party to the suit, nor in privity with those who were parties; consequently she was in law a stranger to the proceedings and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels to be good must be mutual.[63] This was in effect the decision of the court below, and it was right.

It follows that there is no error in the record, and

The judgment is affirmed.[64]

---

[63]Per Alderson, B., in *Petrie* v. *Nuttall*, 11 Exch. 569 (1856): "It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take advantage of it." *Brereton* v. *Evans*, Cro. Eliz. 700 (1598); *Bradford* v. *Bradford*, 5 Conn. 127 (1823); *Wenman* v. *Mackenzie*, 5 El. & Bl. 447 (1855); *Simpson* v. *Pearson*, 31 Ind. 1, 99 Am. Dec. 577 (1869); *Parker* v. *Moore*, 59 N. H. 454 (1879); *Chandler's Appeal*, 100 Pa. St. 262 (1882); *Coney* v. *Harney*, 53 N. J. L. 53, 20 Atl. 736 (1890); *Buford* v. *Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. 854 (1897); *Shipman* v. *Rollins*, 98 N. Y. 311, 15 Abb. N. Cas. 288 (1885); *Walker* v. *Philadelphia*, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. 801 (1900); *Pfeffer* v. *Kling*, 58 App. Div. 179, 68 N. Y. S. 641 (1901); *Robinson & Co.* v. *Marr*, 181 Ill. App. 605 (1913); *Jones* v. *Adler*, 183 Ala. 435, 62 So. 777 (1913) *Hudkins* v. *Crim*, 72 W. Va. 418, 78 S. E. 1043 (1913).

[64]Accord: *Lowber* v. *Beauchamp*, 2 Harr. (Del.) 139 (1836); *Burhans* v. *Van Zandt*, 7 N. Y. 523 (1852); *Hale* v. *Chandler*, 3 Mich. 531 (1855); *Queen* v. *Hartington*, 4 El. & Bl. 780 (1855); *Chase* v. *Swain*, 9 Cal. 130 (1858); *Spencer* v. *Williams*, L. R. 2 P. & D. 230 (1871); *Hill* v. *Stevenson*, 63 Maine 364 (1873); *Day* v. *Combination Rubber Co.*, 2 Fed. 570 (1880); *Rittispaugh* v. *Lewis*, 103 Pa. St. 1 (1883); *De Mora* v. *Concha*, L. R. 29 Ch. Div. 268 (1885); *Sturbridge* v. *Franklin*, 160 Mass 149, 35 N. E. 669 (1893); *Ransom* v. *Brinkerhoff*, 56 N. J. Eq. 149, 38 Atl. 919 (1897); *Louisville & N. R. Co.* v. *Brinkerhoff*, 119 Ala. 606, 24 So. 892 (1898); *Owingsville &c. T. Co.* v. *Hamilton*, 53 S. W. 5, 21 Ky. L. 815, 5 S. W. 175, 21 Ky. L. 1150 (1899); *Reynolds* v. *Aetna L. I. Co.*, 160 N. Y. 635, 55 N. E. 305 (1899); *Harris* v. *Columbia Water & L. Co.*, 114 Tenn. 328, 85 S. W. 897 (1904); *Fowler* v. *Stebbins*, 136 Fed. 365 (1905); *Ingersoll* v. *Coram*, 211 U. S. 335, 52 L. ed. 208 (1908); *International Forwarding Co.* v. *Rosati*, 156 Ill. App. 339 (1910); *Kowal* v. *Lehrman*, 144 App. Div. 219, 128 N. Y. S. 968 (1911); *Merriam* v. *Saalfield*, 190 Fed. 927 (1911); *Ehrhart* v. *Bear*, 51 Pa. Super. Ct. 39 (1912); *Feldkamp* v. *Ernst*, 177 Mich. 550, 143 N. W. 887 (1913); *Helm* v. *Zarecor*, 213 Fed. 648 (1913). The judgment is conclusive upon the real party in interest and not upon a merely nominal or formal party having no interest or duty in the subject-matter of the litigation. *Rogers* v. *Haines*, 3 Greenl. (Maine) 362 (1825); *Peterson* v. *Lothrop*, 34 Pa. St. 223 (1859); *Faust* v. *Baumgartner*, 113 Ind. 139, 15 N. E. 337 (1887); *Citizens' Bank* v. *Miller*, 45 La. Ann. 493, 12 So. 516 (1893); *Cheney* v. *Patton*, 144 Ill. 373, 34 N. E. 416 (1893); *Curtis* v. *Bradley*, 65 Conn. 99, 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. 177 (1894); *United States* v. *Des Moines Valley R. Co.*, 84 Fed. 40 (1897); *Maloy* v. *Duden*, 86 Fed. 402 (1898); *Keller* v. *Mount Vernon*, 23 App. Div. 46, 48 N. Y. S. 370 (1897); *Ransom* v. *Pierre*, 101 Fed. 665 (1900). One not a party may be bound if he actually submits to the consideration of the court his claim or interest in the subject of the action. *Sevey* v. *Chick*, 13 Maine 141 (1836); *Conant* v. *Jones*, 50 App. Div. 336, 64 N. Y. S. 189 (1900); *Nash* v. *D'Arcy*, 183 Mass. 30, 66 N. E. 606 (1903); *Lake* v. *Weaver*, 80 N. J. Eq. 395, 86 Atl. 817 (1912).

KIP *v.* BRIGHAM

SUPREME COURT OF NEW YORK, 1810

6 *Johns.* (*N. Y.*) 158

This was an action brought by the plaintiff, as sheriff of the county of Oneida, against the defendants, on a bond given as security for the gaol liberties, granted to the defendant, Abel Brigham, who had been arrested and imprisoned on a ca. sa. in favor of John Bissell.

At the trial, the plaintiff gave in evidence, the record of a recovery against him, in favor of Bissell, for the escape of the defendant Brigham; that immediately after suit was commenced against the plaintiff, he gave notice thereof to the defendants, and the suit was regularly defended by the plaintiff, aided by the active cooperation of the defendant's counsel. The judge ruled, that the record of the recovery in that suit was conclusive against the defendants in this suit, unless they could show fraud or collusion between the plaintiff and Bissell; and he rejected evidence offered by the defendants, to controvert the fact of the escape. A verdict was accordingly found for the plaintiff.

A motion was made to set aside the verdict; and the question submitted to the court was, whether the opinion of the judge was correct.

PER CURIAM: There was no misdirection on this point. The case of *Blasdale* v. *Babcock*, 1 Johns. (N. Y.) 517 shows that the record was evidence, in this case, for the plaintiff; and as the bond, on which the suit was brought, was, in effect, a bond of indemnity, the recovery, after notice to the defendants, and their assuming the defense, was conclusive, that the plaintiff had been damnified to that extent. The case of *Duffield* v. *Scott*, 3 Term Rep. 374, is to this point; and the present is a stronger case, because here the defendants assumed upon themselves the defense of the suit, and became essentially parties. The case of principal and surety is said Pothier, Traité des Obligations, part 4, ch. 3, section 61, not to come within the rule of *res inter alios acta*. The case of *Bander* v. *Fremberger*, 4 Dall. (Pa.) 436, is also a strong authority in support of the opinion given upon the trial. The suit there was on the covenant of warranty in a deed; and to show a breach, the plaintiff gave in evidence a recovery against him in ejectment, by a third person, and that the defendants had notice of this ejectment, and took part in the defense. The defendant then offered to controvert the title of that third person, and that he conveyed good title to the plaintiffs; but the court held the evidence inadmissible. The same rule was laid down in the case of *Hamilton* v. *Cutts*, 4 Tyng (Mass.) 349. The motion to set aside the verdict is therefore denied.

Motion denied.[65]

[65] The general rule is that one responsible over to another, who has been notified of a suit against the person he is bound by law, or by agreement, to

indemnify, and who has had an opportunity to appear and defend, is concluded by the judgment. Freeman on Judgments, § 181; *Hamilton* v. *Cutts*, 4 Mass. 349, 3 Am. Dec. 222 (1808); *Kip* v. *Bingham*, 7 Johns. (N. Y.) 168 (1810); *Clarke* v. *Carrington*, 7 Cranch (U. S.) 308, 3 L. ed. 354 (1813); *Barney* v. *Dewey*, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372 (1816); *Brown Co.* v. *Butt*, 2 Ohio 348 (1826); *Pope* v. *Nance*, 1 Stew. (Ala.) 354, 18 Am. Dec. 60 (1828); *Mehaffy* v. *Lytle*, 1 Watts (Pa.) 314 (1833); *Walker* v. *Ferrin*, 4 Vt. 523 (1832); *Lloyd* v. *Barr*, 11 Pa. St. 41 (1849); *Bullock* v. *Winter*, 10 Ga. 214 (1851); *Chicago & N. W. R. Co.* v. *Northern Line Packet Co.*, 70 Ill. 217 (1873); *Washington Gaslight Co.* v. *District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. 564 (1895); *Dempsey* v. *Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100 (1897); *Fowler* v. *Jersey Shore*, 17 Pa. Super. Ct. 366 (1901); *Prescott* v. *Le Conte*, 83 App. Div. 482, 82 N. Y. S. 411 (1903); *Rowell* v. *Smith*, 123 Wis. 510, 102 N. W. 1 (1905); *Koch* v. *Hinkle*, 35 Pa. Super. Ct. 421 (1908); *May* v. *Poluhoff*, 65 Misc. 546, 120 N. Y. S. 827 (1910); *American Surety Co. of New York* v. *Sandberg*, 225 Fed. 150 (1915). The decisions of different courts are not uniform upon the requirements of the notice to be given to the indemnitor. It need not be in writing. *Ferrea* v. *Chabot*, 63 Cal. 564 (1883); *Miner* v. *Clark*, 15 Wend. (N. Y.) 425 (1836); *Somers* v. *Schmidt*, 24 Wis. 417, 1 Am. Rep. 191 (1869). The party against whom ultimate liability is claimed must be fully and fairly informed that the action is pending, with full opportunity to defend or participate in the defense. If he then neglects, or refuses to make any defense he may have, the judgment will conclude him. *Oceanic Steam Nav. Co.* v. *Campania T. E.*, 144 N. Y. 663, 39 N. E. 360 (1895); *Consolidated Hand-Method Lasting Mach. Co.* v. *Bradley*, 171 Mass. 127, 50 N. E. 464, 68 Am. St. 409 (1898); *Shrewsbury* v. *Boylston*, 1 Pick. (Mass.) 105 (1822); *Jacob* v. *Pierce*, 2 Rawle (Pa.) 204 (1828); *Stephens* v. *Jack*, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583 (1832); *Bramble* v. *Poultney*, 11 Vt. 208 (1839); *Brown* v. *Chaney*, 1 Ga. 410 (1846); *Hardy* v. *Nelson*, 27 Maine 525 (1847); *Pittsburgh, C. & St. L. R. Co.* v. *Marshall*, 85 Pa. St. 187 (1877); *Lamar Ins. Co.* v. *Pennell*, 19 Ill. App. 212 (1885); *Richmond* v. *Ames*, 164 Mass. 467, 41 N. E. 671 (1895); *The Chesapeake L. & T. Co.* v. *Western Assur. Co.*, 99 Md. 433, 58 Atl. 16 (1904). The appearance of the indemnitor in defense of the suit is evidence that he had notice. *Harding* v. *Larkin*, 41 Ill. 413 (1866); *In re Alexander's Estate*, 214 Pa. 369, 63 Atl. 799 (1906). But one is not bound if it appears that the defendant in the first action refused to permit him to become a party on the record, or to participate in the trial or to perfect an appeal from the judgment. *Fifth Mut. Bldg. Society* v. *Holt*, 184 Pa. St. 572, 39 Atl. 293 (1898).

One who, to protect himself from liability on the covenants in a lease, actively conducts the defense in an action against his tenant to recover possession and for use and occupation, employing counsel and paying costs, is estopped from questioning the validity of a judgment obtained in such action against his tenant. But he can not be compelled to pay the plaintiff in such action the damages awarded. His liability is to his tenant and covenantee only. *Hendricks* v. *Dean*, 105 Minn. 162, 117 N. W. 426 (1908).

GIBSON *v.* LEDWITCH

SUPREME COURT OF KANSAS, 1911

84 *Kans.* 505

JOHNSON, C. J.: This was an action to foreclose a mortgage executed by Thomas F. Ledwitch to E. Heliker, as trustee for A. C. Wilcox, who assigned it to Charles E. Gibson. It recited that "the said Thomas F. Ledwitch is indebted to A. C. Wilcox, five hundred dollars, evidenced by one promissory note of even date herewith, executed by said Thomas F. Ledwitch, payable to the order of A. C. Wilcox." It also stipulated that if default should be made in payment of either the note or the interest coupons, or in procuring insurance, or in paying taxes, the whole debt should become due at the option of the owner, and that a foreclosure suit might be instituted at once. It was also agreed that if there was a default of payment of any sum for thirty days the mortgagor would be required to pay to the owner of the note interest at the rate of twelve per cent. per annum from the date of the note to the time of actual payment. The only duty devolving on the trustee, by the terms of the mortgage, was that he was authorized by the mortgagor "to pay all liens of any kind, either prior or subsequent, that may in any manner affect the title to the land herein conveyed," etc. There was no appearance by any of the defendants in the foreclosure action, except J. K. Hitch, who set up as a defense that in a former action against E. Heliker, trustee, as defendant, a judgment was rendered by default quieting the title of the land in Hitch. In that action it appears that Heliker was served by publication, and that Wilcox, the payee and owner of the note, was not made a party. In the present action the trial court held that the former decree, quieting title in Hitch, was a bar to the maintenance of the action of foreclosure by Wilcox's assignee, and from this decree the plaintiff appeals.

The only question for decision is whether the judgment quieting title in Hitch is binding on Wilcox and his assignee, and is a bar to the action of foreclosure. The instrument in suit is conceded to be a mortgage—a mere incident to the debt which it secures. It is not a trust deed, and by it nothing is conveyed to the trustee. He is named as trustee, but it seems that he bears only a nominal relation to the security. The debt is not payable to him, the option to declare the debt due upon default in any of the conditions does not rest with him, he has no authority to transfer the mortgage or to foreclose it and is given no control whatever over the mortgage relations. He is a trustee in name, without powers or duties in respect to the mortgage relations, and manifestly is without authority to represent the owner of the debt which the mortgage secures. Even when a trustee has an interest, and is vested with powers and duties over the mortgage relations, it is generally deemed necessary to make the trustee and beneficiary parties to a foreclosure action. It has been said:

"The general rule is that, in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein." 23 Cyc. 1246. See also 2 Black. Judg. (2d ed.) section 585; 2 Perry Trusts section 873; Wiltsie Mort. Forecl. section 112.

In *Hutchinson* v. *Myers*, 52 Kans. 290, where a mortgage in which a trustee was named as second party and occupied a position similar to the nominal trustee in the mortgage in this case was involved, it was held that the beneficiary or creditor alone could maintain an action to foreclose in his own name. It was easy to imagine a case of a trustee vested with powers and duties as to the mortgage relations, and clothed with authority to represent the beneficiary in the collection of the mortgage debt, the foreclosure of the mortgage and the protection of the security from the attacks of third parties, where a judgment against the trustee might be binding on the beneficiary. *Swenney* v. *Hill*, 65 Kans. 826.

In *Kerrison* v. *Stewart*, 93 U. S. 155, it was said: "It can not be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust.[66]

[66]The opinion (per Waite, C. J.), continues: "If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust. *Shaw* v. *Norfolk Co. R. Co.*, 5 Gray (Mass.) 162 (1855); *Bifield* v. *Taylor*, 1 Beat. 91 (1828); *Campbell* v. *Texas & New Orleans R. Co.*, Fed. Cas. No. 2366, 1 Woods (U. S. C. C.) 368 (1871); *Ashton* v. *Atlantic Bank*, 3 Allen (Mass.) 220 (1861); or to one by a stranger against him to defeat it in whole or in part. *Rogers* v. *Rogers*, 3 Paige (N. Y.) 379 (1832); *Wakeman* v. *Grover*, 4 Paige (N. Y.) 23 (1832); *Winslow* v. *Minn. R. Co.*, 4 Minn. 313 (Gil. 230), 77 Am. Dec. 519 (1860); *Campbell* v. *Watson*, 8 Ohio 499 (1838). In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party." *Vetterlein* v. *Barnes*, 124 U. S. 169, 8 S. Ct. 441, 31 L. ed. 400 (1888); *Robertson* v. *Van Cleave*, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68 (1891); *Cooley* v. *Kelley*, 52 Ind. App. 687, 98 N. E. 653, 96 N. E. 638 (1911). The principle has frequently been applied in proceedings relating to mortgages where a trustee holds the title for the benefit of bondholders. *Corcoran* v. *Chesapeake & O. Canal Co.*, 94 U. S. 741, 24 L. ed. 190 (1867); *Shaw* v. *Railroad Co.*, 100 U. S. 605, 25 L. ed. 757 (1879); *Chicago & Great Western Railroad Land Co.* v. *Peck*, 112 Ill. 408 (1885); *Beals* v. *Ill. Cent. R. Co.*, 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. 314 (1880); *Toler* v. *East Tennessee &c. R. Co.*, 67 Fed. 168 (1894); *Woods* v. *Woodson*, 100 Fed. 515 (1900); *Grant* v. *Winona & S. R. Co.*, 85 Minn. 422, 89 N. W. 60 (1902). Contra: *Davis* v. *Hemingway*, 29 Vt. 438 (1857); *Raphael* v. *Wasatch &c. Co.*, 201 Fed. 854 (1912); *Tyson* v. *Applegate*, 40 N. J. Eq. 305 (1885). For England, see rules of Supreme Court, order 16, rule 8. *Francis* v. *Harrison*, L. R. 43 Ch. Div. 183 (1889); *In re Mitchell*, 65 L. T. 851 (1892).

Here the trustee has no beneficial interest in the mortgage, he was vested with no power or control as to either the debt or the security and was clothed with no authority to represent the creditor as to the mortgage or the mortgage lien, and unless the creditor is himself brought into litigation the judgment can not operate as an estoppel against him. Nothing done by or against the nominal trustee, in an action to which the owner of the note and mortgage was not a party, could operate to bind the latter, and the judgment relied on by the appellees was no defense or bar to the maintenance of the foreclosure action.

It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.[67]

---

[67]One not a party will be concluded by a judgment in a suit if represented by a party legally entitled to represent him. *Stout* v. *Lye*, 103 U. S. 66, 26 L. ed. 428 (1880); *Green* v. *Bogue*, 158 U. S. 478, 39 L. ed. 1061, 15 Sup. Ct. 975 (1894). As applied to trusts, "a suit to obtain or defend possession of property belonging to trustees, or claimed to belong to them, is readily distinguishable from one concerning the execution of the trust, where there are often various and conflicting interests between the different *cestui que trust*." *Jewett* v. *Tucker*, 139 Mass. 566, 2 N. E. 680 (1885). At law, in matters affecting the trust estate the trustee, invested with the legal title, sues in his own name, *McRaeny* v. *Johnson*, 2 Fla. 520 (1849); *Parsons* v. *Boyd*, 20 Ala. 112 (1852); *Presley* v. *Stribling*, 24 Miss. 527 (1852); *Penna. R. Co.* v. *Duncan*, 111 Pa. St. 352, 5 Atl. 742 (1886); *Barker* v. *Furlong*, L. R. 2 Ch. Div. 172 (1891), and the beneficiaries will be concluded by the judgment, although they may have a remedy against the trustee if he fails in his duty. *Clark* v. *Flannery*, 99 Ga. 239, 25 S. E. 312 (1896); *Boyden* v. *Partridge*, 68 Mass. (2 Gray) 190 (1854); *Miller* v. *Butler*, 121 Ga. 758, 49 S. E. 754 (1904); *Cooley* v. *Kelley*, 52 Ind. App. 687, 96 N. E. 638, 98 N. E. 653 (1911).

In equity, the general rule is that all persons interested in the subject-matter of the suit must be made parties, if the same is to affect their rights, and this rule requires that in litigation respecting trust property both trustee and *cestui que trust* be made parties. *Kirk* v. *Clarke*, 2 Eq. Ca. Abr. 165 (1708); s. c. Prec. Ch. 275; *Bifield* v. *Taylor*, 1 Moll. 193, 1 Beat. 91 (1828); *Collins* v. *Lofftus*, 10 Leigh. (Va.) 5, 34 Am. Dec. 719 (1839); *Stillwell* v. *McNeely*, 2 N. J. Eq. 305 (1840); *Mathews* v. *Stephenson*, 6 Pa. St. 496 (1847); *Dunn* v. *Seymour*, 11 N. J. Eq. 220 (1856); *Scholl* v. *Schoener*, 1 Woodw. (Pa.) 200 (1862); *Sprague* v. *Tyson*, 44 Ala. 338 (1870); *Day* v. *Wetherby*, 29 Wis. 363 (1872); *Potter* v. *Hoppin*, 10 Phila. (Pa.) 396, 32 Leg. Int. 66 (1875); *Trustees of the Internal Improvement Fund* v. *Gleason*, 15 Fla. 384 (1875); *Scanlon* v. *Cobb*, 85 Ill. 296 (1877); *Rembert* v. *Key*, 58 Miss. 533 (1880); *Hill* v. *Durand*, 50 Wis. 354, 7 N. W. 243 (1880); *Lehigh C. & N. Co.'s Appeal*, 88 Pa. St. 499 (1879); *Bank* v. *Crafts*, 145 Mass. 444 (1888); *Zehnbar* v. *Spillman*, 25 Fla. 591, 6 So. 214 (1889); *Nevitt* v. *Woodburn*, 82 Ill. App. 649 (1898), reversed 190 Ill. 283, 60 N. E. 500; *Wilcox* v. *Mann*, 115 Iowa 91, 87 N. W. 748 (1901); *Pyle* v. *Henderson*, 55 W. Va. 122, 46 S. E. 791 (1904). The modern tendency is to limit this rule to cases where the relations between trustee and beneficiary are material or where the power of the trustee to bind or control the property is in question. *McGraw* v. *Bayard*, 96 Ill. 146 (1880); *Northampton Nat. Bank* v. *Crafts*, 145 Mass. 444, 14 N. E. 758 (1888); *General F. E. Co.* v. *Lundell*, 66 Ill. App. 140 (1895); *In re Tucker*, 153 Fed. 91 (1906). And, ordinarily, the beneficiaries are represented by the trustee where the trust is an active one, imposing upon the trustee the duty of receiving, controlling and managing the trust fund for the benefit of the *cestui que trust*. *Willis* v. *Henderson*, 5 Ill. 13 (1842); *Carey* v. *Brown*, 92 U. S. 171, 23 L. ed. 469 (1875); Ames' Cases on Trusts (2d ed.) 260, note; *Van Bokkelen* v. *Tinges*, 58 Md. 53 (1881); *Smith* v. *Portland*, 30 Fed. 734 (1887); *Warren* v. *Howard*, 99 N. Car. 190, 5 S. E. 424 (1888); *Vetterlein* v. *Barnes*, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. 441 (1888); *In re Estate of*

SINGER *v.* HUTCHINSON

SUPREME COURT OF ILLINOIS, 1900

183 *Ill.* 606

This is an appeal from a judgment of the appellate court affirming a decree rendered on a creditor's bill filed by appellees January 7, 1898, against the Singer & Talcott Stone Company and others, as defendants, to reach the assets of the Singer & Talcott Stone Company in the possession of the defendants, as stockholders. Edward T. Singer, Charles G. Singer, Walter Singer, Harriet A. Singer, Charles B. Kimball, Spencer Kimball and the Singer & Talcott Company were made defendants to the bill.

The evidence showed that June 12, 1897, a judgment was rendered in the Superior Court of Cook County in a suit at law brought January 21, 1893, in which appellees were plaintiffs and the Singer & Talcott Stone Company was defendant, in favor of appellees, for the sum of $15,496.33 and costs; that August 10, 1897, an execution was issued on said judgment, which execution was returned by the sheriff November 8, 1897, "no property found."

The defendants (appellants here) offered evidence tending to show that the appellees were not entitled to recover in the action at law—in other words, such evidence as might have been admissible in that suit—which evidence the court excluded.

The decree was that the defendants Edward T. Singer and Charles G. Singer and the Singer & Talcott Stone Company pay to the complainants $16,639.66.[68]

CRAIG, J.: It is first claimed by appellants in the argument that the judgment recovered in the law court against the stone company is not proper evidence of the existence of a claim against the cor-

---

Stewart, 126 N. Y. 201 (1891); *Roberts* v. *New York E. R. Co.*, 155 N. Y. 31, 49 N. E. 262 (1898); *Sanders* v. *Houston Guano &c. Warehouse Co.*, 107 Ga. 49, 32 S. E. 610 (1899); *Iowa & C. I. Co.* v. *Hoag*, 132 Cal. 227, 64 Pac. 1073 (1901); *Perkins* v. *Burlington Land & Improvement Co.*, 112 Wis. 509, 88 N. W. 648 (1902); *Miller* v. *Butler*, 121 Ga. 758, 49 S. E. 754 (1904); *Felkner* v. *Dooly*, 27 Utah 350, 75 Pac. 854 (1904); *McDevitt* v. *Bryant*, 104 Md. 187, 64 Atl. 931 (1906); *Gould* v. *Soto*, 14 Ariz. 558, 133 Pac. 410 (1913); *Sherman* v. *Goodwin*, 15 Ariz. 47, 135 Pac. 719 (1913). See also N. Y. Code Civ. Pro., § 449; Cal. Code Civ. Pro., § 369.

The beneficiary is bound where the suit is prosecuted or defended by the trustee with the consent or participation of the beneficiary. *Plum* v. *Goodnow*, 123 U. S. 560, 31 L. ed. 268, 8 Sup. Ct. 216 (1887); *Bracken* v. *Atlantic Trust Co.*, 36 App. Div. 67, 55 N. Y. S. 506 (1899); *Jackson* v. *West*, 22 Tex. Civ. App. 483, 54 S. W. 297 (1900); *Glass* v. *Concordia*, 113 La. 544, 37 So. 189 (1904); *Alexander's Estate*, 214 Pa. 369, 63 Atl. 799 (1906). But a judgment against a party sued or suing as an individual is not an estoppel in a subsequent action where he sues as trustee. *Rathbone* v. *Hoonly*, 58 N. Y. 463 (1874); *Baker* v. *Small*, 17 Pa. Super. Ct. 423 (1901). So, a common-law judgment against the *cestui que trust* does not bind the trustee, he not being a party. *Roberts* v. *Yancey*, 94 Ky. 243, 21 S. W. 1047, 15 Ky. L. Rep. 10, 42 Am. St. 357 (1893).

[68] Only so much of the case as relates to the question of *res judicata* is printed.

poration to charge property in good faith distributed to appellants, they not being parties thereto. It is well settled rule that a judgment rendered in a court of competent jurisdiction is conclusive between parties and privies in regard to all matters of controversy determined by the judgment, and all persons represented by the parties, both plaintiff and defendant, are bound and concluded as privies by the judgment which may be rendered. It is also a well settled rule that a corporation represents the stockholders in all matters within the scope of its corporate powers transacted in good faith by the officers of the corporation. Among the conceded powers of corporations may be mentioned those of bringing and defending actions in regard to the rights and obligations of the corporation. *Bissit* v. *Kentucky River Nav. Co.*, 15 Fed. 353, is an interesting case on this question, where the authorities are fully cited and commented upon in a note.

This was a creditor's bill by a creditor who had reduced his claim to judgment against the Singer & Talcott Stone Company, brought against the corporation and its stockholders, to reach assets belonging to the corporation which had been turned over by the officers of the corporation to the stockholders in fraud of the rights of the creditors, and it is not claimed that the judgment against the corporation was obtained by fraud, or that there was a want of jurisdiction in the court in which the judgment was rendered. In the absence of fraud in obtaining the judgment against the corporation, and in the absence of a want of jurisdiction in the court wherein the judgment was rendered, we think the judgment in a case of this character was conclusive against the stockholders as to the amount and validity of the claim of the creditor.[69]

Affirmed.

---

[69]Accord: *Brewer* v. *New Gloucester*, 14 Mass. 216 (1817); *Gaskill* v. *Dudley*, 47 Mass. (6 Metc.) 546, 39 Am. Dec. 750 (1843); *Lane* v. *Inhabitants of the Fourth School Dist. in Weymouth*, 51 Mass. 462 (1845); *Donworth* v. *Coolbaugh*, 5 Iowa 300 (1857); *Milliken* v. *Whitehouse*, 49 Maine 527 (1860); *Wilson, McElroy & Co.* v. *Pittsburgh & Youghiogheny Coal Co.*, 43 Pa. St. 424 (1862); *Hawes* v. *Anglo-Saxon P. Co.*, 101 Mass. 385 (1869); *Thayer* v. *New England L. Co.*, 108 Mass. 523 (1871); *Hawkins* v. *Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. 739 (1889); *Willoughby* v. *Chicago Junction R. Co.*, 50 N. J. Eq. 656, 25 Atl. 277 (1892); *Capital City Mut. F. Ins. Co.* v. *Boggs*, 172 Pa. St. 91, 33 Atl. 349 (1895); *Hatfield* v. *Cummings*, 152 Ind. 537, 53 N. E. 761 (1898); *Welch* v. *Sargent*, 127 Cal. 72, 59 Pac. 319 (1899); *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. 506 (1900); *Hearst* v. *Putnam Min. Co.*, 28 Utah 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. 698 (1904); *Converse* v. *Ayer*, 197 Mass. 443, 84 N. E. 98 (1908); *French* v. *Harding*, 46 Pa. Super. Ct. 363 (1911). Contra: *McMahon* v. *Macy*, 51 N. Y. 155 (1872); *Larkin* v. *Hogan*, 14 Ariz. 63, 126 Pac. 268 (1912); *Davidson* v. *Real Estate & Investment Co.*, 249 Mo. 474, 155 S. W. 1 (1913); *Mister* v. *Thomas*, 122 Md. 445, 89 Atl. 844 (1914); *Clarke* v. *Marks*, 111 Maine 218, 88 Atl. 718 (1913); *Chase* v. *Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. ed. 1038 (1884 N. Y. Law); *Wetter* v. *Lewis*, 22 Misc. 12, 48 N. Y. S. 617 (1897); *Assets Realization Co.* v. *Howard*, 70 Misc. 651, 127 N. Y. S. 798 (1911); *Finney* v. *Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486 (1900); *Clausen* v. *Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. 933 (1901). Or at least, not more than *prima facie* evidence. *Merchants' Bank* v. *Chandler*, 19 Wis. 434 (1865); *Grund* v. *Tucker*, 5 Kan. 70 (1869); *Ward* v. *Joslin*, 105 Fed. 224 (1900 Kans. Law).

HARVEY *v.* WILDE.

COURT OF CHANCERY, 1872

L. R. 14 *Eq. Cas.* 438

This was a creditor's suit for the administration of the real and personal estate of William Wilde, deceased, who by his will, dated the 15th of February, 1865, appointed the defendants, Samuel Secker Hill and William Wilde, executors thereof; and also devised certain specific real estate to them upon trust for the benefit of his daughter Eliza Reilly for life, and after her death for her brothers and sisters and the two sons of her deceased brother.[70]

The testator died July 28, 1866. In February, 1869, the firm of Harveys & Hudsons, bankers, brought an action at law against the executors for the recovery of a balance due from the testator at the time of his death. The executors denied liability and commenced a cross action. Under an order of court both actions were referred to an arbitrator who found that the bank was entitled to recover from the defendants, as executors, the sum of £5,066 10s. 6d. and judgment was signed for the plaintiffs June 14, 1870.

On the 9th of July, 1870, the decree was made in this suit in the usual form, directing inquiries as to the real estate, and a sale both of the residuary and of the specifically devised real estate in the event of the personal estate proving insufficient for the payment of the testator's debts and funeral expenses.

On the 19th of July, 1870, Sir Robert Harvey died. On the 22d of July following, the firm of Harveys & Hudsons was adjudicated bankrupt.

The personal estate of the testator proved insufficient for payment of his debts, and an application was made for a sale of the real estate. Thereupon the persons beneficially interested therein required that the debt due to Messrs. Harveys & Hudsons should be proved as against them, and the question whether they were entitled to require such proof was now brought before the court on an adjourned summons.

Mr. Fry, Q. C., and Mr. Cozens-Hardy, for the trustee in bankruptcy, pointed out that in this case the executors were also devisees in trust, and urged the hardship of requiring the debt to be established a second time, the question having been decided after full hearing, and the principal witness being now dead.

Mr. Chitty and Mr. Maidlow, for the persons interested in the real estate, contended that the judgment was against the executors only, and could not be enforced at law against the real estate of the testator; that the devisees were clearly entitled to have the debt established as against them, *Willson* v. *Leonard*, 3 Beav. 373; that the circumstances of the executors being devisees in trust

[70] Part of the statement of facts is omitted.

made no difference, *Morse* v. *Tucker*, 5 Hare 79; that as to the hardship alleged to be occasioned by the death of Sir R. Harvey, the executors were at a like disadvantage before the arbitrator.

LORD ROMILLY, M. R.: I do not think that I can hold the devisees bound by the judgment, but on a claim made in a suit such as this I think I have jurisdiction to decide on which side the burden of proof lies. When a creditor brings in a claim I frequently order an action to be brought in order to decide the matter; and if, after the action has been tried and decided against the executor, it were necessary to have it tried over again against the devisees of the real estate, the delay would be endless. I think, therefore, that the judgment ought to be prima facie evidence of the debt. The devisees will be at liberty to disprove it, if they can; but if they do not, I shall hold the debt binding against the real estate.[71]

[71] "Between the real and personal representatives of a deceased person there is no privity. Hence a judgment against an administrator or executor is never conclusive against the heirs or devisees." Freeman on Judgments (4th ed.), § 163; *Mason* v. *Peter*, 1 Munf. (Va.) 437 (1810); *Osgood* v. *Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 Am. Dec. 304 (1824); *Dale* v. *Rosevelt*, 1 Paige Ch. (N. Y.) 35 (1828); *Collinson* v. *Owens*, 6 Gill & J. (Md.) 4 (1833); *Dencale* v. *Stump*, 8 Pet. (U. S.) 528, 8 L. ed. 1033 (1834); *McCoy* v. *Nichols*, 4 How. (Miss.) 31 (1839); *Thayer* v. *Hollis*, 44 Mass. (3 Metc.) 369 (1841); *Hasen* v. *Tillman*, 5 N. J. Eq. 363 (1846); *Stone* v. *Wood*, 16 Ill. 177 (1854); *Nichols* v. *Day*, 32 N. H. 133, 64 Am. Dec. 358 (1855); *Beckett* v. *Selover*, 7 Cal. 215, 68 Am. Dec. 237 (1857); *Ingle* v. *Jones*, 9 Wall. (U. S.) 486, 19 L. ed. 621 (1869); *Sharpe* v. *Freeman*, 45 N. Y. 802 (1871); *Lehman* v. *Bradley*, 62 Ala. 31 (1878); *Scott* v. *Ware*, 64 Ala. 174 (1879); *Starke* v. *Wilson*, 65 Ala. 576 (1880); *Charles* v. *Spears*, 9 Lea (Tenn.) 725 (1882); *Watts* v. *Taylor*, 80 Va. 627 (1885); *Clark* v. *Bettelheim*, 144 Mo. 258, 46 S. W. 135 (1898); *Eayrs* v. *Nason*, 54 Nebr. 143, 74 N. W. 408 (1898); *Howell* v. *Hughes*, 168 Ala. 460, 53 So. 105 (1910). Contra, by statute, *Cunningham* v. *Ashley*, 45 Cal. 485 (1873); *Meeks* v. *Olpherts*, 110 U. S. 564, 25 L. ed. 735 (1879, Cal. Stat.); *Merritt* v. *Daffin*, 24 Fla. 320, 4 So. 806 (1888); *Texas & P. R. Co.* v. *Smith*, 91 Fed. 483 (1899 La. Stat.); *Hinton* v. *Pritchard*, 126 N. Car. 8, 35 S. E. 127 (1900); *Gunn* v. *James*, 120 Ga. 482, 48 S. E. 148 (1904); *Poiset* v. *Townsend*, 166 Ill. App. 384 (1911). Conversely, a judgment for or against an heir or devisee does not bind the administrator, 19 Iowa 269 (1865); *Douglass* v. *McCarer*, 80 Ind. 91 (1881); *Forbes* v. *Douglass*, 175 Mass. 191, 55 N. E. 847 (1900). It is frequently said that the judgment is *prima facie* evidence against the heirs or devisees. *Garnett* v. *Macon*, Fed. Cas. No. 5245, 6 Call (Va.) 308, 2 Brock. (U. S.) 185 (1825); *Sergeant* v. *Ewing*, 36 Pa. St. 156 (1860); *Steele* v. *Lineberger*, 59 Pa. St. 308 (1868) *Hopkins* v. *Stout*, 6 Bush (Ky.) 375 (1869) *Gibson* v. *Gibson*, 82 Ill. 61 (1876); *Hobbs* v. *McMakin*, 4 S. W. 793, 9 Ky. L. 221 (1887); *Paul* v. *Grimm*, 183 Pa. St. 330, 38 Atl. 1017 (1898). Contra: *Robertson* v. *Wright*, 17 Grat. (Va.) 534 (1867); *Laidley* v. *Kline*, 8 W. Va. 218 (1875); *Board* v. *Callihan*, 33 W. Va. 209, 10 S. E. 382 (1889); *Burnham* v. *Burnham*, 46 App. Div. 513, 62 N. Y. S. 120 (1900), (affd. 165 N. Y. 659, 59 N. E. 1119).

Where the personal representative is also heir or sole devisee he will be bound by a judgment against him as executor. *Stewart* v. *Montgomery*, 23 Pa. St. 410 (1854); *Colton* v. *Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556 (1886); *Commonwealth* v. *Cochran*, 146 Pa. St. 223, 23 Atl. 203 (1891); *Donifelser* v. *Heyl*, 7 Kans. App. 606, 52 Pac. 468 (1898). Contra: *Merchants' Nat. Bank* v. *Good*, 21 W. Va. 455 (1883); *Lanby* v. *Gill*, 42 Misc. 334, 86 N. Y. S. 718 (1904).

Generally, a judgment against the personal representative will be conclusive upon legatees, as the personalty is the primary fund for the payment of debts. *Castellaw* v. *Guilmartin*, 54 Ga. 299 (1875); *Harris* v. *Bryant*, 83

SECTION 8. LIEN OF JUDGMENTS

COAD *v.* COWHICK

SUPREME COURT OF WYOMING, 1910

9 *Wyo.* 316

On reserved question from the District Court of Laramie County.

Mark M. Coad on September 14, 1888, recovered a judgment against Oscar F. Cowhick upon which a balance remained unpaid. On June 18, 1891, J. Y. Cowhick died, seized of the real estate in controversy, leaving Oscar F. Cowhick as one of his heirs at law. On August 15, 1891, Oscar F. Cowhick conveyed to Marshall Field & Company all his interest, as heir at law of said decedent, in his estate. On August 29, 1891, Coad issued execution on his judgment levied on said real estate and became the purchaser at sheriff's sale. The question was whether the judgment rendered in the district court became a lien on the after-acquired real estate of the judgment debtor.[72]

Corn, J.: The sole question submitted in this case is whether, in this state, a judgment of the district court is a lien upon after-acquired lands. Our statute upon the subject is as follows: Section 3828, "Lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution, and sold as hereinafter provided."

Section 3829. "Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgment rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution."

N. Car. 568 (1880); *Mauldin* v. *Gossett*, 15 S. Car. 565 (1881); *Martin* v. *Ellerbe*, 70 Ala. 326 (1881); *Fraser* v. *Charleston*, 19 S. Car. 384 (1882); *Hooper* v. *Hooper*, 32 W. Va. 526, 9 S. E. 937 (1889); *Ward* v. *Durham*, 134 Ill. 195, 25 N. E. 745 (1890); *Carey* v. *Roosevelt*, 81 Fed. 608 (1897); *Hansen E. F. F.* v. *Teabout*, 104 Iowa 360, 73 N. W. 875 (1898). But it has been held that a judgment against the executor is not conclusive upon legatees so far as their legacies are charged upon and payable out of realty. *First Baptist Church* v. *Syms*, 51 N. J. Eq. 363, 28 Atl. 461 (1893). And one of two claimants to a specific legacy was held not bound by a judgment, to which he was not a party, recovered by the other cliamant against the executors of the will. *Weeks* v. *Weeks*, 16 Abb. N. Cas. (N. Y.) 143, 52 Super. Ct. 512 (1885), and see *Shipman* v. *Rollins*, 98 N. Y. 311, 15 Abb. N. Cas. 288 (1885).

314 (1889); *Toler* v. *East Tennessee &c. Co.*, 67 Fed. 168 (1894); *Woods* v.

[72] The statement of facts is abridged and the arguments of counsel and part of the opinion omitted.

At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. But by the Statute Westm. II, 13 Edw. I, the judgment creditor was given his election to sue out a writ of fi. fa. against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant, except oxen and beasts of the plow and a moiety of his lands until the debt should be levied by a reasonable price and extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an elegit. *Hutcheson* v. *Grubbs*, 80 Va. 254. While this statute did not in direct terms create the lien, courts so construed it as to infer a lien from the power to take the lands in execution.[78] *Scriba* v. *Deanes*, 1 Brock. (C. C.) 170. And this lien has been held by the English courts and by the almost unanimous opinion of the courts of this country, to extend to the after-acquired lands of the debtor. Most of the states have enacted statutes declaring the lien, and almost without exception, and without regard to whether such statute in terms extended the lien to after-acquired lands, they have held that such lands were bound by the judgment from the time of their acquisition by the debtor. Freeman on Judgments, 367. So far as I can find, the only two exceptions are Pennsylvania and Ohio. There was also a similar holding in Iowa. *Harrington* v. *Sharp*, 1 Green (Iowa) 131. But the rule laid down in that case was subsequently changed by an amendment to the statute expressly providing that judgments should be a lien upon after-acquired lands, thus bringing it into line with the mass of opinion in this country. *Ware* v. *Delahaye*, 95 Iowa 682. The Mississippi court is also cited as adopting the same construction. But an examination of the cases shows that that court simply rejected

[78] Accord: *Jones* v. *Jones*, 1 Bland (Md.) 443, 18 Am. Dec. 327 (1827); *Coombs* v. *Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236 (1831); *United States* v. *Morrison*, 4 Pet. (U. S.) 124, 7 L. ed. 804 (1830); *Burton* v. *Smith*, 13 Pet. (U. S.) 464, 10 L. ed. 248 (1839); *Massingill* v. *Downs*, 7 How. (U. S.) 760, 12 L. ed. 903 (1849); *Hutcheson* v. *Grubbs*, 80 Vt. 251 (1885); *Morsell* v. *First Nat. Bank*, 91 U. S. 357, 23 L. ed. 436 (1875); *Anderson* v. *Taylor*, 6 Lea (Tenn.) 382 (1880); *Converse* v. *Michigan Dairy Co.*, 45 Fed. 18 (1891); *McMillan* v. *Davenport*, 44 Mont. 23, 118 Pac. 756 (1911).

In England a judgment does not operate as a charge on land unless a writ or order for its enforcement is registered in the Land Registry under the acts of 1888 (51 & 52 Vict. ch. 51 § 2), and 1900 (63 & 64 Vict. ch. 26, § 2), and ceases to have effect at the expiration of five years from date of registration unless renewed for a further period of five years. *Hood* v. *Cathcart*, L. R. (1895), 2 Ch. Div. 411.

Statutes in the American states generally provide that judgments shall be a lien on land for a prescribed term of years. See New York Code of Civil Procedure, § 1251; *Aultman & Taylor Co.* v. *Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. 565 (1900); *Belfer* v. *Ludlow*, 143 App. Div. 147, 127 N. Y. S. 623 (1911); California Code of Civil Procedure, § 671; 3 Comp. Stat. of New Jersey (1910) 2956; *Bogert* v. *Lydecker*, 45 N. J. L. 314 (1883); Pennsylvania acts of April 4, 1798, 3 Sm. L. 331, § 2; June 1, 1887, P. L. 289, § 1, 2 P. & L. Dig. (2d ed.) 4201-4206; *Bank of N. America* v. *Fitzsimons*, 3 Binn. (Pa.) 342 (1811); *Miller* v. *Miller*, 147 Pa. St. 548, 23 Atl. 841 (1892); *Brown's Appeal*, 91 Pa. St. 485 (1874); *Ziegler* v. *Schall*, 209 Pa. 526, 58 Atl. 912 (1904).

the contention that lands subsequently acquired were bound from the date of the judgment, and held that "the lien attached on after-acquired property from the time it was acquired by the debtor." *Moody* v. *Harper,* 25 Miss. 492; *Cayce* v. *Stoval,* 50 Miss. 402.

But it is contended that our legislature having adopted the language of the Ohio statute, we are bound by the construction given to it by the Ohio courts. The case of *Roads* v. *Symmes,* 1 Ohio 314, which settled the law in that state, is not a construction of the statute under consideration, but is an exposition of the rule at the common law or under the statute of Westm. II. The court deem it unnecessary to decide whether it was a maxim of the common law or was first introduced by the statute of Westm. II, as they say both are equally the law in Ohio. And the decision is expressly based upon the reasoning in the Pennsylvania case of *Colhoun* v. *Snider,* 6 Bin. (Pa.) 145. But the decision in the Pennsylvania case is not based upon the common law nor the statute of Westm. II. The author of Freeman on Judgments says of that decision: "As long ago as the year 1813, in the case of *Colhoun* v. *Snider,* the judges in Pennsylvania, in deference to a long course of decisions in that state, were constrained to decide that no judgment could ever attach as a lien upon lands in which the judgment debtor had no interest at the date of its rendition. The judge delivering this opinion at the same time said: 'I am well satisfied that by the English common law lands purchased by the defendant, after judgment, but aliened before execution, were bound by the lien.' Forty-seven years later it was said in the same state that, 'whatever may be thought of the doctrine of *Colhoun* v. *Snider,* that a judgment lien does not bind after-acquired real estate, it is too firmly established in the jurisprudence of this state to be shaken at this day.' Waters' Appeal, 35 Pa. St. 523. The rule thus established in Pennsylvania, and confessedly repugnant to the common law, was adopted in a few other American cases. It is, nevertheless, clearly repudiated, in favor of the common-law rule, by the vast majority of the American decisions declaring judgments to be liens upon real property acquired by the defendant, after their rendition." Freeman on Judgments, section 367. The Ohio court in 1829, in *Stiles* v. *Murphy,* 4 Ohio 92, reaffirmed the doctrine as laid down in *Roads* v. *Symmes.* But while they construe the statute then in force in that state, they base their decision upon *Roads* v. *Symmes,* and they say in conclusion, "That decision may have been an innovation upon established principles of law. It may have been a departure from true policy, under the circumstances in which we are placed. But it would be a more dangerous innovation, and a wider departure from true policy now to disturb it."

The decisions in Pennsylvania and Ohio, as before observed, are substantially conceded by the courts of those states to have been erroneous, and are only adhered to under the rule of stare decisis. That rule is not in any measure persuasive with us, the question not having been passed upon before by this court, and no such rule of property having been established in this state. Most of the states have enactments similar to our own, to which they have given a

construction extending the lien to after-acquired lands, and this was the prevailing construction long prior to the adoption of the statute by us.

Our conclusion is, therefore, that, having adopted the statute of Westm. II into the legislation of this state, we adopted the construction given to it with substantial unanimity by the courts of England and this country, that the lien of the judgment attaches to the after-acquired lands of the debtor. And that our enactment upon the subject was framed for the purpose of adapting that statute to our conditions by defining the territorial limits of the lien existing by force of it, and not to change the character or extent of the lien in any other respect.[74]

Potter, C. J., and Knight, J., concur.

---

[74]Accord: *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491 (1728); Sudgen on Vendors (8th Amer. ed.) vol. II, p. 156; *Harris* v. *Rankin*, 4 Manitoba 115 (1887); *McClure* v. *Croteau*, 18 Quebec Super. Ct. 336 (1900); *Ridgely* v. *Gartell*, 3 H. & McH. (Md.) 449 (1796); *Stow* v. *Tifft*, 15 Johns. 458, 8 Am. Dec. 266 (1818); *Ridge* v. *Prather*, 1 Blackf. (Ind.) 401 (1825); *Den ex dem. Green* v. *Steelman*, 10 N. J. L. 193 (1828); *Jackson* v. *Bank of* U. S., 5 Cranch (C. C.) 1, Fed. Cas. No. 7131 (1836); *McClung* v. *Beirne*, 10 Leigh (Va.) 394, 34 Am. Dec. 739 (1839); *Chapron* v. *Cassaday*, 3 Humph. (Tenn.) 661 (1842); *Trustees Real Estate Bank* v. *Watson*, 13 Ark. 74 (1852); *Harrison* v. *Roberts*, 6 Fla. 711 (1856); *Steele* v. *Taylor*, 1 Minn. 274 (Gil. 210) (1856); *Ralston* v. *Field*, 32 Ga. 453 (1861); *Wales* v. *Bogue*, 31 Ill. 464 (1863); *Handly* v. *Sydenstricker*, 4 W. Va. 605 (1871); *Thulemeyer* v. *Jones*, 37 Tex. 560 (1872); *Cayce* v. *Stovall*, 50 Miss. 396 (1874); *Babcock* v. *Jones*, 15 Kan. 296 (1875); *Campbell* v. *Martin*, 87 Ind. 577 (1882); *Ex parte Trenholm*, 19 S. Car. 126 (1882); *Dickson* v. *Hynes*, 36 La. Ann. 684 (1884); *Duell* v. *Potter*, 51 Nebr. 241, 70 N. W. 932 (1897); *Lessert* v. *Sieberling*, 59 Nebr. 309, 80 N. W. 900 (1899); *Wamble* v. *Gant*, 112 Tenn. 327, 79 S. W. 801 (1903); *Glenn Morris Co.* v. *McColgan*, 100 Md. 479, 60 Atl. 608 (1905); N. Y. Code Civ. Pro., § 1251; Cal. Code Civ. Pro., § 671. Contra: *Rundle* v. *Ettwein*, 2 Yeates (Pa.) 23, 6 Binn 137n (1795); *Colhoun* v. *Snider*, 6 Binn. (Pa.) 135 (1813); *Roads* v. *Symmes*, 1 Ohio 281, 13 Am. Dec. 621 (1824); *McCormick* v. *Alexander*, 2 Ohio 65 (1825); *Stiles* v. *Murphy*, 4 Ohio 92 (1829); *Parker's Appeal*, 6 Pa. St. 277 (1847); *Lea* v. *Hopkins*, 7 Pa. St. 492 (1848); *Moorehead* v. *McKinney*, 9 Pa. St. 265 (1848); *Jacob's Appeal*, 23 Pa. St. 477 (1854); *Ross & Co.'s Appeal*, 106 Pa. St. 82 (1884); *Smith* v. *Hogg*, 52 Ohio St. 527, 40 N. E. 406 (1895); *Herrman Saw Mill Co.* v. *Martin*, 22 Ky. L. 651, 58 S. W. 524 (1900); *Bryan* v. *Jones & Laughlin Steel Co.*, 238 Pa. 191, 85 Atl. 1089 (1913). The same rule prevailed in Iowa. *Harrington* v. *Sharp*, 1 Greene (Iowa) 131, 48 Am. Dec. 365 (1848); *Woods* v. *Mains*, 1 G. Greene (Iowa) 275 (1848) until altered by the Code, § 3801; *Ware* v. *Delabaye*, 95 Iowa 667, 64 N. W. 640 (1895). In Illinois, where an execution is issued on a judgment within a year from its rendition, the judgment will become a lien on after-acquired realty; if no execution is issued within the year no lien will exist. *Breed* v. *Gorham*, 108 Ill. 81 (1883), and see *Winter* v. *Dunlap*, 84 Kan. 519, 114 Pac. 1057 (1911).

Several judgments entered at different times, if they become a lien on after-acquired realty, attach together and all stand on an equal footing, *Goetz* v. *Mott*, 21 Abb. N. Cas. 246, 1 N. Y. S. 153, 15 Civ. Proc. R. 11 (1888); *In re Hazard*, 73 Hun 22, 25 N. Y. S. 928, 56 N. Y. St. Rep. 82 (1893); *Moore* v. *Jordan*, 117 N. Car. 86, 23 S. E. 259, 42 L. R. A. 209, 53 Am. St. 576 (1895); *Kisterton* v. *Tate*, 94 Iowa 665, 63 N. W. 350, 58 Am. St. 419 (1895); *Belknap* v. *Greene*, 56 S. Car. 119, 34 S. E. 26 (1899). Contra: *Creighton* v. *Leeds &c. Co.*, 9 Ore. 215 (1881). And see *Elston* v. *Castor*, 101 Ind. 426, 51 Am. Rep. 754 (1884); *Sherrard* v. *Johnston*, 193 Pa. St. 166, 44 Atl. 252, 74 Am. St. 680 (1899).

INDEPENDENT SCHOOL DISTRICT OF WEST POINT *v.* WERNER

SUPREME COURT OF IOWA, 1876

43 *Iowa* 643

The Independent School District of West Point, plaintiff and appellant, avers in its petition that it obtained judgment against the defendant, and one Charles Peters and others, on which an execution issued and was returned: "no property found of defendant's." Afterwards plaintiff brought a suit in equity against the said Charles Peters and others, for the purpose of subjecting to the payment of said judgment certain land to which it was averred that said Charles Peters formerly held title, but which he had fraudulently conveyed to the other persons made parties defendant to that suit. Decree was rendered in favor of the plaintiff. The judgment was established as a lien on the land, and a special execution was ordered to be issued and levied on the same, which was done.

Afterward, and before sale this suit was brought. The petition avers, in addition to the facts above set forth, that Wm. Werner, the defendant in this suit, entered upon the said land by himself and servants since the date of the decree, and cut wood and carried off the same, and that a portion of the wood so cut still remains on the land; that the defendant then had several hands chopping wood on said land, for the purpose of removing the same, and was greatly depreciating the value of said land, and impairing the plaintiff's security and liens thereon; and the petition prays that the defendant be restrained from the further chopping of wood on said land and from removing the wood already chopped.

The answer admits the decree; avers that defendant had control of the land for twenty-four years, during which time he had paid taxes and cut from it his fire-wood and fence posts; admits that there were several cords of fire-wood, some fence posts and rails cut and remaining on said land, but avers that they were cut before the decree was rendered, and denies that he has removed wood since the decree, and denies that any one has done so for him.

The defendant moved for a dissolution of the injunction. The motion was sustained and the plaintiff appeals.[75]

ADAMS, J.: At the time of the alleged cutting and removal of wood and timber, no decree has been rendered in favor of the plaintiff. At that time the plaintiff was, at most, a mere judgment lien holder. Plaintiff had, it is true, brought suit in equity to set aside the title of those in whom it stood of record, but no attachment had issued and no levy had been made. "A judgment lien on land constitutes no property or right in the land itself; it only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment." *Rodgers* v. *Bonner*, 45 N. Y. 379.

[75]Part of the opinion is omitted.

A judgment debtor, therefore, has a right to cut fire wood and timber upon his land previous to a levy, and it follows that such wood and timber cut, but not removed, become his personal property, and do not pass by a levy upon and sale of, the land.

We think the injunction was properly dissolved.[76]

Affirmed.

MAY *v.* EMERSON

SUPREME COURT OF OREGON, 1908

52 Ore. 262

This is an action of ejectment, commenced on October 23, 1907, to recover the possession of lots 35 and 36, in block 11, Stewart's second addition to Baker City. The answer admits that defendant is in possession, and alleges that he is owner of the lots in fee simple; and as a second defense alleges possession under a contract of purchase, as disclosed in the stipulation of facts which includes the

---

[76]Accord: *Lanning* v. *Carpenter*, 48 N. Y. 408 (1872). So, while machinery sold to the debtor may become affixed to the realty so as to be subject to the judgment lien, the lien, alone, gives the judgment creditor no right of possession. *Raymond* v. *Schoonover*, 181 Pa. St. 352, 37 Atl. 524 (1897). And, so long as a debtor uses his property for ordinary purposes, he can not be impeached for waste. *Hoskin* v. *Woodward*, 45 Pa. St. 42 (1863). But a debtor wasting the property in *fraud of creditors* will be liable in an action on the case, *Yates* v. *Joyce*, 11 Johns. (N. Y.) 136 (1814); *Christian* v. *Mills*, 2 Walk. (Pa.) 130, 16 W. N. Cas. 393 (1885), or may be restrained by injunction. *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505 (1863).

In *Conrad* v. *Atlantic Insurance Co.*, 1 Pet. (U. S.) 386, 7 L. ed. 189 (1828), at p. 442, it is said by Story, J.: "It is not understood that a general lien by judgment on land constitutes, *per se*, a property, or right, in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment so as to cut out intermediate incumbrances. * * * In short, a judgment creditor has no *jus in re*, but a mere power to make its general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land." See also, *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 277 (1715); *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491 (1728); *Ladd* v. *Blunt*, 4 Mass. 402 (1808); *Shepard* v. *Rowe*, 14 Wend. (N. Y.) 260 (1835); *Petit* v. *Shepherd*, 5 Paige (N. Y.) 493, 28 Am. Dec. 437 (1835); *Cover* v. *Black*, 1 Pa. St. 493 (1845); *Kollock* v. *Jackson*, 5 Ga. 153 (1848); *Reed's Appeal*, 13 Pa. St. 475 (1850); *Whiting & Slark* v. *Beebe*, 12 Ark. 421 (1851), at p. 542; *Swarts* v. *Stees*, 2 Kans. 236, 85 Am. Dec. 588 (1864); *Brown* v. *Pierce*, 7 Wall. (U. S.) 205, 19 L. ed. 134 (1868); *Grevemeyer* v. *Southern Mut. Ins. Co.*, 62 Pa. St. 340, 1 Am. Rep. 420 (1869), where a judgment creditor was held not to have an insurable interest in specific property; *Rogers* v. *Bonner*, 45 N. Y. 379 (1871); *Foute* v. *Fairman*, 48 Miss. 536 (1873); *Ashton* v. *Slater*, 19 Minn. 347 (1872); *Dyson* v. *Simmons*, 48 Md. 207 (1877); *Mansfield* v. *Gregory*, 11 Nebr. 297, 9 N. W. 87 (1881); *Bruce* v. *Nicholson*, 109 N. Car. 202, 13 S. E. 790, 26 Am. St. 562 (1891); *Light* v. *Countrymen's M. F. I. Co.*, 169 Pa. St. 310, 32 Atl. 439, 47 Am. St. 904 (1895); *Fulkerson* v. *Stiles*, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181 (1909); *Huff* v. *Sweetser*, 8 Cal. App. 689, 97 Pac. 705 (1908); *Hunter* v. *Citizens S. & T. Co.*, 157 Iowa 168, 138 N. W. 475 (1912); *Apple* v. *Robb*, 54 Ind. App. 359, 103 N. E. 12 (1913).

following: That on February 24, 1906, defendant purchased the lots from Dugan and wife, the price to be paid in monthly installments, continuing over a period of more than a year; that a deed was executed by Dugan and wife, and deposited in escrow with M. S. Hughes, to whom payments were made, and was to be delivered by Hughes when the payments were completed; that the defendant was to have possession from the date of the purchase; that on April 12, 1906, after the purchase and before the delivery of the escrow deed, plaintiff, in an action of debt against Dugan and wife, attached the said lots, which action resulted in judgment against them on April 25, 1906; that an execution sale of said lots was had on June 12, 1906, and confirmation thereof was had on June 22, 1906, and a sheriff's deed issued to the plaintiff on June 27, 1907, that plaintiff, at the time of the attachment, had knowledge of the contract of sale and escrow deed, and on July 15, 1906, notified the defendant of said judgment and execution sale, and demanded that payment of the purchase price be made to him; that defendant paid all the installments of the said purchase price to Hughes, according to the agreement, and received the deed from him on or about September 14, 1907. From these facts the trial court found that plaintiff acquired the title to the property free from any equity of the defendant, and rendered judgment accordingly, and the defendant appeals.[77]

EAKIN, J.: It is beyond controversy that the title remains in the vendor until the actual delivery of the deed. The vendor still has not only the legal title, but also an interest in the property as security for the payment of the purchase price; and this interest should be and is available to a creditor through the lien of his judgment, which lays hold of such legal title, and thereafter payments made to the vendor by the vendee are at his peril. *Tomlinson* v. *Blackburn*, 37 N. Car. 509. If the purchase price is fully paid, although the deed is not actually delivered, the vendor having but the naked legal title, the judgment creditor can acquire no more. *Stannis* v. *Nicholson*, 2 Ore. 332; *Riddle* v. *Miller*, 19 Ore. 468; *Riddle's Appeal*, 104 Pa. 171; *Uhl* v. *May*, 5 Nebr. 157; *Elwell* v. *Hitchcock*, 41 Kans. 130.[78]

But to the extent of the unpaid purchase price the creditor's lien will bind the property. *Kinports* v. *Boynton*, 120 Pa. 306; *Lefferson* v. *Dallas*, 20 Ohio St. 68, and until the delivery of the

[77]Part of the opinion of the court is omitted.

[78]Accord: *Finch* v. *Winchelsea*, 1 P. Wms. 277 (1715); *Prior* v. *Penprase*, 4 Price 99 (1817); *Manley* v. *Hunt*, 1 Ohio 257 (1824); *Hoagland* v. *Latourette*, 2 N. J. Eq. 254 (1839); *Lounsbury* v. *Purdy*, 11 Barb. (N. Y.) 490 (1851); *Thomas* v. *Kennedy*, 24 Iowa 397, 95 Am. Dec. 740 (1868); *Adickes* v. *Lowry*, 15 S. Car. 128 (1880); *Hurt* v. *Prillman*, 79 Va. 257 (1884); *Davey* v. *Ruffell*, 162 Pa. St. 443, 29 Atl. 894 (1894); *Gibbs* v. *Tiffany*, 4 Pa.Super. Ct. 28 (1897); *Hecker* v. *Mourer*, 8 Pa. Super. Ct. 43 (1898); *Dalrymple* v. *Security Imp. Co.*, 11 N. Dak. 65, 88 N. W. 1033 (1902); *Fleming* v. *Wilson*, 92 Minn. 303, 100 N. W. 4 (1904); *McCleery* v. *Stoup*, 32 Pa. Super. Ct. 42 (1906); *Adams* v. *White*, 40 Okla. 535, 139 Pac. 514 (1914). Contra: *Robertson* v. *Wood*, 5 La. Ann. 197 (1850); *Buchanan* v. *Kimes*, 2 Baxt. (Tenn.) 275 (1872).

escrow deed the rights and remedies of the creditors of the vendor are the same as in the case of an executory sale, evidenced by a bond for a deed. In both cases the vendee has but an equitable interest in the property, and the legal title remains in the vendor; and where the escrow agreement requires the vendee to make payments to the depositary, he being a mere stakeholder, without any personal interest in the fund, the vendee is only bound to pay to him, while the grantor alone is the party in interest. But when a creditor of the grantor has laid hold of his interest in the property, and the grantee has notice of that fact, he is bound by the new conditions. However, the docketing of the judgment is not constructive notice to him. He is not bound to search the records every time he makes a payment. He is entitled to the benefit of all payments made to the vendor until he has actual knowledge of the lien. Freeman, Judgments, section 364; 1 Black., Judgments, section 438; 17 A. & E. Encyc. of Law (2d ed.) 780; *Wehn* v. *Fall*, 55 Nebr. 547; *Tayloe* v. *Thompson*, 5 Pet. (U. S.) 357; *Moyer* v. *Hinman*, 13 N. Y. 180; *Hampson* v. *Edelen*, 2 Har. & John. (Md.) 64; *Parks* v. *Jackson*, 11 Wend. (N. Y.) 442.[79]

Defendant was not required to make the payments to plaintiff as they matured, until plaintiff acquired the vendor's rights. The vendee can not assume to determine for himself, and at his own risk, the controversy between plaintiff and his debtor; and defendant need not go into equity to settle their differences. He may stand upon his contract, and when plaintiff has acquired the vendor's right to the money by perfecting title in himself the defendant will be justified in making payment to him. In *McMullen* v. *Wenner*, 16 Serg. & R. (Pa.) 19, it is held that the sale on execution binds the legal estate, and the execution purchaser stands in the place of the original vendor, and is entitled to the unpaid purchase-money, the payment of which he can enforce by ejectment; and this works no hardship on the vendee, as he can protect himself by withholding further payments, unless he is indemnified. And upon payment to the judgment creditor he is entitled to a conveyance of the legal title vested in the sheriff's vendee. *Moyer* v. *Hinman*, 13 N. Y. 180; *Id.*, 17 Barb. (N. Y.) 137. In the latter case it is held that the judgment against the vendor is a charge upon the land, and binds the legal title; but equity limits and restricts this lien to the amount of the unpaid purchase-money due from the vendee, and the vendee may insist upon a conveyance of the premises upon payment of the purchase-price.

In *Stewart* v. *Coder*, 11 Pa. 90, it is held that when the vendor retains the legal title for the security of unpaid purchase-money,

---

[79]Accord: *Vance* v. *Workman*, 8 Blackf. (Ind.) 306 (1846); *Filley & Hopkins* v. *Duncan*, 1 Nebr. 134, 93 Am. Dec. 337 (1859); *Shinn* v. *Taylor*, 28 Ark. 523 (1873); *Floyd* v. *Harding*, 28 Grat. (Va.) 401 (1877); *Schroeder* v. *Gurney*, 73 N. Y. 430 (1878); *Logan* v. *Pannill*, 90 Va. 11, 17 S. E. 744 (1893). Unless it can be shown that the payments were made with actual knowledge of a lien on the vendor's interest in the land, *Wehn* v. *Fall*, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. 397 (1898). Compare *State Bank of Decatur* v. *Sanders*, 114 Ark. 440, 170 S. W. 86 (1914).

a judgment against him is a lien not only on the naked title, but it also attaches on the money remaining unpaid, and the execution purchaser may enforce payment by an action in ejectment. A judgment creditor has a right to sell the vendor's interest in the property, and in that manner acquire his interest in the debt, as well as the property, as security for its payment. *Olander* v. *Tighe*, 43 Nebr. 344; *Doe* v. *Startzer*, 62 Nebr. 718. Whether the creditor has a remedy by attaching the debt or whether in all cases that remedy would be adequate, need not be decided here; the remedy by judgment and execution sale of the vendor's interest is a proper one. But the defendant has not forfeited his rights by failing to redeem from plaintiff's execution sale. He is not a redemptioner until he has received the escrow deed, which he can secure only by paying the purchase-price to the depositary, which would thus require a double payment; and, without the peril of litigation with the vendor, he could not pay plaintiff until the vendor's interest is extinguished. The burden is upon plaintiff to put himself in a position to demand the money from the defendant. This makes it necessary for him to acquire the vendor's right and title.

Defendant has pleaded possession under his contract of purchase, of which the plaintiff at all times had notice; and, until the defendant has forfeited his right to possession thereunder, he can not be ousted. The stipulation in this case discloses that he paid the money to the depositary, but that is not an act of forfeiture, even though such payment may be a total loss to him. *Tomlinson* v. *Blackburn*, 37 N. Car. 509.

But defendant can not be ousted by plaintiff until the latter has placed him in default, by tendering him a deed and demanding the money. The execution of the deed by plaintiff and the payment of the purchase-money by the defendant are concurrent acts. *Guthrie* v. *Thompson*, 1 Ore. 353; *Wolcott* v. *Madden*, 10 Ore. 370; *Powell* v. *Dayton, etc., R. Co.*, 12 Ore. 488.

The defendant is not in default, and therefore can not be ousted by ejectment; and the judgment is reversed.[80]

Reversed.

---

[80] A judgment lien accruing against a vendor of land after the making of the contract of sale binds his interest in the land to the extent of the unpaid purchase money. *Catlin* v. *Robinson*, 2 Watts (Pa.) 373 (1834); *Lane* v. *Ludlow*, 2 Paine (C. C.) 591, Fed. Cas. No. 8052 (1835); *Moyer* v. *Hinman*, 13 N. Y. 180 (1855); *Patton* v. *Hollidaysburg*, 40 Pa. St. 206 (1861); *Jefferson* v. *Dallas*, 20 Ohio St. 68 (1870); *Jackson* v. *Snell*, 34 Ind. 241 (1870); *Minneapolis & St. Louis R. Co.* v. *Wilson*, 25 Minn. 382 (1879); *Pack* v. *Hansbarger*, 17 W. Va. 313 (1880); *Hardee* v. *McMichael*, 68 Ga. 678 (1882); *Coolbough* v. *Roemer*, 30 Minn. 424, 15 N. W. 869 (1883); *Berryhill* v. *Potter*, 42 Minn. 279, 44 N. W. 251 (1890); *Snyder* v. *Botkin*, 37 W. Va. 355, 16 S. E. 591 (1892); *Kinports* v. *Boynton*, 120 Pa. St. 306, 14 Atl. 135, 6 Am. St. 706 (1888); *Valentine* v. *Seiss*, 79 Md. 187, 28 Atl. 892 (1894); *First Nat. Bk.* v. *Edgar*, 65 Nebr. 340, 91 N. W. 404 (1902); *Zenda Min. Co.* v. *Tiffin*, 11 Cal. App. 62, 104 Pac. 10 (1909).

DOE EX DEM COOPER *v.* CUTSHALL

SUPREME COURT OF INDIANA, 1848

1 *Ind.* 246

Ejectment, by Doe on the demise of Cooper against Cutshall. Judgment for the defendant below. Cutshall derives title from Comparet; Cooper, the lessor of the plaintiff, from Norris. The facts of the case are these:

On the 9th of August, 1831, Francis Comparet sold the land in controversy to Luke Norris, gave him a title-bond for, and put him in possession of it. Norris continued in possession till December, 1833, and made improvements. At the time he found he should be unable to pay for the land, and, accordingly, surrendered the possession and title-bond, received back his notes, given for the purchase-money, and the contract was then cancelled by mutual consent. Comparet then sold the land to Cutshall.

On the 2d of May, 1833, Stephen Coles obtained a judgment in the Allen Circuit Court against said Luke Norris; and on the 20th day of May, 1834, had the land in dispute sold, on an execution on said judgment against Norris, at which sale, Henry Cooper, the lessor of the plaintiff, became the purchaser. Such are the respective titles of the parties. The plaintiff claims to succeed on the ground that the judgment of Coles was a lien on the equitable estate of Norris in the land, under his title-bond and possession, and that, by the sheriff's sale and deed, that interest and right of possession were conveyed to Cooper, his lessor; and he relies upon the cases of *Jackson* v. *Parker,* 9 Cow. (N. Y.) 73, and *Wayman et al.* v. *Harding,* 3 Blackf. (Ind.) 26. The case of *Jackson* v. *Parker* was examined, and held not to be law in this state, in *Modisett* v. *Johnson,* 2 Blackf. (Ind.) 431; and *Modisett* v. *Johnson* was reviewed and confirmed by this court in *Orth* v. *Jennings et al.,* 8 Blackf. (Ind.) 420. The case of *Wayman et al.* v. *Hardin,* has no bearing upon the present.

We think Cole's judgment was no lien on the land held by Norris, and that the sale by the sheriff of the land, under Cole's judgment, and his deed pursuant to said sale, conveyed no title to Cooper, the plaintiff's lessor.

The judgment is affirmed with costs, etc.[81]

---

[81]Many cases hold that the interest of a vendee in possession under a contract of purchase is equitable and not subject to the lien of a judgment against him. *Modisett* v. *Johnson,* 2 Blackf. (Ind.) 431 (1831); *Davis* v. *Cumberland,* 6 Ind. 380 (1855); *Gentry* v. *Allison,* 20 Ind. 481 (1863); *Evans* v. *Feeny,* 81 Ind. 532 (1882); *Roddy & Co.* v. *Elam,* 12 Rich. Eq. (S. Car.) 343 (1866); *Merchants' Nat. Bank* v. *Eustis,* 8 Tex. Civ. App. 350, 28 S. W. 227 (1894); *Rosenberger* v. *Jones,* 118 Mo. 559, 24 S. W. 203 (1893); *Sweeney* v. *Pratt,* 70 Conn. 274, 39 Atl. 182, 66 Am. St. 101 (1898); *Powell* v. *Bell,* 81 Va. 222 (1885); *Nelson* v. *Turner,* 97 Va. 54, 33 S. E. 390 (1899). In New York the decisions were conflicting, compare *Bogert* v. *Perry,* 17 Johns. (N. Y.) 351 (1819), with *Jackson ex dem. Cary* v. *Parker,* 9 Cow. (N. Y.)

MUTUAL ASSUR. SOC. *v.* STANARD

SUPREME COURT OF APPEALS OF VIRGINIA, 1815

4 *Munf.* (*Va.*) 539

The Mutual Assurance Society against fire on buildings, in the state of Virginia, filed a bill in the Superior Court of Chancery for the Richmond District, against Larkin Stanard, and Beverley C. Stanard and Robert S. Chew, trustees in a deed executed by the said Larkin, for the benefit of sundry creditors of his, who were also made defendants.

The object of the bill was to obtain satisfaction of a judgment rendered by the district court of Fredericksburg, in favor of the

---

73 (1828); *Ellsworth* v. *Cuyler*, 9 Paige (N. Y.) 418 (1842); *Salisbury* v. *La Fitte*, 21 Colo. App. 13, 121 Pac. 952 (1912); *Ross* v. *Nichols*, 25 Colo. App. 409, 138 Pac. 1013 (1914). The revised statutes provided that such an interest should not be bound by the docketing of a judgment, nor sold by execution thereon, *Griffin* v. *Spencer*, 6 Hill (N. Y.) 525 (1844); *Boughton* v. *Bank*, 2 Barb. Ch. (N. Y.) 458 (1847), and this provision is re-enacted in the Code of Civil Procedure, § 1253. *Packard* v. *Sugarman*, 31 Misc. 623, 66 N. Y. S. 30 (1900). (But the interest can be reached by attachment, *Higgins* v. *McConnell*, 130 N. Y. 482, 29 N. E. 978 (1892).

Where, by statute or decision, a judgment is a lien on an equitable estate in lands the rule is otherwise. *Baldwin* v. *Belcher*, 1 J. & L. 18 (1844); *Walcott & Calder* v. *Lynch*, 13 Ir. Eq. R. 199 (1850); *Adams* v. *Harris*, 47 Miss. 144 (1872); *Rand* v. *Garner*, 75 Iowa 311, 39 N. W. 515 (1888); *Stewart* v. *Berry*, 84 Ga. 177, 10 S. E. 601 (1889); *Washington* v. *Bogart*, 119 Ala. 377, 24 So. 245 (1898); *Davis* v. *Vass*, 47 W. Va. 811, 35 S. E. 826 (1900). In Pennsylvania, "A judgment against the equitable estate which a vendee holds under articles of agreement for the sale and purchase of land attaches to and binds the legal estate the instant that it vests in the vendee." *Water's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354 (1860); *Richter* v. *Selin*, 8 Serg. & R. (Pa.) 425 (1822); *Auwerter* v. *Mathiot*, 9 Serg. & R. (Pa.) 397 (1823); *Episcopal Academy* v. *Frieze*, 2 Watts (Pa.) 16 (1833); *Foster's Appeal*, 3 Pa. St. 79 (1846); *Russell's Appeal*, 15 Pa. St. 319 (1850); *Lloyd, Huff and Watt's Appeal*, 82 Pa. St. 485 (1876); *Eberly* v. *Lehman*, 100 Pa. St. 542 (1882). But a vendee who has paid no part of the purchase money and with the consent of the vendor has cancelled the articles of agreement, has no estate which would be bound by the lien of a judgment against him. *Raffensberger* v. *Cullison*, 28 Pa. St. 426 (1857).

At common law a judgment at law is not a lien upon an equitable interest, the creditor must have relief in equity. *Jackson ex dem. Montgomery* v. *Chapin*, 5 Cow. (N. Y.) 485 (1826); *Baird* v. *Kirtland*, 8 Ohio 21 (1837); *New York Dry Dock Co.* v. *Stillman*, 30 N. Y. 174 (1864); *Morsell* v. *First Nat. Bank*, 91 U. S. 357, 23 L. ed. 436 (1875); *Brandies* v. *Cochrane*, 112 U. S. 344, 28 L. ed. 760, 5 Sup. Ct. 194 (1884); *Trusdell* v. *Lehman*, 47 N. J. Eq. 218, 20 Atl. 391 (1890); *Sipley* v. *Wass*, 49 N. J. Eq. 463, 24 Atl. 233 (1892); *Cummings* v. *Duncan*, 134 N. W. 712, 22 N. Dak. 534, Ann. Cas. 1914B, 976n (1912); *Smith* v. *Collins*, 81 N. J. Eq. 348, 86 Atl. 957 (1913). In Pennsylvania, in the absence of a court of chancery it was established as a principle that judgments were liens on equitable estates. *Carkhuff* v. *Anderson*, 3 Binn. (Pa.) 4 (1810); *Fair Hope North Salvage Fire Brick Co.'s Estate*, 183 Pa. St. 96, 38 Atl. 519 (1897). And in several states statutes provide that a judgment is a lien on equitable interests in real estate. *McMechen* v. *Marman*, 8 Gill & J. (Md.) 57 (1836); *Blain* v. *Stewart*, 2 Iowa 378 (1856); *Niantic Bank* v. *Dennis*, 37 Ill. 381 (1865); *Trimble* v. *Hunter*, 104 N. Car. 129, 10 S. E. 291 (1889); *Weaver* v. *Smith*, 102 Tenn. 47, 50 S. W. 771 (1898); *Barlow* v. *Cooper*, 109 Ill. App. 375 (1902).

complainants, against the defendant, Larkin Stanard, at April term, viz., on the 6th of May, 1808, by subjecting for that purpose a tract of land, and sundry slaves and other personal property ("being all his estate, real and personal") which he had conveyed by that deed, bearing date the 28th of April, and recorded on the 9th of May, 1808.

Larkin Stanard and the trustees in their answers denied the charge of fraud made in the bill. The other defendants appeared to be just creditors, and by their answers stated their claims, to satisfy which the deed was given. It did not appear that the plaintiffs had sued out any execution upon their judgment. Chancellor Taylor dismissed the bill and plaintiffs appealed.[82]

ROANE, J.: The court is of opinion, that, as it appears in evidence, in this cause, that the deed of trust in the proceedings mentioned, was executed on and after the first day of the term in which the appellants' judgment was obtained, and as that judgment relates to the said first day, inclusively, the said deed of trust could not vacate or affect the lien on the land created by the judgment,[83] that, consequently, it was incompetent to exclude the claim of the appellants upon the land thereby conveyed; and that the right of the trustees under the same ought to be taken in subordination thereto; that, as the said deed provided, that the said land should be sold to answer the purposes of the said trust, the court is of opinion, that the trustees therein named, should have been decreed to sell the same, and pay, in the first place, the principal sum, interest and costs, due to the appellants by the said judgment, out of the proceeds thereof, after which they should be held at liberty to proceed in the execution of their trust; and that there is error in so much

---

[82]A portion of the statement of facts is omitted.

[83]At *common law*, judgments of a court of record, on whatever day of the term entered, related back to the first day of the term and overreached as a lien all intermediate conveyances of, or, charges upon, the debtor's lands. *Standford* v. *Cooper*, Cro. Car. 102 (1627); 2 Tidd's Pr. 967, 3 Salk. 212. The Statute of Frauds (29 Car. II, ch. 3, §§ 14, 15), required that the true date of all judgments should be noted in the margin of the roll, and provided that, as against *bona fide purchasers for value*, such judgments should bind from the time they were signed. *Odes* v. *Woodward*, 2 Ld. Raym. 766 (1702); *Robinson* v. *Tonge*, 3 P. Wms. 398 (1735); *Fann* v. *Atkinson*, Willes 427 (1743); *Swann* v. *Broome*, 3 Burr. 1595 (1764); *Bragner* v. *Langmead*, 7 T. R. 20 (1796); *Waghorne* v. *Langmead*, 1 B. & P. 571 (1796). The common-law rule was followed in a number of early American cases. *Coutts* v. *Walker*, 2 Leigh (Va.) 268 (1830); *Skipwith* v. *Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642 (1837); *Brockenborough* v. *Brockenborough*, 31 Grat. (Va.) 580 (1879); *Farley* v. *Thomas L. Lea*, 3 Dev. & B. (N. Car.) 169 (1838); *Urbana Bank* v. *Baldwin*, 3 Ohio 65 (1827); *Riddle* v. *Bryan*, 5 Ohio 49 (1831), and with some statutory qualifications is still the law in several states, *Colt* v. *Du Bois*, 7 Nebr. 391 (1878); *Hayden* v. *Huff*, 60 Nebr. 625, 83 N. W. 920 (1900); *Coad* v. *Cowhick*, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. 953 (1900); *Bowlin* v. *Garrett*, 49 Kans. 504, 31 Pac. 135, 33 Am. St. 377 (1892); *Holman* v. *Miller*, 103 N. Car. 118, 9 S. E. 429 (1889); *Jeffrey* v. *Moran*, 101 U. S. 285, 25 L. ed. 785 (1879 Ohio); *Nat. Bank* v. *Tennessee C. &c. R. Co.*, 62 Ohio St. 564, 57 N. E. 450 (1889); *New South Building & L. Assn.* v. *Reed*, 96 Va. 345, 31 S. E. 514, 70 Am. St. 858 (1898); *Smith* v. *Parkersburg Co-op. Assn.*, 48 W. Va. 232, 37 S. E. 645 (1900); *McKinney* v. *Street*, 165 N. Car. 515, 81 S. E. 757 (1914).

of the said decree as dismisses the bill in toto, instead of making the provision respecting the land.

With respect to the personal estate conveyed by the said deed, the court is of opinion, that, as it is competent to a debtor to prefer one bona fide creditor to another not having a lien thereupon, which lien only arises by the delivery of the execution to the sheriff;[84] and as no execution was taken out by the appellants in this case, the court is of opinion, that the appellants have no lien or ground to stand on, either for the purpose of vacating the deed aforesaid, or of being permitted to redeem the said personal property, according to the doctrine established in the case of *Shirley* v. *Watts*, 3 Atk. 200; but this opinion, on this point, is not to bar or affect the right of the appellants, if any, to the residuary money, resulting to the grantor, Stanard, from the sale of the personal estate thereby conveyed.

The court is of opinion, therefore, that, so far as the decree dismisses the bill as to the personal property, it is correct; but that it was erroneously dismissed as to the land, for the reason before assigned; and that, instead thereof, it should have made the provision hereinbefore mentioned, in favor of the appellants.

Decree reversed, and cause remanded to the court of chancery, to be reformed pursuant to the principles of this decree.[85]

---

[84] *Simpson* v. *Smith*, 75 Miss. 505, 22 So. 805 (1897); *In re Tupper*, 163 Fed. 766 (1908 N. Y.); *Whitaker* v. *Wisbey*, 12 C. B. 44 (1852); *Duncan* v. *McCumber*, 10 Watts (Pa.) 212 (1840), infra page 694.

[85] In a great majority of states the common-law rule has been modified or abolished. 1 Black on Judgments, § 443. In some jurisdictions judgments rendered at the same term are equal. *Morgan* v. *Sims*, 26 Ga. 283 (1858); *Bailey* v. *Bailey*, 93 Ga. 768, 21 S. E. 77 (1894); *Dloughy* v. *Spanninger*, 30 Ill. App. 302 (1888); *Gay* v. *Rainey*, 89 Ill. 221, 31 Am. Rep. 76 (1878), in others a judgment is regarded as entered on the last day of the term. *Chase* v. *Gilman*, 15 Maine 64 (1838); *Goodall* v. *Harris*, 20 N. H. 363 (1850); *Bradish* v. *State*, 35 Vt. 452 (1862); *Wolfe* v. *Joubert*, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772 (1893), and see *Bradley* v. *Heffernan*, 156 Mo. 653, 57 S. W. 763 (1900). But in most states the lien of a judgment attaches from the date of "rendition" or date of "entry," the language of the statutes varying in this respect. See New York Code of Civil Procedure, § 1250; *In re Hazard*, 73 Hun 22, 25 N. Y. S. 928, 56 N. Y. St. Rep. 82 (1893); *Gay* v. *Hudson R. E. P. Co.*, 182 Fed. 904 (1910 N. Y.); California Code Civ. Pro., § 671; Del. Rev. Code (1915), ch. 132, § 1; *Dyson* v. *Simmons*, 48 Md. 207 (1877); *Callanan* v. *Votruba*, 104 Iowa 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am. St. 538 (1898); *Hunt* v. *Swayze*, 55 N. J. L. 33, 25 Atl. 850 (1892); *Julian* v. *Beal*, 26 Ind. 220, 89 Am. Dec. 460 (1866); *Marshall* v. *Hart*, 4 Minn. 450 (1860); *Belbase* v. *Ratto*, 69 Tex. 636, 7 S. W. 501 (1888); *Sklower* v. *Abbott*, 19 Mont. 228, 47 Pac. 901 (1897); *Whitworth* v. *McKee*, 32 Wash. 83, 72 Pac. 1046 (1903); Pennsylvania, Act of March 21, 1772, 1 Sm. L. 389, § 3; P. & L. Dig. (2d ed.) 4201; *Welch* v. *Murray*, 4 Dall. (Pa.) 320, 4 Yeates 197, 1 L. ed. 850 (1805); *Burns* v. *Burns*, 18 Phila. (Pa.) 389 (1886); *Glasgow* v. *Kann*, 171 Pa. St. 262, 32 Atl. 1095 (1895), and see *Patterson's Appeal*, 96 Pa. St. 93 (1880); *Cranford Mercantile Co.* v. *Anderton*, 179 Ala. 573, 60 So. 874 (1913).

GALLAGHER *v.* TRUE AMERICAN PUB. CO.

COURT OF CHANCERY OF NEW JERSEY, 1908

75 N. J. Eq. 171

On appeal of the Trenton Trust and Safe Deposit Company, from the decision of the receiver of the defendant corporation refusing preference of a claim.

On April 28, 1908, at ten minutes after four o'clock in the afternoon, a judgment was recovered in the Supreme Court of this state against the defendant company, impleaded with others. The suit was on a promissory note of which the defendant company was the maker, and, consequently, the party primarily liable. The other defendants were indorsers. At eight o'clock in the evening of the same day the bill of complaint in this cause was presented to this court, and an order was thereupon made appointing Edward L. Katzenbach, Esq., receiver of the defendant company. The bill and order were, according to the practice, marked filed as of April 28, 1908, the date of their presentation and consideration, and were actually filed in the clerk's office the next day. Mr. Katzenbach qualified as receiver on the 29th, the day the papers were lodged in the clerk's office.

A claim by the plaintiff as a preferred creditor against the defendant corporation in respect to the lands of the defendant was duly made and presented to the receiver, who disallowed it as a preference.[86]

WALKER, V. C.: This solution of the question here presented depends upon whether the law will take account of the fraction of a day.

Our act concerning judgments (Gen. Stat., p. 1841, section 2) provides that a judgment shall bind lands from the time of the actual entry thereof on the records of the court.

Section 68 of our present corporation act (Rev. of 1896; P. L., pp. 277, 299) provides that upon the appointment of a receiver the property of an insolvent corporation forthwith vests in him; and, therefore, the property of the defendant company vested in the receiver on the day the appellant's judgment was recovered.

The rule that the law does not take account of the fraction of a day, is, like almost every other rule, subject to exceptions, and one exception is that which is recognized in the contest between judgment creditors as to who has the prior lien by virtue of a levy made on the same day with another or with other levies. Now, as it is incumbent upon courts to decide who is first in point of time with reference to the delivery of a writ to a sheriff or other officer, and of the priority of a levy upon property as between several executions, it would be quite an anomaly, if not absurd, for this

[86]The statement of facts is from the vice-chancellor's opinion, part of which is omitted.

court to refuse to take account of time as between a judgment creditor and a receiver each claiming priority of right in the real estate of an insolvent corporation, the judgment creditor by reason of the entry of a judgment, which, by the terms of the statute, is a lien upon the land of the defendant upon its entry, and the receiver in behalf of unsecured creditors, asserting that the judgment merely ascertains the amount of the debt due to the creditor, and that no lien thereunder exists upon the land in his possession and to which he holds title by virtue of the statute and order of his appointment.

The law does take account of parts of days in cases where it is essenntial so to do in order that justice may be done. *Johnson* v. *Pennington,* 15 N. J. L. 188. And the exact time of the entry of a judgment may be proved as matter dehors the record. *Hunt* v. *Swayze,* 55 N. J. L. 33.

The doctrine that the law will not take cognizance of the fractions of a day is a legal fiction, and it will not be permitted to work injustice.[87] *Clark* v. *Bradlaugh,* L. R. 7 Q. B. 151, per Justice Denman (at p. 153), and per Justice Williams (at p. 154); affirmed on appeal, S. C., 8 Q. B. Div. 63.

These views lead to a reversal of the decision of the receiver. I will advise an order that the appellant's judgment be paid by way of preference out of the proceeds of the sale of the defendant corporation's real estate in the hands of the receiver.[88]

---

[87]See note to *Arrowsmith* v. *Hormening,* 23 Amer. L. Reg. (N. S.) 253 (1884).

[88]Accord: *Lemon* v. *Staats,* 1 Cow. (N. Y.) 592; *Biggan* v. *Merritt,* Walk. (Miss.) 430, 12 Am. Dec. 576 (1831); *Reed & Co.* v. *Haviland,* 38 Miss. 323 (1860); *Bates* v. *Hinsdale,* 65 N. Car. 423 (1871); *Marvin* v. *Marvin,* 75 N. Y. 240 (1878); N. Y. Code Civ. Pro., § 1246; *Herron* v. *Walker,* 69 Miss. 707, 12 So. 259 (1892); *German S. Co.* v. *Campbell,* 99 Ala. 249, 12 So. 436, 42 Am. St. 55 (1892). Contra: *Lord Porchester* v. *Petrie,* 3 Doug. 261 (1783); *Pugh* v. *Robinson,* 1 T. R. 116 (1786); *Schilstra* v. *Van Den Heuvel,* 82 N. J. Eq. 155, 90 Atl. 1056 (1913); *Bulows & Pope* v. *O'Neall,* 4 Desaus. Eq. (S. Car.) 394 (1813); *Rockhill* v. *Hanna,* Fed. Cas. No. 11980, 4 McLean (U. S.) 554 (1849); *Emerick* v. *Garwood,* 1 Browne (Pa.) 20, 4 Dall. 321 n., 1 L. ed. 851 n. (1806); *Wright* v. *Mills,* 4 H. & N. 488 (1859); *Bruce* v. *Vogel,* 38 Mo. 100 (1866); *McClure* v. *Roman,* 52 Pa. St. 458 (1866); *Patterson's Appeal,* 96 Pa. St. 93 (1880). See also *In re London & Devon Biscuit Co.,* L. R. 12 Eq. 190 (1871). Between a judgment and conveyance priority in time may be shown. *Murfree* v. *Carmack,* 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232 (1833); *Mechanics Bank* v. *Gorman,* 8 Watts & S. (Pa.) 304 (1844); *Berry* v. *Clements,* 9 Humph. (Tenn.) 312 (1848); *Boyer's Estate,* 51 Pa. St. 432, 91 Am. Dec. 129 (1866); *Hoppock* v. *Ramsey,* 28 N. J. Eq. 413 (1877); *Clark* v. *Duke,* 59 Miss. 575 (1882); *Hunt* v. *Swayze,* 55 N. J. L. 33, 25 Atl. 850 (1892). Compare *Hockman* v. *Hockman,* 93 Va. 455, 25 S. E. 534, 57 Am. St. 816 (1896). As to Mortgages compare *Claason's Appeal,* 22 Pa. St. 359 (1853); *Hollingsworth* v. *Thompson,* 5 Harr. (Del.) 432 (1854); *Hendrickson's Appeal,* 24 Pa. St. 363 (1855) with *Goetzinger* v. *Rosenfield,* 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257 (1897); *Holliday* v. *Franklin Bank,* 16 Ohio 533 (1847); *Ex parte Stagg,* 1 N. & McC. (S. Car.) 405 (1819), where judgments are entitled to equal precedence as liens on land, it has been held in some jurisdictions that execution gives priority as to the proceeds of the sale. *Adams* v. *Dyer,* 8 Johns. (N. Y.) 347, 5 Am. Dec. 344 (1811); *Waterman* v.

HUBBARD *v.* PRESIDENT, ETC., HAMILTON BANK

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1844

48 Mass. 340

Petition by the receivers of the Phoenix Bank to restrain the Hamilton Bank from further prosecuting a suit against the Phoenix Bank commenced by attachment before the appointment of the receivers and to dissolve the attachment. In denying the prayer of the petition the court explained the nature of the lien acquired by attachment as follows.[89]

DEWEY, J.: Originally, an attachment on mesne process seems to have been instituted merely for the purpose of compelling the appearance of the defendant in court to answer to the suit. But as early as 1650, attachments were authorized for the additional purpose of securing the payment of such judgment as might be recovered in the action. The colonial ordinance of 1650 was thus: "It is hereby ordered by this court, and the authority thereof, that henceforth, all goods attached upon any action shall not be released upon the appearance of the party, or judgment, but shall stand engaged until the judgment, or the execution granted upon such judgment, be discharged." Anc. Chart. 51. The same provision was substantially re-enacted in 1659, with this limitation: "Where execution is not taken out and executed within one month after that judgment is granted, all such attachments shall be released and void in law, unless the court that granted the judgment shall see cause to give further time." Anc. Chart. 193.

The Statute of 1784, ch. 28, provided that all goods and estate, attached upon mesne process for the security of the debt or damages sued for, should be held for the space of thirty days after final judgment, to be taken on execution. Thus the law continued until the revision of the statutes of the commonwealth, when, by Rev. Stats., ch. 90, sections 23-25, it was enacted, that all real estate and all personal estate, attached upon the original writ, "shall be held as security to satisfy such judgment as the plaintiff may recover," with the former limitation of thirty days after judgment rendered, for the service of the execution.

Haskin, 11 Johns. (N. Y.) 228 (1814); *Reeves* v. *Johnson*, 12 N. J. Law 29 (1830); *Burney* v. *Boyett*, 1 How. (Miss.) 39 (1834); *Tilford* v. *Burnham*, 7 Dana (Ky.) 109 (1838); *Rockhill* v. *Hanna*, 15 How. (U. S.) 189, 14 L. ed. 656 (1853); *Cook* v. *Dillon*, 9 Iowa 407, 74 Am. Dec. 354 (1859); *Kisterson* v. *Tate*, 94 Iowa 665, 63 N. W. 350, 58 Am. St. Rep. 419 (1895); *Canfield* v. *Browning*, 69 N. J. L. 553, 55 Atl. 101 (1903). Contra: *Metsler* v. *Kilgore*, 3 Pen. & W. (Pa.) 245, 23 Am. Dec. 76 (1831); *Wilson's Appeal*, 90 Pa. St. 370 (1879). As to bankruptcy see *Golden* v. *Blaskopf*, 126 Mass. 523 (1879); *In re Rhoads*, 98 Fed. 399 (1890); *Metcalf* v. *Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. ed. 122 (1902); *Clarke* v. *Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. ed. 555 (1902); *Mencke* v. *Rosenberg*, 202 Pa. St. 131, 51 Atl. 767, 90 Am. St. 627n (1902); *Hillyer* v. *LeRoy*, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919 (1904).

[89] Extracts from the opinion of the court only are printed.

In this connection it may be proper to notice, that in order to secure the dissolving of an attachment, even in case of the death of the defendant, it has been thought necessary to provide therefor by statute; and that such dissolution of an attachment is limited to cases where some person shall, within one year after the debtor's decease, make application for administration, and obtain it on such application. Stat. 1822, ch. 93, section 6. Rev. Stats., ch. 90, section 105.

These various statutes, authorizing a party thus to acquire, not indeed a property in the estate attached, but merely a charge or incumbrance, of a peculiar character, seem to have been uniformly considered by this court as conferring upon the party thus attaching a right in the nature of a lien. Thus in *Grosvenor* v. *Gold*, 9 Mass. 210, 211, Sedgwick, J., says, "by an attachment a plaintiff has a lien upon the subject of it provisionally; that is, to the amount of the judgment he may finally recover; and in so much is the absolute property of the defendant diminished." In *Fettyplace* v. *Dutch*, 13 Pick. (Mass.) 392, it was said by the court, "an attachment constitutes a lien." So in *Arnold* v. *Brown*, 24 Pick. (Mass.) 95, the court say, "an attachment constitutes a mere lien on the property. The effect of the sale" of the same afterwards by the defendant "will be to pass the general property incumbered by the attachment." In *Smith* v. *Bradstreet*, 16 Pick. (Mass.) 264, it was held that an attachment of property would authorize the attaching creditor to appear, as a party in interest, to oppose the probate of a will devising the premises attached to another person in exclusion of the heir at law, as whose estate it was attached.

That an attachment creates a valid lien, was held also in the District Court of the United States for the District of Vermont, in *Downer* v. *Brackett*, 5 Law Reporter 392, decided in 1824. It was there ruled that an attachment on mesne process binds the lands or goods attached, during the time fixed by law, as effectually as a judgment binds in England. See also *Haughton* v. *Eustis*, 5 Law Reporter 505. In New Hampshire the question has been very recently considered in the case of *Kittredge* v. *Warren*, 7 Law Reporter 77, and the doctrine, that an attachment constitutes a lien, fully sustained—in a case where the question raised as to the proper construction to be given to the saving clause in the United States Bankrupt Act of 1841—in a very able and learned opinion of Chief Justice Parker.

We are satisfied that under the laws of Massachusetts an attachment is a lien or incumbrance upon the property attached. It fastens itself upon the property, and whoever takes the property takes it cum onere. It is constantly spoken of as a lien in the books of reports, in the agreements of the bar, and in the opinions of the bench. It is not a lien in that sense which requires the party to be in possession of the property thus incumbered or charged with it. An attachment of real estate does not require a change of possession. But that does not make it the less a lien in the sense which we attach to that term. Such would be the case of all liens under judgments, where judgments create a lien. The only dis-

tinction to be taken between the cases of lien by attachment and lien by a judgment is, that in the latter case the debt is ascertained and fixed; the party has proceeded one step further in the series of acts necessary to give effect to his lien. But does this really make the cases to differ, where nothing subsequently occurs to prevent the plaintiff from proceeding with his action so far as to terminate it by a judgment in his favor? Where such judgment is actually rendered, it gives effect to the attachment, and everything relates back to the time when the attachment was made. A judgment in England and in New York does not give any actual legal estate in the property attached, but a lien that operates to vest such title upon a seizure and transfer on execution; and which, when perfected, relates back to the time of the judgment.[90]

SECTION 9. ACTIONS ON JUDGMENTS

STEWART *v.* PETERSON'S EXECUTORS

SUPREME COURT OF PENNSYLVANIA, 1869

63 Pa. St. 230[91]

SHARSWOOD, J.: At common law where a party had recovered a judgment in a personal action, and suffered a year and a day to elapse without taking out execution, he was driven in order to reap the fruits of it to a new action of debt upon the judgment. The statute of Westm. II, 13 Edw. I., St. 1, ch. 45, first gave a writ of scire facias in such a case, as was the law previously in real actions: 6 Bacon's Abr. tit. "Scire Facias," C.; Roberts Dig. 240. The right to resort to the former action still remained, and it seems to be the settled doctrine that it might be maintained as well within the

---

[90]Rev. Laws Mass. (1902), ch. 167, § 38. The attachment is effective for thirty days after judgment. Sec. 54. In attaching land the officer need not enter on the land or be within view. Sec. 58; *Taylor* v. *Mixter*, 11 Pick. (Mass.) 341 (1831). But no attachment of land or of a leasehold estate shall be valid against a subsequent attaching creditor or purchaser in good faith for value unless the officer deposits a certified copy of the original writ in the registry of deeds for the county in which the land lies. Sec. 59. Attachments may be dissolved by giving bond. Secs. 88, 116. If the land is not attached on mesne process, the officer in making levy shall forthwith deposit in the registry of deeds a copy of the execution with a memorandum that the execution is in his hands for the purpose of taking the land and no taking shall be valid against a purchaser in good faith for value and without notice, before such copy is deposited. Ch. 178, § 4; *Owen* v. *Neveau*, 128 Mass. 427 (1878); *Croacher* v. *Oesting*, 143 Mass. 195, 9 N. E. 532 (1887).

The practice of attaching real and personal property on *mesne process* to be held as security for the satisfaction of the judgment prevails throughout New England. See Maine Rev. Stat. (1903), ch. 83, §§ 24-79; New Hampshire Laws (1911), ch. 45, §1; Connecticut Gen. Stat. (1902), ch. 56; Vermont Pub. Stat. (1906), §§ 1450-1458, 1782-1791; R. I. Gen. Laws (1909), ch. 301, *De Wolf* v. *Murphy*, 11 R. I. 630 (1877).

[91]Extract from the opinion of the court.

year as afterwards; so that even though the party might issue execution, he could still sue an original in debt. It is laid down in the Year Book, 43 Edw. III, 2, 6, that "if one recover upon a statute merchant, the statute gives an execution by capias and also against the land, notwithstanding he can have a writ of debt." This authority is relied upon as establishing the point by the most respectable of our standard writers: Com. Dig. "Debt," A. 2; 2 Bacon's Abr. tit. "Debt," A.; Wheaton's Selwyn, 616, 7th Amer. Ed. The weight of the American cases is the same way; *Clark* v. *Goodwin,* 14 Mass. 237; *Hale* v. *Angel,* 20 Johns. (N. Y.) 342; *Church* v. *Cole,* 1 Hill (N. Y.) 645; *Denison* v. *Williams,* 4 Conn. 402. It is not a valid objection to the action that at the time it was commenced, the plaintiff could have proceeded by execution upon the original judgment. *Headley* v. *Roby,* 6 Ohio 523; *Kingsland* v. *Forest,* 19 Ala. 519; *White River Bank* v. *Downess,* 29 Vt. 332; *Greathouse* v. *Smith,* 3 Scam. (Ill.) 541; *Davison* v. *Nebaker,* 21 Ind. 334. The reason for this was that at common law the plaintiff could have execution only for the amount of the judgment without interest. In order to recover that he must resort to a new action. Hence our Act of 1700 (1 Smith's Laws, 7) provided that "lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale or till satisfaction be made." There exists no reason why the same rule, which as we have seen obtains in actions of debt on the judgment, should not apply to proceedings by scire facias, which have so completely and so properly taken their place in this state.[92]

---

[92] 3 *Blackstone's Commentaries,* 160. In modern English practice an action will lie on a judgment or order which finally establishes a debt. *Hodsoll* v. *Baxter,* E. B. & E. 884 (1858); *In re Boyd,* L. R. (1895), 1 Q. B. 611; *Godfrey* v. *George,* L. R. (1896), 1 Q. B. 48; *Seldon* v. *Wilde,* L. R. (1910), 2 K. B. 9. And a foreign judgment can be enforced in this way alone. *Grant* v. *Easton,* L. R. (1883), 13 Q. B. 302; *Nouvion* v. *Freeman,* L. R. (1889), 15 App. Cas. 1; *Pemberton* v. *Hughes,* L. R. (1899), 1 Ch. 781. But if an action of debt is brought on a domestic judgment which can be enforced by execution, the plaintiff "will run the risk of having it stayed as an abuse of the process of the court, and probably have to pay the costs." Per Lindley, M. R., in *Pritchett* v. *English and Colonial Syndicate,* L. R. (1899), 2 Q. B. 428. The right to sue on a judgment is barred by the English statute of limitations in twelve years. *Hebblethwaite* v. *Peever,* L. R. (1891), 1 Q. B. 124; *Jay* v. *Johnstone,* L. R. (1893), 1 Q. B. 25. At common law, a presumption of payment arose after the lapse of twenty years, *Miller* v. *Smith,* 16 Wend. (N. Y.) 425 (1836); *Maxwell* v. *De Valinger,* 2 Pennew. (Del.) 504, 47 Atl. 381 (1900); *Roberts* v. *Powell,* 210 Pa. 594, 60 Atl. 258 (1905); *Horn* v. *Sayer,* 184 Ill. App. 326 (1913), which might be rebutted by competent evidence, *Johnson* v. *Tuttle,* 9 N. J. Eq. 365 (1853); *Walker* v. *Robison,* 136 Mass. 280 (1884).

Scire Facias

"In *Foster, sci. fa.* 2, it is said that *scire facias post annum et diem* lay at common law in real actions and on a writ of annuity, where the plaintiff did not sue out execution on his judgment within a year and a day. In personal actions, prior to the statute of Westminster II (13 Edw. I, ch. 45), if the plaintiff did not have execution within a year and a day, he was put to a new action upon his judgment. This statute, however, extended the remedy by *scire facias* to personal actions, and its provisions have been re-enacted generally in the United States, though the new acts have generally extended

AMES *v.* HOY

SUPREME COURT OF CALIFORNIA, 1859

12 *Cal.* 11

Action of debt on a decree for a sum of money obtained by the plaintiff against the defendant in the District Court of Nevada County. The case was tried without a jury, the plaintiff had judgment and defendant appealed.[93]

BALDWIN, J.: Plaintiff recovered a judgment in the district of Nevada County, in October, 1854, for a sum of money. The judg-

---

the time within which execution may issue without revival by *scire facias*. Treating of the methods of executing judgments, Blackstone says (book 3, p. 421): 'But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* that the judgment is satisfied and extinct. Yet, however, it will grant a writ of *scire facias* in pursuance of St. Westm. II, 13 Edw. I, ch. 45, for the defendant to show cause why the judgment should not be revived and execution had against him, to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt founded on his dormant judgment, which was the only method of revival allowed by the common law.' It will thus be seen that the statute of Westminster II served to extend to personal actions the remedy by *scire facias* to revive a dormant judgment, which theretofore existed at common law only as respected real actions and writs of annuity. It will be observed from the quotation from Blackstone that the judgment, in default of execution within a year and a day, did not become 'dead,' but merely dormant. It still subsisted as a debt, and could still be the foundation of a new action of debt, or, at the election of the plaintiff, be revived by *scire facias*, so as to again become a lien upon which execution might issue. And the writ of *scire facias* to revive a judgment was not a new action, but a continuation of the old one. *Eldred* v. *Haslett*, 38 Pa. St. 16." Per Keller, J., in *Davis* v. *Davis*, 174 Fed. 786 (1909).

In some states the judgment on *scire facias* is that plaintiff *have execution* of the judgment described in the writ. *Tindall* v. *Carson*, 16 N. J. L. 94 (1837); *Bertram* v. *Waterman*, 18 Iowa 529 (1865); *Houston* v. *Emery*, 76 Tex. 282, 13 S. W. 264 (1890); *Rogers* v. *Hollingsworth*, 95 Tenn. 357, 32 S. W. 197 (1895); *Trimble* v. *Elkin*, 88 Mo. App. 229 (1901). In others a new judgment is entered for the amount then due upon the original judgment with interest. "The judgment is *quod recuperet* instead of a bare award of execution." *Duff* v. *Wynkoop*, 74 Pa. St. 300 (1873); *Kistler* v. *Mosser*, 140 Pa. St. 367, 21 Atl. 357 (1891); *Slayton* v. *Smilie*, 66 Vt. 197, 28 Atl. 871 (1894); *Gregory* v. *Perry*, 71 S. Car. 246, 50 S. E. 787 (1904).

In a number of states the writ of *scire facias* is abolished and a judgment is revived by an action under the code. N. Y. Code Civ. Pro., §§ 1376-78 (1913); *Wallace* v. *Swinton*, 64 N. Y. 188 (1876); *Haupt* v. *Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698 (1898); *Wilson* v. *McCornack*, 10 Okla. 180, 61 Pac. 1068 (1900); *Davidson* v. *Hunter*, 22 Utah 117, 61 Pac. 556 (1900); *Sears* v. *Kilbourne*, 28 Wash. 194 (1902).

Where a judgment is sued on and a second judgment recovered the first judgment is not merged. *Preston* v. *Perton*, Cro. Eliz. 817 (1600); *Mumford* v. *Stocker*, 1 Cow. (N. Y.) 178 (1823); *Weeks* v. *Pearson*, 5 N. H. 324 (1831); *Stockwell* v. *Walker*, 3 Ind. 215 (1851); *Lawton* v. *Perry*, 40 S. Car. 255, 18 S. E. 861 (1893); *Kelly* v. *Hamblen*, 98 Va. 383, 36 S. E. 491 (1900); *Springs* v. *Pharr*, 131 N. Car. 191, 42 S. E. 590, 92 Am. St. 775 (1902). Contra: *Gould* v. *Hayden*, 63 Ind. 443 (1878). Compare *Collingwood* v. *Carson*, 2 Watts & S. (Pa.) 220 (1841); *Custer* v. *Detterer*, 3 Watts & S. (Pa.) 28 (1841), with *Fursht* v. *Overdeer*, 3 Watts & S. (Pa.) 470 (1842).

[93] The statement of facts is abridged and the arguments of counsel omitted.

ment was in an equitable suit brought to dissolve a copartnership and settled the firm accounts, and for a decree for the balance due. The records of Nevada were consumed by fire before the institution of this suit, and the papers and minutes of the court evidencing this judgment destroyed. An action at law is now brought to recover the amount of this judgment or decree. Several questions are made:

1. That suit can not be maintained in this state on a domestic judgment. At common law, actions could be so maintained. (1 Ch. Pl. 103-4.)[94] There is nothing in our statute which divests the right; and the policy and inconvenience, suggested by the appellant, applied as well in England as here. The chief argument is, that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of

---

[94]At common law a judgment for a sum certain is a debt of record and an action of debt will lie thereon as soon as recovered irrespective of the plaintiff's right to take out execution. *Barracliff* v. *Griscom*, Coxe, N. J. L. 193 (1793); *Clark* v. *Goodwin*, 14 Mass. 237 (1817); *Denison* v. *Williams*, 4 Conn. 402 (1822); *Hale* v. *Angel*, 20 Johns. (N. Y.) 342 (1823); *Richards* v. *Bickley*, 13 Serg. & R. (Pa.) 395 (1825); *Goodrich* v. *Colvin*, 6 Cow. (N. Y.) 397 (1826); *Smith* v. *Mumford*, 9 Cow. (N. Y.) 26 (1828); *Tindall* v. *Carson*, 16 N. J. L. 94 (1837); *Church* v. *Cole*, 1 Hill (N. Y.) 645 (1841); *Millard* v. *Whitaker*, 5 Hill (N. Y.) 408 (1843); *Lockwood* v. *Barefield*, 7 Ga. 393 (1849); *McDonald* v. *Butler*, 3 Mich. 558 (1855); *White River Bank* v. *Downer*, 29 Vt. 332 (1857); *Ives* v. *Finch*, 28 Conn. 112 (1859); *Griffin* v. *Eaton*, 27 Ill. 379, 81 Am. Dec. 233 (1862); *O'Neal* v. *Kittredge*, 85 Mass. 470 (1862); *Simpson* v. *Cochran*, 23 Iowa 81, 92 Am. Dec. 410 (1867); *Burnes* v. *Simpson*, 9 Kans. 658 (1872); *Linton* v. *Hurley*, 114 Mass. 76 (1873); *Wilson* v. *Hatfield*, 121 Mass. 551 (1877); *Boyd* v. *Mann*, 9 Baxt. (Tenn.) 349 (1878); *Becknell* v. *Becknell*, 110 Ind. 42, 10 N. E. 414 (1886); *Copeland* v. *Todd*, 30 S. Car. 419, 9 S. E. 341 (1888); *Morse* v. *Pearl*, 67 N. H. 317, 36 Atl. 255, 68 Am. St. 672 (1892); *Harter* v. *Harter*, 4 Pa. D. R. 211 (1895); *Harris* v. *Steiner*, 30 Misc. Rep. 624, 62 N. Y. S. 752 (1900); *Kelly* v. *Hamblen*, 98 Va. 383, 36 S. E. 491 (1900); *Treat* v. *Wilson*, 65 Kans. 729, 70 Pac. 893 (1902); *Town of Fletcher* v. *Hickman*, 165 Fed. 403 (1908 Colo.); *Ratchford* v. *Covington County Stock Co.*, 172 Ala. 461, 55 So. 806 (1911); *Bashor* v. *Beloit*, 20 Idaho 592, 119 Pac. 55 (1911). In some jurisdictions it has been held that the creditor does not have an absolute right to sue on his judgment without showing some special reason or necessity therefor. *Pitzer* v. *Russel*, 4 Ore. 124 (1871); *Stevens* v. *Stone*, 94 Tex. 415, 60 S. W. 595 (1901); *Succession of Beckham*, 16 La. Ann. 352 (1861); *Solen* v. *Virginia & T. R. Co.*, 15 Nev. 313 (1880). In Kentucky a second judgment can not be obtained, the remedy is to enforce the original judgment. *Cundiff* v. *Trimble*, 52 S. W. 940, 21 Ky. L. 657 (1899). And in a number of states by statute or code an action can not be brought on a domestic judgment without leave of court upon cause shown. N. Y. Code Civ. Pro., § 1913; *Shuman* v. *Strauss*, 52 N. Y. 404 (1873); *Partridge* v. *Monihan*, 110 N. Y. S. 539, 50 Misc. 234 (1908); *Rando* v. *National Park Bank of New York*, 137 App. Div. 190, 121 N. Y. S. 1048 (1910); *McDonald* v. *Dickson*, 85 N. Car. 248 (1881); *Cole* v. *Mitchell*, 77 Wis. 131, 45 N. W. 948 (1890); *Merchants' Nat. Bank* v. *Gaslin*, 41 Minn. 552, 43 N. W. 483 (1889); *Wilson* v. *Tucker*, 105 Iowa 55, 74 N. W. 908 (1898); *Brock* v. *Kirkpatrick*, 60 S. Car. 322, 38 S. E. 779, 85 Am. St. 847 (1900).

action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt.

2. It is also argued that the destruction of the book containing the judgment is the destruction of the judgment itself; so that the primary evidence of the judgment being removed, no other proof of it is admissible. We think that this position is alike indefensible in reason and on authority.[95]

3. The last objection is, that no action can be maintained at law upon a decree in equity for a specific sum of money. The action in the case before us may be considered to be in debt, or as an action in the nature of the action of debt, under the old system. This action was proper whenever a sum liquidated and made definite by contract or judgment was recoverable, and we are not able to perceive why a recovery in equity for a certain and ascertained amount is not as legitimate a basis for action as a judgment at law. Some of the most respectable courts in the Union have so adjudged, and we think properly. See 15 Mass. 196, and other cases cited therein.[96]

Judgment affirmed.

---

[95]Accord: *Stockbridge* v. *West Stockbridge*, 12 Mass. 400 (1815), *semble*; *Jackson ex dem Taylor* v. *Cullum*, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158 (1829); *Newcomb* v. *Drummond*, 4 Leigh (Va.) 57 (1832); *Jackson ex dem. M'Fail* v. *Crawfords*, 12 Wend. (N. Y.) 533 (1834); *Miltimore* v. *Miltimore*, 40 Pa. St. 151 (1861); *Mason* v. *Bull*, 26 Ark. 164 (1870); *Parry* v. *Walser*, 57 Mo. 169 (1874); *Mandeville* v. *Reynolds*, 68 N. Y. 528 (1877); *Richard's Appeal*, 122 Pa. St. 547, 15 Atl. 903 (1888). Contra: *Walton* v. *McKesson*, 64 N. Car. 77 (1870), and see *Cox* v. *Stout*, 85 Ind. 422 (1882). Generally, a court determines the authenticity of its own records by inspection, *Eisenhart* v. *Slaymaker*, 14 Serg. & R. (Pa.) 153 (1826); *Anderson* v. *Dudley*, 5 Call (Va.) 529 (1805); *Treat* v. *Maxwell*, 82 Maine 76, 19 Atl. 98 (1889). The issue on the plea of *nul tiel* record must be tried by the court, not the jury. *White* v. *Elkin*, 6 Blackf. (Ind.) 123 (1842); *Carter* v. *Wilson*, 1 Dev. & Bat. (N. Car.) 362 (1835). Compare *Crawford* v. *Simmonton*, 7 Port. (Ala.) 110 (1838). If the judgment is rendered by a co-ordinate court of the same state it should be proved by a transcript or exemplification in accordance with the local law. *Smith* v. *Frost*, 5 Hill (N. Y.) 431 (1843); *Kinsey* v. *Ford*, 38 Barb. (N. Y.) 195 (1862); N. Y. Code Civ. Pro., § 939; *Dickinson* v. *Chesapeake & Ohio R. Co.*, 7 W. Va. 390 (1874). Judgments of sister states must be authenticated in accordance with the act of Congress of May 26, 1790; U. S. Comp. Stat. (1913), § 1519. See Pa. P. & L. Dig. of Dec. 10,080; *Santa Clara Valley Mill & Lumber Co.* v. *Prescott*, 127 Ill. App. 644 (1906); *Hammond* v. *Knox*, 125 App. Div. 9, 109 N. Y. S. 367 (1908); *Flack* v. *Andrews*, 86 Ala. 395, 5 So. 452 (1888); *Davis* v. *Davis*, 174 Fed. 786 (1909).

[96]To constitute a cause of action the judgment must be final, personal, unsatisfied and for the payment of money. *Seligman* v. *Kalkman*, 17 Cal. 152 (1860); *Brown* v. *Bridge*, 106 Mass. 563 (1871); *Smith* v. *Kander*, 58 Mo. App. 61 (1894); *Pratt* v. *Jones*, 22 Vt. 341, 54 Am. Dec. 80 (1850); *Hutchinson* v. *Gillespie*, 11 Exch. 798 (1856).

In England, foreign and colonial decrees in chancery for the payment of money could be enforced by actions at law. *Sadler* v. *Robins*, 1 Camp. 253 (1808); *Henley* v. *Soper*, 8 B. & C. 16 (1828), but not domestic decrees, *Carpenter* v. *Thornton*, 3 B. & Ald. 52 (1819); *Bailey* v. *Bailey*, L. R. (1884), 13 Q. B. Div. 855. In a recent case, however, an order for the payment of money made in the Chancery Division was enforced by an action in the King's Bench Division of the High Court. *Seldon* v. *Wilde*, L. R. (1910), 2 K. B. 9. In the United States, "in all cases where an action of debt can be maintained upon a judgment at law to recover a sum of money awarded by

BENJAMIN F. STEPHENS *v.* MANLEY HOWE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1879

127 Mass. 164[97]

LORD J.: This is an action against Manley Howe and Henry R. Stevens, brought upon a judgment recovered in the Circuit Court of the United States for the Second Circuit against the defendants, who were formerly partners. Howe alone defends. No question is made as to the jurisdiction of the court, in which the judgment was recovered, over the parties to the suit and of the subject matter of it. The parties defendant appeared and defended. So far as we understand the offer of evidence, the rejection of which is complained of, it was an offer to prove that, before judgment, the claim in suit had been wholly or in part paid by Stevens. Of course, such evidence is incompetent while the judgment remains unreversed.[98]

Exceptions overruled.

SAVAGE *v.* EVERMAN

SUPREME COURT OF PENNSYLVANIA, 1872

70 Pa. St. 315

Error to the District Court of Philadelphia.

This was an action of debt brought by John W. Everman against John R. Savage and others trading as Savage, Martin & Co. on a judgment by default in the Supreme Court of New Jersey for

---

such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount and that the records of the two courts are of equal dignity and binding obligation." *Nations* v. *Johnson*, 24 How. (U. S.) 195, 16 L. ed. 628 (1860); *Pennington* v. *Gibson*, 16 How. (U. S.) 65, 14 L. ed. 847 (1853); *Evans* v. *Tatem*, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717 (1823); *Thrall* v. *Waller*, 13 Vt. 231, 37 Am. Dec. 592 (1841); *Warren* v. *McCarthy*, 25 Ill. 95 (1860); *Dubois* v. *Dubois*, 6 Cow. (N. Y.) 494 (1826); *Mutual Life Ins. Co.* v. *Newton*, 50 N. J. L. 571, 14 Atl. 756 (1888). Contra: *Hugh* v. *Higgs*, 8 Wheat. (U. S.) 697, 5 L. ed. 719 (1823); *Boyle* v. *Schindel*, 52 Md. 1 (1879).

[97] Part of the opinion is omitted.

[98] "To an action on a judgment or decree, no defense should be entertained which might have been interposed to defeat the original action." 2 Freeman on Judgments, § 435; *Middleton* v. *Hill*, Cro. Eliz. 588 (1597); *Biddle* v. *Wilkins*, 1 Pet. (U. S.) 686, 7 L. ed. 315 (1828); *Brown* v. *Trulock*, 4 Blackf. (Ind.) 429 (1837); *Crawford* v. *Simonton*, 7 Port. (Ala.) 110 (1838); *Jackson* v. *Fletcher*, Morris (Iowa) 230 (1843); *Tappan* v. *Heath*, 16 N. H. 34 (1844); *Dickson* v. *Wilkinson*, 3 How. (U. S.) 57, 11 L. ed. 491 (1845); *Bird* v. *Smith*, 34 Maine 63, 56 Am. Dec. 635 (1852); *Guinard* v. *Heysinger*, 15 Ill. 288 (1853); *Burton* v. *Stewart*, 11 Ind. 238 (1858); *Morris* v. *Boomer*, 16 Wis. 547 (1863); *Poorman* v. *Mitchell*, 48 Mo. 45 (1871); *McAllister* v. *Singer Mfg. Co.*, 64 Ga. 622 (1880); *Morris* v. *Curry*, 41 Ark. 75 (1883); *Kitteredge* v. *Martin*, 141 Mass. 410, 6 N. E. 95 (1886); *Barton* v. *Radclyffe*, 149 Mass. 275, 21 N. E. 374 (1889); *Harter* v. *Shull*, 17 Colo. App. 162, 67 Pac. 911 (1902); *Stilwell* v. *Smith*, 219 Pa. 36, 61 Atl. 910 (1907).

$810.47. The defendants pleaded "Nil debuerunt," "Nul tiel record," "Payment with leave" and a special plea, and on the trial before Hare, P. J., offered to prove that, before the commencement of the suit, it was agreed between Everman and the defendants, who were all residents of Pennsylvania, that certain real estate of the defendants in New Jersey should be sold at sheriff's sale and Everman should purchase and take title to the same in full satisfaction and discharge of the promises and sums of money due by the defendants. Accordingly Savage went into New Jersey, accepted service of a summons for himself and his partners, judgment was obtained, the same set forth in the declaration; and a sheriff's sale had at which plaintiffs became the purchaser. The court rejected the offer and sealed a bill of exceptions. A verdict was rendered for the plaintiff for $862.24 and defendants took out a writ of error.[98a]

SHARSWOOD, J.: Anciently, it seems to have been considered that nothing could be pleaded to an action on a judgment which was matter in pais and not of record. Thus even payment was held (30 Eliz.) not to be a good plea. *Ordway & Perote's Case,* 2 Leon. 213. Of course accord and satisfaction fell within the same category. *Littleford* v. *LeMayn,* Cro. Jac. 579. For remedy, it was enacted by the statute, 4 Anne, ch. 16, section 12, that "where any action shall be brought upon any single bill, or where action of debt or scire facias shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit." This statute, as to this and some other sections, was reported by the judges of the Supreme Court as in force in this state. 3 Binn. (Pa.) 625; Roberts' Dig. 45. There is a similar statute in New Jersey. *Gulick* v. *Loder,* 1 Green (N. J.) 68. It is said in 2 Saund. on Pl. & Ev. 115, that accord and satisfaction can not be pleaded under this statute. He cites 4 Moore 165, but that must be a mistake, as it contains nothing to the point. Whether under this statute or at common law, the American authorities without a single exception that I can find, maintain the contrary doctrine—that accord and satisfaction is a good defense to an action or other proceeding on a judgment. *Witterby* v. *Mann,* 11 John. (N. Y.) 568; *Boyd* v. *Hitchcock,* 20 John. (N. Y.) 76; *Le Page* v. *McCrea,* 1 Wend. (N. Y.) 164; *Brown* v. *Feeter,* 7 Wend. (N. Y.) 301; *Evans* v. *Wells,* 22 Wend. (N. Y.) 224, 341; *La Farge* v. *Herter,* 11 Barb. (N. Y.) 159; *Campbell* v. *Booth,* 4 Gill. 29; *McCullough* v. *Franklin Coal Co.,* 21 Md. 256; *Reid* v. *Hibbard,* 6 Wis. 175; *Jones* v. *Rahcom,* 3 Ind. 327; *Farmers' Bank* v. *Groves,* 12 How. (U. S.) 51. In the recent case of *Maute* v. *Gross,* 6 P. F. Smith (Pa.) 250, it was assumed, apparently without question, that such was the law in this state. There the defendants confessed a judgment in favor of the plaintiffs under a cotemporaneous agreement by them, that they would accept in satisfaction lubricating oil of a certain quality, according to sample. The only question was, whether oil of that quality had been furnished, and an

[98a] The statement of facts is abridged and the arguments of counsel and part of the opinion of the court omitted.

issue had been directed to determine that fact. It is certainly within the spirit, if not the letter of the statute of 4 Anne, to admit as a good plea in bar whatever in law or equity amounts to a discharge and satisfaction of the debt secured by the judgment. A text writer of great respectability so states it: 2 Troubat & Haly, 13, edition of 1853. The simple, intelligible and well-settled rule on this subject is, that whenever a defense exists, which has arisen since the judgment, and which could not therefore have been available at the time it was rendered, it may be set up in any subsequent proceeding. *Cardesa* v. *Humes*, 5 Serg. & R. (Pa.) 65; *Thatcher* v. *Gammon*, 12 Mass. 267.

Upon this principle the evidence offered by the defendants ought to have been received. It was admissible under the plea of payment with leave to give the special matter in evidence. As no objection was made, we are bound to presume that due notice was given or was waived. The matter contained in the offer could not have availed the defendants as an answer to the demand of the plaintiff in the original suit. All that took place before the rendition of the judgment was a mere accord without satisfaction. An agreement to accept something collateral to the debt is without consideration, and therefore not binding. What made it effectual was actual acceptance by the plaintiff, and this was not until after the judgment *Hearn* v. *Kiehl*, 2 Wright. (Pa.) 147. Here, by the accord, a house and lot was agreed to be accepted in satisfaction. Afterwards, and in pursuance of this accord, it was actually conveyed to the plaintiff and accepted by him. It matters not how the title was conveyed, if it was under and in pursuance of the original accord.

Judgment reversed.[99]

---

[99] *Conner* v. *Pennington*, 1 Del. Ch. 177 (1821); *Briley* v. *Sugg*, 1 Dev. & B. Eq. (N.Car.) 366, 30 Am. Dec. 172 (1836); *La Farge* v. *Herter*, 9 N. Y. 241 (1853); *Lyon* v. *Northrup*, 17 Iowa 314 (1864); *Thom* v. *Wilson*, 27 Ind. 370 (1866); *Wolcott* v. *Ensign*, 53 Ind. 70 (1876); *Potter* v. *Hartnett*, 148 Pa. 15, 23 Atl. 1007 (1892); *Lofland* v. *McDaniel*, 1 Pennyw. (Del.) 416, 41 Atl. 882 (1898); *Roberts* v. *Pratt*, 158 N. Car. 50, 73 S. E. 129 (1911).

A payment of part of the amount due upon a money judgment under a parol agreement that it should operate as a satisfaction in full will not discharge a judgment, *Deland* v. *Hiett*, 27 Cal. 611, 87 Am. Dec. 102 (1865); *Moss* v. *Shannon*, 1 Hilton (N. Y.) 175 (1856); *Knight* v. *Cherry*, 64 Mo. 513 (1877); *McArthur* v. *Dane*, 61 Ala. 539 (1878); *Haggin* v. *Clark*, 61 Cal. 1 (1882); *Weber* v. *Couch*, 134 Mass. 26, 45 Am. Rep. 274 (1883); *Fletcher* v. *Wurgler*, 97 Ind. 223 (1884); *Madeley* v. *White*, 2 Colo. App. 408, 31 Pac. 181 (1892). Otherwise where there is a sealed release, *Braden* v. *Ward*, 42 N. J. L. 518 (1880); *Beers* v. *Hendrickson*, 45 N. Y. 665. And there are other authorities which hold that part payment of a judgment, by way of compromise, may under all the circumstances and equities of the case amount to an accord and satisfaction. *Harper* v. *Graham*, 20 Ohio 105 (1851); *Booth* v. *Campbell*, 15 Md. 569 (1859); *Clay* v. *Hoysradt*, 8 Kans. 74 (1871); *Case* v. *Hawkins*, 53 Miss. 702 (1876); *Miller* v. *Lilly*, 84 Ind. 533 (1882); *Hendrick* v. *Thomas*, 106 Pa. 327 (1884); *Neal* v. *Handley*, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784 (1886); *Pinson* v. *Puckett*, 35 S. Car. 178, 14 S. E. 393 (1891); *Fowler* v. *Smith*, 153 Pa. St. 639, 25 Atl. 744 (1893); *Brown* v. *Kern*, 21 Wash. 211, 57 Pac. 798 (1899).

As to payment by joint party or third person see 2 Black on Judgments (2d ed.), § 995.

CHAPTER VI

EXECUTION

SECTION 1. ISSUING OF THE WRIT

"Execution, Executio, and signifieth in law the obtaining of actual possession of anything acquired by judgment of law, or by fine executory levied, whether it be by the sheriff or by the entry of the party, whereof you shall read more hereafter." *Coke on Littleton*, 154a.[1]

"A writ of execution is a written command or precept to the sheriff or ministerial officer, directing him to execute the judgment of the court. It is the command of the court addressed to the ministerial officer in writing, and under the seal of the court, containing with more certainty the command of the court, and expressed with more solemnity, than if uttered verbally by the court. It is nevertheless the command of the court to the officer to proceed and execute the judgment of the court." Sutliff, J., in *Kelly* v. *Vincent*, 8 Ohio St. 415 (1858).

New York Code of Civil Procedure, section 1364.

"There are four kinds of execution, as follows:

"1. Against property.

"2. Against the person.

"3. For the delivery of the possession of real property with or without damages for withholding the same.

"4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

"An execution is the process of the court, from which it is issued."[2]

---

[1] 3 Blackst. Comm. 412; Bacon's Abridgement, "Execution"; Comyn's Digest "Execution." Tidd's Practice (9th ed.) 993, 11 A. & E. Encyc. of Law (2d ed.) 609; 17 Cyc. 21.

[2] Execution issues from the court in which the judgment is given, *Memorandum*, Cro. Car. 34 (1626); *Chandler* v. *Colcord*, 1 Okla. 260, 32 Pac. 330 (1893); *Willamette Real Estate Co.* v. *Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. 800 (1895); *Garnett* v. *Goldman*, 39 Okla. 516, 135 Pac. 410 (1913), and, in the absence of a statute or rule of court to the contrary without special leave of court, *Miller* v. *Milford*, 2 Serg. & R. (Pa.) 35 (1815); *Little* v. *Cook*, 1 Aikens (Vt.) 363, 15 Am. Dec. 698 (1826); *Union Bank* v. *McClung*, 9 Humph. (Tenn.) 91 (1848); *Irons* v. *McQuewan*, 27 Pa. St. 196, 67 Am. Dec. 456 (1856); *Carpenter* v. *Vanscoten*, 20 Ind. 50 (1863); *Dorn* v. *Howe*, 59 Cal. 129 (1881); *Ensley* v. *McCorkle*, 74 Ind. 240 (1881); *Maloney* v. *Real Estate B. & L. Assn.*, 57 Mo. App. 384 (1894); *Horrman* v. *Sherin*, 8 S. Dak. 36, 65 N. W. 434, 59 Am. St. Rep. 744 (1895); *Bludworth* v. *Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717 (1899). In England, leave to issue execution is required where six years have elapsed since the judgment and in certain other cases as provided in Order XLII, rule 23 of the Supreme Court. By the New York Code of Civil Procedure, § 1375, executions are of course within five years after judgment, after that time there must be an order of court granting leave, §§ 1377, 1381. So also, an order is required for an execution against wages, § 1391; *Reibstein* v. *Stens*, 140 App. Div. 519, 125 N. Y. S. 508 (1910); *Neu* v. *Fox*, 151 App. Div. 17, 135 N. Y. S. 208 (1912).

The plaintiff alone, or his attorney, has a right to sue out and control the execution *Osgood & Co.* v. *Brown*, Freem. Ch. (Miss.) 392 (1839);

TRUETT AND GILL *v.* LEGG

COURT OF APPEALS OF MARYLAND, 1870

32 Md. 147

Appeal from the Circuit Court for Anne Arundel County. This was an action of assumpsit brought by the appellants against the appellee. On the 24th of April, 1867, during the April term of the court below, a verdict was rendered for the plaintiffs, but no judgment, absolute or nisi, was rendered or entered thereon against the defendant. On the twenty-sixth day of April, 1867, the defendant filed a motion, and reasons for a new trial, and no day appears to have been fixed for its hearing, nor rule upon the plaintiffs to show cause against it, at any prescribed time. The case thus standing, and several terms having intervened, on the 10th of March, 1868, a writ of execution was issued by order of the plaintiffs. On motion of the defendant the court below ordered the execution quashed and plaintiffs excepted.[3]

STEWART, J.: After the verdict, the plaintiffs who had prevailed were entitled at once to have judgment nisi causa, and if they moved to that effect the judgment would have become final after four days, unless the defendant moved for a new trial, or in arrest of judgment, within that time, which would suspend the judgment until that motion was disposed of.[4] But as the plaintiffs made no motion to that effect, and no judgment was in fact entered, the verdict still continued as such, and the expiration of the term could not give to it the force and effect of a judgment. Non constat, in the absence of such motion on the part of the plaintiffs they desired judgment to be entered on the verdict, as they might also move for a new trial, or other action, upon the verdict. The judgment rendered on the verdict is the conclusion of the law upon the facts found by the jury, and is the act of the court, and the clerk in entering it, records it as the judgment of the court, and has no authority to enter it without the sanction of the court. After the judgment becomes final, and not before, execution may be issued

Ex parte Hampton, 2 Greene (Iowa) 137 (1849); *Watt* v. *Alvord*, 25 Ind. 533 (1865); *Remington Paper Co.* v. *O'Dougherty*, 81 N. Y. 474 (1880); *Wills* v. *Chandler*, 2 Fed. 273, 1 McCrary 276 (1880); *State* v. *Pilsbury*, 35 La. Ann. 408 (1883); *Cortes* v. *Superior Court*, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. 37 (1890); *Galle* v. *Tode*, 148 N. Y. 270, 42 N. E. 673 (1896). But an unauthorized execution may be ratified and then the irregularity will be deemed to have been waived. *Clarkson* v. *White*, 4 J. J. Marsh (Ky.) 530, 20 Am. Dec. 229 (1830); *Lerch* v. *Gallup*, 67 Cal. 595, 8 Pac. 322 (1885); *Johnson* v. *Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174 (1887).

[3]The statement of facts is from the opinion of the court, part of which is omitted.

[4]At common law, judgment is suspended pending a motion for new trial and an execution can not be issued until the motion is disposed of. 2 Tidd's Practice (9th ed.) 903, 930; *Barre* v. *Affleck*, 2 Yeates (Pa.) 274 (1798); *Danielson* v. *Northwestern Fuel Co.*, 55 Fed. 49 (1893), but in many of the states by statute or rule, execution will not await the disposition of a motion for new trial unless a stay is ordered. *Church* v. *Goodin*, 22 Kans. 527 (1879); *Ex parte Craig*, 130 Mo. 590, 32 S. W. 1121 (1895); *Erie R. Co.* v. *Ackerson*, 33 N. J. L. 33 (1868).

against the defendant, but in order to charge him in execution, or bind his property, or proceed against him by action of debt, or have scire facias on the judgment, it is necessary that the judgment should be entered of record. 2 Tidd's Practice, 964, 975. The record in this case shows no such judgment, and therefore the execution was improvidently issued, and was properly quashed by the court.[5]

Judgment affirmed.

[5]To support an execution there must be a valid and subsisting judgment or decree. *Jones* v. *Pope*, 1 Saund. 37 (1666); *Stampe* v. *Kinsey*, 2 Show. 494 (1686); *Parker* v. *Frambes*, 2 N. J. L. 156 (1807); *Lofton* v. *Champion*, 2 N. J. L. 157 (1807); *Albee* v. *Ward*, 8 Mass. 79 (1811); *Cutler* v. *Wadsworth*, 7 Conn. 6 (1828); *Van Ness* v. *Cantine & Radcliff*, 4 Paige (N. Y.) 55 (1833); *Dinsmore* v. *Biggert*, 9 Pa. St. 133 (1848); *Dawson* v. *Wells*, 3 Ind. 398 (1852); *Keeling* v. *Heard*, 3 Head (Tenn.) 592; *Criswell* v. *Ragsdale*, 18 Tex. 443 (1857); *Lincoln* v. *Cross*, 11 Wis. 91 (1860); *Johnson* v. *Baker*, 38 Ill. 98, 87 Am. Dec. 293 (1865); *Chase* v. *Dana*, 44 Ill. 262 (1867); *Fithian* v. *Monks*, 43 Mo. 502 (1869); *Davidson* v. *Seegar*, 15 Fla. 671 (1876); *Darrow* v. *Scullin*, 19 Kans. 57 (1877); *Strother* v. *Richardson*, 30 La. Ann. 1269 (1878); *Ling* v. *King*, 91 Ill. 571 (1879); *Jenness* v. *Circuit Judge for Lapeer County*, 42 Mich. 468, 4 N. W. 220 (1880); *Balm* v. *Nunn*, 63 Iowa 641, 19 N. W. 810 (1884); *Ninde* v. *Clark*, 62 Mich. 124, 28 N. W. 765, 4 Am. St. 823 (1886). The judgment also must be final. *Mather* v. *Chapman*, 6 Conn. 54 (1825); *Daniel* v. *Cooper*, 2 Houst. (Del.) 506 (1862); *Walden* v. *Clark*, 50 Vt. 383 (1877); *In re Sedgeley Ave.*, 88 Pa. St. 509 (1879); *Devlin* v. *Hinman*, 40 App. Div. 101, 57 N. Y. S. 663, 29 Civ. Proc. 127 (1899). Ordinarily, the party who has obtained judgment is immediately entitled to execution, *Smith* v. *Smith*, L. R. 9 Exch. 121 (1874); *Kaylor* v. *Holloway*, 5 Phila. (Pa.) 530 (1864); *Sweetser* v. *Fox*, 43 Utah 40, 134 Pac. 599, 47 L. R. A. (N. S.) 145 (1911); but a judgment subject to conditions can be enforced only in accordance with their terms. *Veal* v. *Warner*, 1 Mod. 20 (1669); *Shoemaker* v. *Shirtliffe*, 1 Dall. (U. S.) 133, 1 L. ed. 69 (1785); *Otwell* v. *Messick*, 4 Houst. (Del.) 542 (1873). And where a statute provides that a certain time shall elapse after judgment before execution, an execution issued sooner is erroneous. *Bacon* v. *Cropsey*, 7 N. Y. 195 (1852); *Wilkinson's Appeal*, 65 Pa. St. 189 (1870); *Jones* v. *Carnahan*, 63 Ind. 229 (1878), and by some authorities void, *Briggs* v. *Wardwell*, 10 Mass. 356 (1813); *Penniman* v. *Cole*, 49 Mass. 496 (1844); *Washington Nat. Bank* v. *Williams*, 188 Mass. 103, 74 N. E. 470 (1905). At common law, execution might issue as soon as judgment was signed and before its entry of record, provided there was no writ of error depending or agreement to the contrary. Tidd's Practice (9th ed.) 994; *Hastings* v. *Cunningham*, 39 Cal. 137 (1870); *Willson* v. *Binford*, 54 Ind. 569 (1876); *Los Angeles County Bank* v. *Raynor*, 61 Cal. 145 (1882); *Drake* v. *Harrison*, 69 Wis. 99, 33 N. W. 81, 2 Am. St. 717 (1887); *Fontaine* v. *Hudson*, 93 Mo. 62, 5 S. W. 692, 3 Am. St. 515 (1887), otherwise justice's judgments, *Huffman* v. *Sisk*, 62 Mo. App. 398 (1895); *Weigley* v. *Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. 335 (1888), otherwise out of term time, *Knight* v. *Martin*, 155 Ill. 486, 40 N. E. 358 (1895); *Stevens* v. *Manson*, 87 Maine 436, 32 Atl. 1002 (1895); *Lowenstein* v. *Caruth*, 59 Ark. 588, 28 S. W. 421 (1894); *Fisher* v. *Jones*, 114 Ga. 648, 40 S. E. 700 (1901). But by statutes in some states an enrollment or docketing of the judgment is a prerequisite to an execution. *Barrie* v. *Dana*, 20 Johns. (N. Y.) 307 (1822); *Marvin* v. *Herrick*, 5 Wend. (N. Y.) 109 (1830); *Smith* v. *Trenton Delaware Falls Co.*, 20 N. J. L. 116 (1843); *Blashfield* v. *Smith*, 27 Hun (N. Y.) 114 (1822); *Balm* v. *Nunn*, 63 Iowa 641, 19 N. W. 810 (1884); *Mason & Risch Vocalion Co.* v. *Killough Music Co.*, 45 S. Car. 11, 22 S. E. 755 (1895); *Dewey* v. *Dewey*, 151 Mich. 586, 115 N. W. 735 (1908); *Belfer* v. *Ludlow*, 69 Misc. 486, 126 N. Y. S. 130 (1910). But the irregularity may be cured by *nunc pro tunc* order. *Graham* v. *Lynn*, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493 (1843); *Doughty* v. *Meek*, 105 Iowa 16, 74 N. W. 744, 67 Am. St. 282 (1898). As to what is sufficient docketing see *Appleby* v. *Barry*, 2 Rob. (N. Y.) 689 (1864).

FARMERS' AND MECHANICS' NAT. BANK *v.* CRANE

SUPREME COURT OF NEW YORK, SPECIAL TERM, 1873

15 *Abb. Pr.* (*N. S.*) (*N. Y.*) 434

The plaintiffs, the Farmers' and Mechanics' National Bank of Philadelphia, sued Walworth D. Crane and Joseph C. Danckelman, copartners, to recover the amount of an overdraft; and in the complaint alleged fraud. Judgment was obtained against both defendants. Separate executions were issued against the person of each defendant. The plaintiffs neglected to charge the defendant, Danckelman, in execution, and he was discharged by an order of supersedeas. The defendant, Crane, now moved to have the execution against him set aside.

Bushnell & Albright, attorneys for defendant Crane, and Samuel Jones, of counsel, cited 6 T. R. 525; Gra. Pr. 357; 2 Stra. 1218; Gra. Pr. 411; 5 Duer 682.

Sandford, Woodruff & Robinson, attorneys for plaintiffs, and Edmund R. Robinson, of counsel, cited *Fake* v. *Edgerton*, 5 Duer 681, and asked to be allowed to amend execution by indorsement directing the sheriff to apprehend one defendant only.

FANCHER, J.: It is a well settled principle of practice that an execution, being founded on the judgment, must in all respects follow it, and be warranted by it. It has been held that it must be in the name of all the plaintiffs against all the defendants (6 T. R. 525; Gra. Pr. 357; 2 Stra. 1218), and that it must strictly pursue the judgment (Gra. Pr. 411).[6]

---

[6]The execution must accord with the judgment. *Breidenthal* v. *McKenna*, 14 Pa. St. 160 (1850); *Kneib* v. *Graves*, 72 Pa. St. 104 (1872); *Winslow* v. *O'Pry*, 56 Ga. 138 (1876); *Snavely* v. *Harkraker*, 30 Gratt. (Va.) 487 (1878); *Van Cleave* v. *Bucher*, 78 Cal. 600, 21 Pac. 954 (1889); *Brown* v. *Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. 545 (1890); *Maloney* v. *Real Estate B. & L. Assn.*, 57 Mo. App. 384 (1894); *Merrifield* v. *Western Cottage Piano & Organ Co.*, 238 Ill. 526, 87 N. E. 379 (1909); *Schmitt* v. *Weber*, 239 Ill. 377, 88 N. E. 268 (1909); *Mallory* v. *Hartman*, 86 Conn. 615, 86 Atl. 567 (1913); *Jordan Bros.* v. *Gordon*, 8 Ala. App. 479, 62 So. 1023 (1913). In *Corbin* v. *Pearce*, 81 Ill. 461 (1876), it is said by the court: "A variance between a judgment and an execution might be so marked that, in the absence of other proof, it would properly be inferred that the judgment in question was not the judgment mentioned in the writ, but such inference may be rebutted by proof, and if it appears that, in fact, the judgment in question was the judgment upon which the writ was issued, in such case the variance, though an irregularity, does not render the writ void." And see *Chesebro* v. *Barme*, 163 Mass. 79, 39 N. E. 1033 (1894). Thus, the execution should follow the judgment in the statement of the amount due, *McSherry* v. *Queen*, 2 Cranch (C. C.) 406, Fed. Cas. No. 8926, (1823); *Tipton* v. *Grubbs*, 2 B. Mon. (Ky.) 83 (1841); *Monaghan* v. *Monaghan*, 25 Ohio St. 325 (1874); *Jaffray* v. *Saussman*, 52 Hun 561, 5 N. Y. S. 629 (1889), but a slight discrepancy will not vitiate the execution. *Becker* v. *Quigg*, 54 Ill. 390 (1870); *Williams* v. *Brown*, 28 Iowa 247 (1869); *Bruere* v. *Britton*, 20 N. J. L. 268 (1844). Contra: *Wilson* v. *Fleming*, 16 Vt. 649, 42 Am. Dec. 531 (1844); *Hightower* v. *Handlin*, 27 Ark. 20 (1871).

The case cited from term reports is authority for holding that if a separate execution against the body of the defendant is issued upon a joint judgment against two defendants, the execution will be set aside, and the defendant arrested under it will be discharged.

If the plaintiffs wish to exonerate one of several defendants from arrest on an execution, they can not do so by an irregular execution, but must indorse upon it a direction to the sheriff (5 Duer 682).

As to the amendment suggested, I do not think it can properly be made on this motion. If the plaintiffs desire to amend, they should move for that purpose, on a notice to the defendants, who perhaps may wish to be heard on the effect of the former arrest of the defendants, the discharge of one of them, and the subsequent arrest of the other on a several execution.

The motion should be granted.[7]

---

[7]Accord: *Whitman* v. *James*, 10 Daly (N. Y.) 490 (1882), affirmed 89 N. Y. 635. Where a judgment is recovered against a number of defendants it is irregular to issue execution against less than all. *Anonymous*, Goodb. 181 (1610); *Panton* v. *Hall*, 2 Salk. 598 (1689); *Morse* v. *Dewey*, 3 N. H. 535 (1826); *State* v. *Stout*, 11 N. J. L. 362 (1830); *Boyken* v. *State*, 3 Yerg. (Tenn.) 426 (1832); *Saunders* v. *Gallagher*, 2 Humph. (Tenn.) 445 (1841); *Gibbs* v. *Atkinson*, 3 Pa. L. J. (Phila.) 139 (1843); *Conn* v. *Pender*, 1 Smedes & M. (Miss.) 386 (1843); *Shaffer* v. *Watkins*, 7 Watts & S. (Pa.) 219 (1844); *Wilson & Wheeler* v. *Nance & Collins*, 11 Humph. (Tenn.) 189 (1850); *Saul & Hensinger* v. *Geist*, 1 Woodw. (Pa.) 306 (1865); *Flanagan* v. *Tinen*, 53 Barb. (N. Y.) 587, 37 How. Prac. 130 (1867); *Linn* v. *Hamilton*, 34 N. J. L. 305 (1870); *Dandistel* v. *Kronenberger*, 39 Ind. 405 (1872); *Elson* v. *O'Dowd*, 40 Ind. 300 (1872); *Brinton* v. *Gerry*, 7 Ill. App. 238 (1880); *Zelle* v. *Bobb*, 14 Mo. App. 267 (1883); *Burdick* v. *Burdick*, 16 R. I. 495, 17 Atl. 859 (1889); *In re First Nat. Bank*, 49 Fed. 120 (1891); *Merrifield* v. *Western Cottage Piano Co.*, 238 Ill. 526, 87 N. E. 379, 149 Ill. App. 1 (1909). But see, where separate judgments or orders are entered in one proceeding. *Kempton* v. *Cook*, 4 Pick. (Mass.) 21, 305 (1826); *Sharpe* v. *Baker*, 51 Ind. App. 547, 99 N. E. 44, 96 N. E. 627 (1912); *Hyder* v. *Butler*, 103 Tenn. 289, 52 S. W. 876 (1899); *McManus* v. *Price*, 246 Mo. 438, 152 S. W. 3 (1912). Compare *Land Credit Co.* v. *Fermoy*, L. R. 5 Ch. App. 322 (1870). The rule, it is said, is technical, and the court from which the process issues will take care that it is not used to work injustice. *Mortland* v. *Himes*, 8 Pa. St. 265 (1848); *Sheets* v. *Wynkoop*, 74 Pa. St. 198 (1873); *Duffield* v. *Cooper*, 87 Pa. St. 443 (1878). And generally, the plaintiff, under his power to control the writ, may direct the sheriff to make the amount of the debt out of the property of one, or any or all of the defendants. *Godfrey* v. *Gibbons*, 22 Wend. (N. Y.) 569 (1840); *Root* v. *Wagner*, 30 N. Y. 9, 86 Am. Dec. 348 (1864); *Crossiti* v. Wiles, 13 N. Y. Civ. Pro. 327 (1888); *Flanders* v. *Batten*, 50 Hun 543, 3 N. Y. S. 728, 20 N. Y. St. 671 (1889).

One execution can not issue on two separate and distinct judgments. *Doe* v. *Pue*, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368 (1836); *Merchie* v. *Gaines*, 5 B. Mon. (Ky.) 126 (1844); *Bain & Wyatt* v. *Chrisman & Porter*, 27 Mo. 203 (1858); *Lewis* v. *Dennis*, 54 Tex. 487 (1881); *B. & O. R. Co.* v. *Vanderwarker*, 19 W. Va. 265 (1881); *Bigham* v. *Dover*, 86 Ark. 323, 110 S. W. 217 (1908).

Upon a judgment in favor of several, an execution issued in favor of one of the plaintiffs is irregular. *Moody* v. *R. Hoe*, 22 Fla. 314 (1886); *Cleveland* v. *Simpson*, 77 Tex. 96, 13 S. W. 851 (1890), but see *Railsback* v. *Lovejoy*, 116 Ill. 442, 6 N. E. 504 (1886); *Couch* v. *Atkinson*, 32 Ala. 633 (1858).

EARL *v.* BROWN

COURT OF KING'S BENCH, 1750

1 Wils. K. B. 302

The plaintiff died after the verdict and before judgment was entered thereupon. Afterwards judgment was entered and an execution taken out, without any scire facias sued out at the suit of the plaintiff's representative. And now it was moved to set aside the execution of fieri facias, and it was held that although the judgment was regularly entered by the 17 Car. 2, c 8[8] yet the fieri facias issued irregularly, for there ought to have been a scire facias; so the fieri facias was set aside, and the money levied thereupon ordered to be restored to the defendant, per totam curiam.[9]

---

[8] "The death of either party between the verdict and judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." Act of 17 Charles II. ch. 8 (1666). *Murray* v. *Cooper*, 6 Serg. & R. 126 (1820); *Walter* v. *Erdman*, 4 Pa. Super. Ct. 348 (1897).

[9] *Johnson* v. *Parmely*, 17 Johns. (N. Y.) 271 (1820); *Gansevoort* v. *Gilliland*, 1 Cow. (N. Y.) 218 (1823); *Harwood* v. *Murphy*, 13 N. J. L. 193 (1832); *Huey* v. *Redden*, 3 Dana (Ky.) 488 (1835); *May* v. *State Bank of North Carolina*, 2 Rob. (Va.) 56, 40 Am. Dec. 726 (1843), at p. 69; *Warwick* v. ———, 20 N. J. L. 116 (1843); *Moore & Cocke* v. *Bell*, 13 Ala. 459 (1848); *Bellinger* v. *Ford*, 14 Barb. (N. Y.) 250 (1852); *Trail* v. *Snouffer*, 6 Md. 308 (1854); *Hewgly* v. *Johns*, 3 Baxt. (Tenn.) 85 (1873); *Brown* v. *Parker*, 15 Ill. 307 (1853); *Morgan* v. *Taylor*, 38 N. J. L. 317 (1876), prior to the practice act of 1874; *Welch* v. *St. Louis*, 12 Mo. 516 (1882); *Tucker* v. *Carr*, 20 R. I. 477, 40 Atl. 1, 78 Am. St. 893 (1898). *Quaere* whether an execution so issued is void. *Seeley* v. *Johnson*, 61 Kans. 337, 59 Pac. 631, 78 Am. St. 314 (1900); *Meyer* v. *Mintonye*, 106 Ill. 414 (1883); *Bellinger* v. *Ford*, 21 Barb. (N. Y.) 311 (1856), or merely voidable, *Day* v. *Sharp*, 4 Whart. (Pa.) 339, 34 Am. Dec. 509 (1839); *Darlington* v. *Speakman*, 9 Watts & S. (Pa.) 182 (1845); *Hughes* v. *Wilkinson*, 37 Miss. 482 (1859); *Jenness* v. *Circuit Judge*, 42 Mich. 469, 4 N. W. 220 (1880). In many of the states the common law rule has been changed and the personal representative may have an execution without a writ of revival. For example, see N. Y. Code Civ. Pro., § 1376; *Ireland* v. *Litchfield*, 22 How. Pr. 178, 21 N. Y. Super. Ct. 634 (1861); *Guiterman* v. *Coutant*, 128 App. Div. 453, 112 N. Y. S. 900 (1908); Pennsylvania Act of Feb. 24, 1834, P. L. 70, § 26; *Gemmill* v. *Butler*, 4 Pa. St. 232 (1846); *Morgan* v. *Taylor*, 38 N. J. L. 317 (1876); *Mavity* v. *Eastridge*, 67 Ind. 211 (1879); *Hatcher* v. *Lord*, 115 Ga. 619 (1902), 41 S. E. 1007, 61 L. R. A. 353 and note; *Kinkade* v. *Gibson*, 209 Ill. 246, 70 N. E. 683 (1904). In England where there is a change of parties by death or otherwise, the party alleging himself entitled to execution may apply to the court for leave to issue execution, and the court may make an order to that effect upon such terms as shall be just. Rules of Supreme Court, Order XLII, rule 17; *Mercer* v. *Lawrence*, 26 W. R. 506 (1878); *Ex parte Woodall*, L. R. 13 Q. B. Div. 479 (1884).

COOPER *v* MAY

SUPERIOR COURT OF DELAWARE, 1832

1 *Har.* (*Del.*) 18

Certiorari. Judgment before a justice of the peace in an action at the suit of Thomas May against Nathaniel D. Masten. An execution issued in 1826, on which a sale was made, but no part applied to that execution. Masten died in 1826, and his widow administered, and afterwards intermarried with Cooper. An alias fi. fa. was issued in 1829.

This was the error assigned, that the alias fi. fa. issued several years after the defendant's death, and without any previous sci. fa.[10]

CLAYTON, C. J.: If judgment is recovered, and the defendant dies in one month afterwards, if a term is suffered to elapse, so that the execution must be tested after his death, such execution would be irregular; for the rule is, that when a new person, who was not a party to a judgment, derives benefit by, or becomes chargeable to, the execution, there must be a sci. fa. to make him a party. 2 Saund. 6, n. 1; 1 Ld. Raym. 245; 1 Salk. 319-20; 2 Ld. Raym. 768; 2 Inst. 471. So when the defendant dies in term time and execution is taken out immediately after the term, a day posterior to the death of defendant, a scire facias is necessary to revive the judgment against the administrator. 6 T. R. 368. Lord Kenyon in this case says, "great injustice may be done to creditors if we permit the execution to stand." The plaintiff should have sued out a scire facias to revive the judgment against the defendant's executor. The moment a party is dead, the rights of his creditors are fixed. An execution once begun should proceed. I understand by this that where chattels or other property are seized in execution, you may proceed to complete the execution at any time after, and the death of neither plaintiff nor defendant will stop the execution.[11] But I have met with

---

[10] A part only of the opinion is printed.

[11] Accord: *Harwood* v. *Phillips*, O. Bridgman 464 (1663); *Adams* v. *Connelly*, 118 Ill. App. 441 (1905); *Farrer* v. *Brooks*, 1 Mod. 188 (1674); *Fox* v. *Lamar*, 2 Brev. (S. Car.) 417 (1810); *Massie* v. *Long*, 2 Ohio 287, 15 Am. Dec. 547 (1826); *Doe* v. *Heath*, 7 Blackf. (Ind.) 154 (1844); *Wood* v. *Morehouse*, 45 N. Y. 368 (1871); *Holman* v. *Holman*, 66 Barb. (N. Y.) 215 (1872); *Rosengarten* v. *Deemer*, 1 W. N. Cas. Pa. 63 (1873); *Davis* v. *Moore*, 103 Ill. 445 (1882); *Coffin* v. *Freeman*, 84 Maine 535, 24 Atl. 986 (1892); *Connell* v. *O'Neil*, 154 Pa. St. 582, 26 Atl. 607 (1893); *Knelly* v. *Bachert*, 13 Pa. D. R. 135 (1903). Contra: *Davis* v. *Oswalt*, 18 Ark. 414, 68 Am. Dec. 182 (1857); *Chandler* v. *Burdett*, 20 Tex. 42 (1857); *McMiller* v. *Butler*, 20 Tex. 402 (1857); *Burge* v. *Brown*, 5 Bush. (Ky.) 535, 96 Am. Dec. 369 (1869).

In *Massie's Heirs' Lessee* v. *Long*, 2 Ohio 287, 15 Am. Dec. 547, it is said: "It is well settled that if the defendant die, after execution is sued out and levied, that the execution proceeds, as if the death had not taken place. The reason generally given for this is, that execution is an entire thing, and having once commenced, can not be stopped. But there is undoubtedly a much more satisfactory reason to warrant the proceeding, at least in the case of a levy

no case where you can take out execution which must be tested after the death of the plaintiff or defendant. A scire facias is necessary in every such case. The alias fi. fa. is irregular, and the proceedings must be reversed.[12]

Judgment reversed.

PAYNE *v.* PAYNE'S EXR.

COURT OF APPEALS OF KENTUCKY, 1848

8 *B. Mon.* (*Ky.*) 391[23]

SIMPSON, J.: This was a motion to quash an execution, made by the defendant in the execution.

There were two plaintiffs in the judgment at law, one of whom had died before the last execution issued. His death was suggested in the execution, and this fact was also relied upon as a ground for quashing it. But it is fully settled that where there are two or more plaintiffs or defendants in a personal action, and one or more of

---

upon chattels. By the levy, the property of the defendant in the goods is divested, and the sheriff acquires a special property, which it is his duty to divest himself of according to the exigent of the writ."

[12]At common law if there is but one defendant and he dies after judgment and before execution, an execution can not issue tested after his death without first reviving the judgment by writ of *scire facias*. Where a statutory remedy is substituted for *scire facias* it must be followed strictly. Fitzherbert Natura Brevium 266; *Vincent* v. *Dale*, 1 Dyer 76b (1552).

Jefferson v. *Morton*, 2 Saund. 6 (1670); *Boyd* v. *Armstrong*, 1 Yerg. (Tenn.) 40 (1821); *Den ex dem. Sharp* v. *Humphreys*, 16 N. J. L. 25 (1837); *Cartney* v. *Reed*, 5 Ohio 221 (1831); *Heapy* v. *Parris*, 6 T. R. 368 (1795); *Stymets* v. *Brooks*, 10 Wend. (N. Y.) 207 (1833); *Bragner* v. *Langmead*, 7 T. R. 20 (1796); *Jewett* v. *Smith*, 12 Mass. 309 (1815); *Henderson* v. *Gandy*, 11 Ala. 431 (1847); *State* v. *Michaels*, 8 Blackf. (Ind.) 436 (1847); *Hildreth* v. *Thompson*, 16 Mass. 191 (1819); *Springer* v. *Brown*, 9 Pa. St. 305 (1848); *Meanor* v. *Hamilton*, 27 Pa. St. 137 (1856); *Trail* v. *Snouffer*, 6 Md. 308 (1854); *Laflin* v. *Herrington*, 16 Ill. 301 (1855); *Wood* v. *Colwell*, 34 Pa. St. 92 (1859); *Ransom* v. *Williams*, 69 U. S. 313, 17 L. ed. 803 (1864); *Smith* v. *Reed*, 52 Cal. 345 (1877); *Welch* v. *Battern*, 47 Iowa 147 (1877); *Sims* v. *Eslava*, 74 Ala. 594 (1883); *Middleton* v. *Middleton*, 106 Pa. St. 252 (1884); *In re Shephard*, L. R. 43 Ch. D. 131 (1889); *Bull* v. *Gilbert*, 79 Iowa 547, 44 N. W. 815 (1890); *Barfield* v. *Barfield*, 113 N. Car. 230, 18 S. E. 505 (1893); *Reddick* v. *Long*, 124 Ala. 260, 27 So. 402 (1899); *Atlas R. Co.* v. *Smith*, 52 App. Div. 109, 64 N. Y. S. 1044 (1900), see N. Y. Code Civ. Pro., §§ 1380-1; *Seely* v. *Johnson*, 61 Kans. 337, 59 Pac. 631, 78 Am. St. 314 (1900); *Watson* v. *Moore*, 40 Ore. 204, 66 Pac. 814 (1901); *Vogt* v. *Daily*, 70 Nebr. 812, 98 N. W. 31 (1904); *Dunbar* v. *Kelly*, 189 Mass. 390, 75 N. E. 740 (1905); *Perret* v. *Lepper*, 226 Pa. St. 528, 75 Atl. 723 (1910); *Rose* v. *Dunbar*, 20 Idaho 1, 115 Pac. 920 (1911); *Craig* v. *Wagner*, 88 Conn. 100, 89 Atl. 916 (1914); *Prentiss* v. *Bowden*, 145 N. Y. 342, 40 N. E. 13 (1895). An execution in violation of this rule is generally held void. *Holloway* v. *Johnson*, 7 Ala. 660 (1845); *per cur.* "of no more effect than waste paper"; *Wallace* v. *Swinton*, 66 N. Y. 188 (1876); *Cunningham* v. *Burk*, 45 Ark. 267 (1885); *Sawyers* v. *Sawyers*, 93 N. Car. 321 (1885); *Prentiss* v. *Bowden*, 145 N. Y. 342 (1895). Contra, holding the proceedings voidable merely, *Butler* v. *Haynes*, 3 N. H. 21 (1823); *Speer* v. *Sample*, 4 Watts (Pa.) 367 (1835); *Harrington* v. *O'Reilly*, 17 Miss. 216 (1848); *Hodges* v. *White*, 19 R. I. 717 (1897).

[23]Part of the opinion of the court is omitted.

them die after judgment, execution may be had for or against the survivors, without a scire facias. (2 Saunders 72, note by Williams, and the cases cited.) This ground was properly held untenable and the motion overruled.[14]

Judgment affirmed.

ERWIN *v.* DUNDAS

SUPREME COURT OF THE UNITED STATES, 1846

4 How. (U. S.) 58

Error from the Circuit Court of the United States for the Southern District of Alabama.

Ejectment by Erwin, the plaintiff in error, to recover a lot in the city of Mobile, known as Hitchcock's cotton press, to which he claimed title as purchaser at sheriff's sale on an alias fi. fa. issued July 19, 1840, on a judgment against Henry Hitchcock and Robert D. James. Henry Hitchcock, the former owner of real estate, died August 12, 1839, having devised the land to his wife, who conveyed to Cowperthwaite and Cowperthwaite to Dundas and others, the defendants. Upon the trial the court below directed a verdict for the defendants to which the plaintiff excepted.[15]

NELSON, J.: A series of cases, coming down from the earliest history of the law on the subject, and the reason assigned in support of them, necessarily lead to the result—and which has also been confirmed by express decision in all courts where the authority of the common law prevails—that an execution issued and bearing teste after the death of the defendant is irregular and void, and can not be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case, or personal representatives in the other.

In the case before us, the judgment upon which the execution was issued and the lands sold had been rendered against two defendants, one of whom was living at the time, but the lands sold belonged to the estate of the deceased. And it is material to inquire, whether, in this aspect of the case, a different rule can be applied to the sale.

At common law a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the exe-

---

[14]Accord: Y. B. 48 Edw. III, 12 b; *Withers* v. *Harris*, 2 Ld. Raym. 806, 3 Salk. 319 (1702); *Hamilton* v. *Lyman*, 9 Mass. 14 (1812); *Bodwoin* v. *Jordan*, 9 Mass. 160 (1812); *Berryhill* v. *Wells*, 5 Binn. (Pa.) 56 (1812) semble; *Lane* v. *Beltzhoover*, 1 Taney (C. C.) 110, Fed. Cas. No. 8047 (1840); *Howell & Howell* v. *Eldridge*, 21 Wend. (N. Y.) 678 (1840); *Ellison* v. *Andrews*, 12 Ired. (N. Car.) 188 (1851); *Cushman* v. *Carpenter*, 62 Mass. 388 (1851); *Dickinson* v. *Bowers*, 7 Baxt. (Tenn.) 307 (1874). Contra: *Ballinger* v. *Redhead*, 1 Kans. App. 434, 40 Pac. 828 (1895); *Freiler* v. *Freiler*, 1 Pa. Co. Ct. 265 (1885); *Frohock* v. *Gustine*, 8 Watts (Pa.) 121 (1839) partition.

[15]The statement of facts is abridged and the arguments of counsel and part of the opinion of the court omitted.

cution disturb the possession, as it went only against the goods and chattels. The Statute of Westm. II, ch. 18 (13 Edw. I), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of elegit by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute, a moiety of the land is deemed bound from the rendition of the judgment. 2 Bac. Abr., tit. Execution, 685; 3 Bl. Com. 418; 3 Coke 12; *The People* v. *Haskins*, 7 Wend. (N. Y.) 466.

Before the statute, a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate.

Before and since the statute, in case of a judgment against two defendants, and the death of one, the charge of the judgment survived against the personal estate of the survivor; and execution could be taken out against him within the year without a scire facias, and the debt levied. 2 Tidd 1120; 1 Salk. 320; Bing. on Ex. 136; *Norton* v. *Lady Harvey*, 2 Wms. Saund. 50, 51, n. 4, and 72, n. 3; 16 Mass. 193, n. 2; 1 Cow. (N. Y.) 738.

The writ, however, must be in form against both, to correspond with the record, but it could be executed against the goods of the survivor only; or, on making a suggestion of the death upon the record, the writ could be against the survivor alone.[16]

And if the judgment against both defendants is founded upon contract, the surviving defendant is entitled to contribution out of the estate of the deceased (Bing. on Ex. 137, and cases cited); if upon tort, it would be otherwise.

But since the statute, if the plaintiff seeks to enforce the judgment against the real estate of the defendants in the case put, he must revive it by scire facias against the surviving defendant, and the heirs, devisees, and terre-tenants of the deceased, before execution can regularly issue. For, as to the real estate of the defendants, the charge of the judgment does not survive; and the execution must go against the lands of both; and as it can not be regularly issued against the deceased codefendant, nor be allowed to charge the estate in the hands of his heirs, devisees, or terre-tenants, until they have notice, and an opportunity to set up a defense, if any, to the judgment, a scire facias is indispensable to the regularity of the execution. 2 Wms. Saund. 51, n. 4; Bing. on Ex. 137, and

[16]Accord: *Johnston* v. *Lynch*, 3 Bibb (Ky.) 334 (1814); *Woodcock* v. *Bennett*, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568 (1823); *Calloway* v. *Eubank*, 4 J. J. Mar. (Ky.) 280 (1830); *Carnahan* v. *Brown*, 6 Blackf. (Ind.) 93 (1841); *Davis* v. *Helm*, 3 Smedes & M. (Miss.) 17 (1844); *Reams* v. *McNail*, 9 Humph. (Tenn.) 542 (1848); *Thompson* v. *Bondurant*, 15 Ala. 346, 50 Am. Dec. 136 (1849); *Cheatham* v. *Brien*, 3 Head (Tenn.) 553 (1859); *Blanks* v. *Rector*, 24 Ark. 496, 88 Am. Dec. 780 (1866); *Sheetz* v. *Wynkoop*, 74 Pa. St. 198 (1873), cf. *Stoner* v. *Stroman*, 9 Watts & S. (Pa.) 85 (1845); *Holt* v. *Lynch*, 18 W. Va. 567 (1881); *Duquesne Nat. Bank* v. *Mills*, 22 Fed. 611 (1883 Pa.); *Reed* v. *Garfield*, 15 Ill. App. 290 (1884); *Loomis* v. *Ross*, 12 Pa. Super. Ct. 95 (1899); *Forbes* v. *Thompson*, 2 Penn. (Del.) 530, 47 Atl. 1015 (1900); *Merrifield* v. *Western Cottage Piano &c. Co.*, 149 Ill. App. 1 (1909).

cases cited; 4 Mod. 316; 2 Coke 14a; 1 Ld. Raym. 244, 1 Salk. 320, Carth. 404; 16 Mass. 193 n.; 1 Cow. (N. Y.) 711.

It will be seen, therefore, upon these authorities, that the same objections exist, both in principle and in reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one, which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For as the charge of the judgment against the land does not survive, but continues upon the lands of both after the death of one, the same as before, and can not be enforced against the real estate of the survivor alone, as in the case of the personalty, and the execution must therefore be issued against both if issued at all, it is obvious the lands of the deceased, in that event, are as liable to be sold by the sheriff as the lands of the survivor. The rights of the heirs and devisees, and the reasons for protecting them by the scire facias, are the same in the one case as in the other; and when the law disables the plaintiff from suing out execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two, after the death of one. Otherwise, in both cases, the interest of new parties, upon whom the estate has fallen, or to whom it may have passed, is liable to be suddenly and without notice divested by the silent, and till then dormant, power of the law; parties, too, who from their age and situation in life will not unfrequently be the least qualified to understand and protect these interests, being the children of the deceased defendant.

Upon the whole, without pursuing the examination further, we are satisfied, that, according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing teste in this case after the death of one of the defendants, the judgment was irregular and void; and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity.[17]

Judgment affirmed.

[17]Accord: Bacon's Abridgement, Executions, G. 1; *In re Harberts Case,* 3 Coke 12 (1584); *Smarte* v. *Edsun,* 1 Lev. 30 (1673); *Lampton* v. *Collingwood,* 4 Mod. 314 (1694); *Pennoir* v. *Brace,* 1 Salk. 319 (1696); *Reed* v. *Garvin,* 7 Serg. & R. (Pa.) 354 (1821); *Commonwealth for the use of Bellas* v. *Vanderslice,* 8 Serg. & R. (Pa.) 452 (1822); *Woodcock* v. *Bennett,* 1 Cow. (N. Y.) 711, 13 Am. Dec. 568 (1823); *Stiles* v. *Brock & Co.,* 1 Pa. St. 215 (1845); *Austin* v. *Reynolds,* 13 Tex. 544 (1855); *Henderson* v. *Vanhook,* 24 Tex. 358 (1859); *Millard* v. *Gavitt,* 15 Phila. (Pa.) 279 (1881). Contra, as to lands of the survivor, *Martin* v. *Branch Bank at Decatur,* 15 Ala. 587, 50 Am. Dec. 147 (1849); *Hardin* v. *McCanse,* 53 Mo. 255 (1873); *Reed* v. *Garfield,* 15 Ill. App. 290 (1884); *Christ* v. *Flannagan,* 23 Colo. 140, 46 Pac. 683 (1896) and see *Baskin* v. *Huntington,* 130 N. Y. 313, 29 N. E. 310 (1891). Section 1383 of the New York Code of Civil Procedure declares that the provisions for obtaining leave to issue execution where a judgment debtor has died "do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must endorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution out of any property which belonged to him."

SECTION 2. PROPERTY AND INTERESTS SUBJECT TO EXECUTION

MACK *v.* PARKS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1857

74 Mass. 517

Action of tort for taking the plaintiff's watch from his person and carrying it away, and converting it to the defendant's use. The question whether the taking was lawful was submitted to the decision of the court upon the following facts:

The defendant was a deputy sheriff and acting in his official capacity at the time of the tort alleged. While the plaintiff and one or two others were in a shop, talking about watches, the defendant came in, and joined in the conversation. In the course of it the plaintiff took the defendant's watch into his hands to compare its weight with that of his own, and then handed both to the defendant. The defendant then (still holding the plaintiff's watch in his hand) told the plaintiff that he had a writ against him and must attach his watch, and asked him to take it off, it being connected to his person by a silk band which passed about his neck. The plaintiff refused to take it off; upon which the defendant severed the band at the place where it was sewed together, and took the watch; and afterward, before the beginning of this suit, tendered to the plaintiff the value of the silk band.[18]

BIGELOW, J.: It seems to be perfectly well settled at common law, that chattels in the actual possession and use of a debtor can not be taken or distrained. It is laid down in Co. Lit. 47a, that "although it be of valuable property, as a horse, etc., yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged and can not be distrained." So "if nets are in the hands of a man, they can not be distrained any more than a horse on which a man is." Hargrave's note 294. S. P. *Read* v. *Burley,* Cro. Eliz. 539, 596.[19]

[18]The arguments of counsel and part of the opinion of the court are omitted.

[19]Accord: *Storey* v. *Robinson,* 6 T. R. 138 (1795). But in *State ex rel. Rogers* v. *Dilliard,* 3 Ired. (N. Car.) 102, 38 Am. Dec. 708 (1842) it was said that a horse although ridden by its owner, could be levied on and that it was the duty of the party to surrender the horse to the officer. In *Bell* v. *Douglass,* 1 Yerg. (Tenn.) 397 (1830), tools of a mechanic in use were held subject to levy. In *Green* v. *Palmer,* 15 Cal. 411, 76 Am. Dec. 492 (1860), a levy upon a bag of gold, which the debtor was carrying along the street, was sustained as not tortious. Field, C. J, said: "The coin was contained in a bag, which was held by the plaintiff in his hand, and from its seizure thus situated the plaintiff could not claim any exemption, as he might, perhaps, do in reference to money upon his person. Thus situated it was like a horse held by its bridle, subject to seizure under execution against its owner."

In *Moorman* v. *Quick,* 20 Ind. 67 (1863), the sheriff levied on money as it was being counted out to the debtor at a bank in payment of a check.

In the leading case of *Simpson* v. *Hartopp*, Willes, 512, which Mr. Justice Buller says (4 T. R. 568) is "of great authority because it was twice argued at the bar, and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress," it is distinctly adjudged that things in actual use can not be taken or distrained; and the reason given is, that an attempt to distrain such articles would lead to a breach of the peace. In the modern case of *Sunbolf* v. *Alford*, 3 M. & W. 253, it is laid down as well settled law, that "goods in the actual possession and use of the debtor can not be distrained"; "a man's clothes can not be taken off his back in execution of a fieri facias."[20] The main ground on which these and other authorities rest is, that it would tend directly to a collision and breach of the peace, if articles thus situated were allowed to be taken from the hands of a debtor. *Gorton* v. *Falkner*, 4 T. R. 565; *Storey* v. *Robinson*, 6 T. R. 139; *Adames* v. *Field*, 12 Ad. & El. 649, and 4 P. & Dav. 504. Com. Dig. Distress, C. Gilbert on Distresses, 43. There are many articles of personal property, subject to attachment under our laws and usages, which could not have been distrained or taken at common law under the rule as stated in the earliest authorities. *Potter* v. *Hall*, 3 Pick. (Mass.) 368. But in the absence of any proof of usage or custom in this state, from which it might be inferred that a different rule of law has ever been adopted, the present case falls within the principles on which the English authorities rest, and must be governed by them.

The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his dress or apparel, and was severed from his person by force. Such an act, if permitted, would tend quite as directly to a breach of the peace as to take from a man the horse on which he was riding, or the axe with which he was felling a tree. It is indeed a more gross violation of the sanctity of the person, and tends to a greater

---

Held, that there was not such a title in the money in the debtor as would, previous to its delivery to him, enable the sheriff to seize it. Accord: *Richards* v. *Heger*, 122 Mo. App. 512, 99 S. W. 802 (1907). See also *Courtoy* v. *Vincent*, 15 Beav. 486 (1852); *Bindon's Case*, Moores (K. B.) 214 (1585) *Arguendo*.

[20] In *Hardistey and Barney*, Comb. 356 (1695), it is said, per Holt, C. J.: "Upon a *fieri facias* the sheriff may take any thing but wearing clothes; nay, if the party hath two gowns, he may take one of them." In *Cooke* v. *Gibbs*, 3 Mass. 193 (1807), it is said, per Parsons, C. J., "a *fieri facias* at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the debtor's wearing apparel from his body, he would be a trespasser, for such apparel when worn, is not liable to the execution." In *Bumpus* v. *Maynard*, 38 Barb. (N. Y.) 626 (1861), it was held that the sheriff was not liable for failure to seize on execution the necessary wearing apparel of the judgment debtor who was in bed at the time of levy.

By statute in many jurisdictions wearing apparel is exempt from execution. *Bowne* v. *Witt*, 19 Wend. (N. Y.) 475 (1838); *Frazier* v. *Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666 (1868). Jewelry may be so classed but debtors will not be permitted to invest large sums in articles of personal adornment and by wearing them, defraud their creditors. *In re Gemmel*, 155 Fed. 551 (1907); *In re Evans & Co.*, 158 Fed. 153 (1907); *In re Leech*, 171 Fed. 622 (1909).

aggravation of the feelings of the debtor. Nor would it be practicable to place any limit to the exercise of such a right. If allowed at all, it must extend to every article of value usually worn or carried about the person; if an officer can sever a silken cord, he may likewise break a metalic chain; if he can seize and take a watch, so he may wrest a breastpin or earring from the person, or thrust his hand into the pocket and carry off money; he may, in short, resort to any act of force necessary to enable him to attach property in the personal custody of the debtor. It is obvious that such a doctrine would lead to consequences most dangerous to the good order and peace of society.

It is no answer to this action, that the defendant tendered to the plaintiff the value of the cord by which the watch was attached to the person, or that the watch itself, detached from the person, was subject to attachment.[21] The wrong consists in having taken an article from the person of the plaintiff, which was at the time by law exempted from attachment. The mode in which it was done is wholly immaterial. He is liable for the value of the watch, being a trespasser ab initio. "No lawful thing, founded on a wrongful act, can be supported." *Luttin* v. *Benin*, 11 Mod. 50; *Ilsley* v. *Nichols*, 12 Pick. (Mass.) 270. The watch, although liable to attachment if it had been taken by the defendant when not connected with the person of the plaintiff, was wrongfully seized and can not now be held under attachment.

Judgment for the plaintiff.[22]

---

[21] In *Deposit Nat. Bank* v. *Wickham*, 44 How. Pr. (N. Y.) 421 (1873), the defendant, the judgment debtor, while under supplementary proceedings, in which he was restrained from disposing of his property, handed his watch to his attorney as a fee for services to be rendered; for this he was adjudged guilty of contempt and directed to be imprisoned. In *Frazier* v. *Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666 (1868), in proceedings in equity for the examination of the judgment debtor it was disclosed that the defendant was in possession of jewelry worth $300. The chancellor said: "The rings and jewelry are not wearing apparel, and must be given up to the complainant to satisfy his debt. Being articles generally worn on the person, it may be out of the power of the sheriff to levy on, or take possession of them, but a receiver will be appointed in this cause, and an order made to deliver them to him."

[22] So, also, property taken from the person of a prisoner upon his arrest, whether upon criminal or civil process, is not subject to levy. *Robinson* v. *Howard*, 61 Mass. 257 (1851); *Morris* v. *Penniman*, 80 Mass. 220, 74 Am. Dec. 675 (1859); *Davies* v. *Gallagher*, 17 Phila. (Pa.) 229 (1883); *Commercial Exchange Bank* v. *McLeod*, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36 (1885); *Dahms* v. *Sears*, 13 Ore. 47, 11 Pac. 891 (1885); *Richardson* v. *Anderson*, 4 White & Wilson's Civil Cases Court of Appeals (Tex.), § 286, 18 S. W. 195 (1892); *Connolly* v. *Thurber Whyland Co.*, 92 Ga. 651, 18 S. E. 1004 (1893); *Holker* v. *Hennessey*, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. 524 (1897); *Hill* v. *Hatch*, 99 Tenn. 39, 41 S. W. 349, 63 Am. St. 822 (1897); *Hubbard* v. *Garner*, 115 Mich. 406, 73 N. W. 390, 69 Am. St. 580 (1897). Contra: *Ex parte Hurn*, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120, 25 Am. St. 23 (1890); *Closson* v. *Morrison*, 47 N. H. 482, 93 Am. Dec. 459 (1867), in the absence of bad faith; *Reifsnyder* v. *Lee*, 44 Iowa 101, 24 Am. Rep. 733 (1876); *Byrne* v. *Byrne*, 89 Wis. 659, 62 N. W. 413 (1895), where the action against the prisoner was by the person who suffered the loss of the property.

"The general rule of law is that all *chattels*, the property of the debtor,

TURNER *v.* FENDALL

SUPREME COURT OF THE UNITED STATES, 1801

1 *Cr.* (*U. S.*) 117

Error to the Circuit Court of the District of Columbia. The plaintiff in error and defendant below had been sergeants of the town of Alexandria and had returned on a writ of fieri facias, issued on a judgment rendered by the Court of Hustings in favor of Philip Richard Fendall, that he had made the debt, but had levied thereon a writ of fieri facias on a judgment against Young and Fendall trading as Robert Young & Co. Before the next succeeding term the Hustings Court was abolished and its powers transferred to the circuit court. Fendall moved for and obtained judgment against Turner for failure to pay him the amount levied on his writ. Turner brought error.[28]

MARSHALL, C. J.: Two questions have been made at the bar. (1) Can an execution be levied on money? (2) Can it be levied on money in the hands of the officer?

The principle that an execution can not be levied on money has been argued to be maintainable under the authority of adjudged cases, and under the letter and meaning of the act of the Virginia legislature on the subject of executions. Yet no such case has been adduced. Lord Mansfield, in the case cited from Douglas 219, said "he believed there were old cases where it had been held that the sheriff could not take money in execution even though he found it in the defendant's scrutoir, and that a quaint reason was given for it, viz., that money could not be sold," and it is believed that there may be such cases, but certainly there are cases in which the contrary doctrine has been held. In 2 Shower 166, it is laid down expressly that money may be taken on a levari facias, and no difference in this respect is perceived between the two sorts of execution. In Dalton's Sheriff 145, it is also stated in terms that money may be taken in execution on a fieri facias. The court can perceive

---

may be taken in execution, and whenever an officer has it in his power to satisfy an execution in his hands, it is his duty to do so, and if he omits to perform his duty he must be accountable to those who may be injured by the omission." Per Marshall, C. J., in *Turner* v. *Fendall*, 1 Cranch. 117 (1801). See also *Fleetwood's Case*, 8 Coke 340 (1610); *Francis and Nash*, Temp. Hard. 53 (1733); *Henson* v. *Edwards*, 10 Ired. (N. Car.) 43 (1849); *Stief* v. *Hart*, 1 N. Y. 20, 4 How Pr. (N. Y.) 223 (1847); *Knox* v. *Hunt*, 18 Mo. 243 (1853). In *Oystead* v. *Shed*, 12 Mass. 505 (1815), it was held that private papers and account books were not goods and chattels that could be sold on execution. So also manuscripts. *Dart* v. *Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544 (1879). Contra: *Washington Bank* v. *Fidelity Abstract Co.*, 15 Wash. 487 (1896) and see *Banker* v. *Caldwell*, 3 Minn. (Gil. 46) 94 (1859). As to intoxicating liquors see *Hines* v. *Stahal*, 79 Kans. 88, 99 Pac. 273, 131 Am. St. 280. 20 L. R. A., N. S., 1118 (1908) and note.

[28]The facts are abridged and only extracts from the opinion of the court printed.

no reason in the nature of things why an execution should not be levied on money.[24]

But has money not yet paid to the creditor become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum, not for the specific pieces which constitute that sum, and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an earmark; and an action of debt not of detinue, may be brought against him if he fails to pay over the sum received, or converts it to his own use. It seems to the court that a right to specific pieces of money can only be acquired by obtaining the legal or actual possession of them, and until this is done there can be no such absolute ownership as that an execution may be levied on them. A right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person, and however wise or just it may be to give such a remedy, the law does not appear yet to have given it.[25]

---

[24]Accord: *King* v. *Webb*, 2 Show. 166 (1681); *Armistead* v. *Philpot*, 1 Dougl. 231 (1779); *Brooks* v. *Thompson*, 1 Root (Conn.) 116 (1790); *Handy* v. *Dobbin*, 12 Johns. (N. Y.) 220 (1815); *Holmes* v. *Nuncaster*, 12 Johns. (N. Y.) 395 (1815); *Summers* v. *Caldwell*, 2 N. & McC. (S. Car.) 341 (1820); *Spencer* v. *Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412 (1827); *Sheldon* v. *Root*, 33 Mass. (16 Pick.) 567, 28 Am. Dec. 266 (1835); *Herron's Appeal*, 29 Pa. St. 240 (1857); *Klinefelter Bros.* v. *Whann*, 2 Chest. Co. (Pa.) 376 (1884); *Noble* v. *Kelly*, 40 N. Y. 415 (1869); *Sullivan* v. *Tinker*, 140 Pa. St. 35, 21 Atl. 247 (1891); *Exchange Nat. Bank of Montgomery* v. *Stewart*, 158 Ala. 218, 48 So. 487 (1909). See Pa. Act of June 16, 1836, P. L. 755, §§ 24, 25; New York Code Civ. Proc., § 1410.

[25]Accord: *Ross* v. *Clarke*, 1 Dall. (U. S.) 354, 1 L. ed. 173 (1788); *Wilder* v. *Bailey*, 3 Mass. 289 (1807); *Knight* v. *Criddle*, 9 East 48 (1807); *Dawson* v. *Holcomb*, 1 Ohio 275, 13 Am. Dec. 618 (1824); *Dubois* v. *Dubois*, 6 Cow. (N. Y.) 494 (1826); *Prentiss* v. *Bliss*, 4 Vt. 513, 24 Am. Dec. 631 (1832); *Thompson* v. *Brown*, 34 Mass. (17 Pick.) 462 (1835); *Masters* v. *Stanley*, 8 Dowl. 169 (1840); *Reddick* v. *Smith*, 4 Ill. (3 Scam.) 451 (1842); *Collingridge* v. *Paxton*, 11 C. B. 683 (1851); *Clymer* v. *Willis*, 3 Cal. 363, 58 Am. Dec. 414 (1853); *Muscott* v. *Woolworth*, 14 How. Pr. (N. Y.) 477 (1857); *Sibert* v. *Humphries*, 4 Ind. 481 (1853); *Baker* v. *Kenworthy*, 41 N. Y. 215 (1869); *State* v. *Taylor*, 56 Mo. 492 (1874); *Hardy* v. *Tilton*, 68 Maine 195, 28 Am. Rep. 34 (1878); *Smith* v. *McMillan*, 84 N. Car. 593 (1881); *Manly* v. *McCarty*, 5 N. J. L. 218 (1882). Contra: *Dolby* v. *Mullins*, 3 Humph. (Tenn.) 437, 39 Am. Dec. 180 (1842); *New Haven Steam Saw Mill Co.* v. *Fowler*, 28 Conn. 103 (1859); *Mann* v. *Kelsey*, 71 Tex. 609, 12 S. W. 43, 10 Am. St. 800 (1888), and compare *Harding* v. *Stevenson*, 6 H. & J. (Md.) 264 (1824); *Crane* v. *Freese*, 16 N. J. L. 305 (1838).

The principle has been applied to a surplus remaining in the sheriff's hands after satisfaction of a prior execution. *Fieldhouse* v. *Croft*, 4 East 510 (1804); *Willows* v. *Ball*, 2 B. & P. (N. S.) 376 (1806); *Harrison* v. *Paynter*, 6 M. & W. 387 (1840); *Wood* v. *Wood*, 4 Ad. & El. (N. S.) 397 (1843). But the weight of authority is contra. *Jaquett* v. *Palmer*, 2 Harr. (Del.) 144 (1836); *King* v. *Moore*, 6 Ala. 160, 41 Am. Dec. 44 (1844); *Langdon* v. *Lockett*, 6 Ala. 727, 41 Am. Dec. 78 (1844); *Pierce* v. *Carleton*, 12 Ill.

The mandate of the writ of fieri facias as originally formed, is that the officer have the money in court on the return day, there to be paid to the creditor. Forms of writs furnish strong evidence of what was law when they were devised, and of the duty of the officer to whom they are directed.

Judgment affirmed.

BAYER *v.* DOSCHER

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1910

139 *App. Div.* (N. Y.) 324

Appeal by the defendant, John H. Doscher, from a judgment of the Supreme Court in favor of the plaintiff. The complaint was for services rendered, materials furnished and upon an account stated. Judgment was demanded for $55.75. The defendant's answer admitted that there was due the plaintiff $55 and alleged as a defense that on a judgment obtained by Winthrop P. Soule against Thomas P. Bayer for the sum of $85.85 an execution was duly issued out of the Supreme Court and on December 2, 1909, the sheriff "duly levied under said execution upon the sum of $55 in cash, in the possession of the defendant herein, the property of the aforesaid Thomas P. Bayer, plaintiff. That thereupon any and all sums due from this defendant to the plaintiff were discharged and satisfied." The facts thus alleged in the answer occurred after the commencement of this action. The plaintiff demurred to the foregoing defense on the ground that it was insufficient in law and the court sustained the demurrer and gave judgment for $55.[26]

COCHRANE, J.: The answer is insufficient as a defense to the causes of action alleged in the complaint because there is no connection shown between the money alleged to have been levied upon as the property of the plaintiff and such causes of action.[27] That

---

358, 54 Am. Dec. 405 (1851); *Wheeler* v. *Smith*, 11 Barb. (N. Y.) 345 (1851); *Herron's Appeal*, 29 Pa. St. 240 (1857); *Walton* v. *Compton*, 28 Tex. 569 (1866); *Roddey* v. *Erwin*, 31 S. Car. 36, 9 S. E. 729 (1888); *Oppenheimer* v. *Marr*, 31 Nebr. 811, 48 N. W. 818, 28 Am. St. 539 (1891); *Wiant* v. *Hays*, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82 (1893); *Young Smyth Field & Co.* v. *Levy*, 6 Super. Ct. Pa. 23 (1897); *Commerce Vault Co.* v. *Barrett*, 123 Ill. App. 398 (1905); *Turner* v. *Gibson*, (Tex.) 152 S. W. 839 (1913).

As a general principle, and in the absence of statutes establishing a special rule for particular cases, property in the custody of the law is not subject to execution. *Winegardner* v. *Hafer*, 15 Pa. St. 144 (1850); *Wiswall* v. *Sampson*, 55 U. S. 52, 14 L. ed. 322 (1852); *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67 (1874); *First Nat. Bank* v. *Dunn*, 97 N. Y. 149, 49 Am. Rep. 517 (1884); *Rockland Bank* v. *Alden*, 103 Maine 230, 68 Atl. 863 (1907).

[26] Part of the statement of facts and opinion of the court are omitted.

[27] To be subject to levy the identical money must be the property of the debtor. It is not sufficient that the sum is owing to him or is on general deposit in bank. *Maxwell* v. *McGee*, 66 Mass. 137 (1853); *McMillan* v. *Richards*, 9 Cal. 365, 70 Am. Dec. 655 (1858); *Scott Kerr & Co.* v. *Smith*, 2 Kans. 438 (1864); *Carroll* v. *Cone*, 40 Barb. (N. Y.) 220 (1862); *Rosell* v. *Rhodes*, 116 Pa. St. 129, 9 Atl. 160, 2 Am. St. 591 (1887) *National Bank of*

money may have represented any other transaction between the parties. Moneys belonging to a judgment debtor may be levied upon under an execution. Code Civ. Pro., section 1410. But if the defendant had in his possession money belonging to the plaintiff which was thus levied upon, that could not affect the cause of action against defendant for services rendered and material furnished or on an account stated. He still remained indebted on those causes of action.

Assuming, however, that the defendant intended to allege that he paid to the sheriff on the execution against plaintiff the amount which defendant admits having owed the plaintiff on the causes of action alleged in the complaint such payment was voluntary. It is well settled that a chose in action is not subject to the lien of an execution and is incapable of levy or seizure by the sheriff. *McNeely* v. *Welz*, 166 N. Y. 124; *Clark* v. *Warren*, 7 Lans. (N. Y.) 180; *Clarke* v. *Goodridge*, 41 N. Y. 210; *Duffy* v. *Dawson*, 2 Misc. (N. Y.) 403. Defendant simply owed a debt to the plaintiff and could not extinguish that debt by voluntarily paying some other debt which the plaintiff owed. The sheriff could not levy on the debt of defendant to plaintiff and defendant had no more right to voluntarily pay the sheriff than he had to pay the judgment creditor directly.[28]

Judgment affirmed.

---

the Republic v. *Young*, 125 Ill. App. 139 (1905); *Summerfield* v. *Goldstein*, 59 Misc. 387, 112 N. Y. S. 357 (1908); *Wash* v. *Hendrick*, 143 Ky. 443, 136 S. W. 883 (1911).

[28]At common law choses in action were not subject to execution. Co. Litt. 290b; *Francis* v. *Nash*, Lee Temp. Hardw. 53 (1733); *Dundas* v. *Dutens*, 1 Ves. Jr. 196 (1790); *Denton* v. *Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264 (1812); *Wier* v. *Davis*, 4 Ala. 442 (1842); *Johnson* v. *Crawford*, 6 Blackf. (Ind.) 337 (1843); *Moore* v. *Pillow*, 3 Humph. (Tenn.) 448 (1842); *Rhoads* v. *Megonigal*, 2 Pa. St. 39 (1845); *Price* v. *Brady*, 21 Tex. 614 (1858); *Chandler* v. *Caldwell*, 17 Ind. 256 (1861); *Brower* v. *Smith*, 17 Wis. 410 (1863); *Dore* v. *Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. 48 (1887); *Crawford* v. *Schmitz*, 139 Ill. 564, 29 N. E. 40 (1891); *Tradesmen's Bldg. & Loan Assn.* v. *Maher*, 9 Pa. Super. Ct. 340 (1899); *Champagne* v. *Bloch Bros.*, 121 La. Ann. 193, 46 So. 207 (1908); *Bidle* v. *Hamilton*, 161 Ill. App. 587 (1911); *In re Fritz's Estate*, 83 N. J. Eq. 610, 91 Atl. 1017 (1914). As to equity see note to *Hall* v. *Henderson*, 126 Ala. 449, 61 L. R. A. 621 (1900).

In many jurisdictions choses in action can be reached by attachment or garnishment. And for certain classes of choses in action there are statutory provisions for their sale upon execution. Such statutes mark the limits of the right and prescribe the manner in which it shall be exercised. California Code Civ. Pro., § 688; *Davis* v. *Mitchell*, 34 Cal. 81 (1867); *Hoxie* v. *Bryant*, 131 Cal. 85, 63 Pac. 153 (1900); Iowa Code (1897) 3971; Burns' Ind. Ann. Stat. (1914), § 763; *Bay* v. *Saulspaugh*, 74 Ind. 397 (1881); N. J. Comp. Stat. (1910), p. 2244, § 4; Pa. Act of June 16, 1836, P. L. 755, § 22, P. & L. Dig. (2d ed.) 3387; *Rozelle* v. *Rhodes*, 116 Pa. St. 129, 9 Atl. 160, 2 Am. St. 591 (1887); N. Y. Code Civ. Pro., § 1411; *McNeely* v. *Welz*, 166 N. Y. 124, 59 N. E. 697 (1901); *Henry* v. *Traynor*, 42 Minn. 234, 44 N. W. 11 (1889) Judgments; *Fishburn* v. *Loudershausen*, 50 Ore. 363, 92 Pac. 1060, 14 L. R. A., N. S. 1234 (1907) Promissory notes; Freeman on Executions (3d ed.), § 112; Herman on Executions, § 122.

PARHAM *v.* THOMPSON

COURT OF APPEALS OF KENTUCKY, 1829

2 J. J. Mar. (Ky.) 159

ROBERTSON, J.: The only question which it is necessary to decide in this case is whether a creditor who has a fieri facias against the estate of his debtor is guilty of a trespass, by entering on land in the possession of the debtor, for the purpose of assisting the officer to levy the execution on the growing crop, and afterward entering, to bid at the sale of the crop, before it is ripe, or is secured. A fieri facias may be levied on a growing crop; it is a chattel. It is "fructus industriale," which goes to the executor; 2 Tidd's Pr. 917; Gil. Executor, 19; 1 Salk. 368; 2 Bl. Comm. 428; Toller, 204.

Corn growing passes to the devisee of the personal property, and not to the devisee of the land. Toller 204; Swin. 933. It passes by parol contract. Roberts on Frauds 126; *Noble* v. *Smith*, 2 Johns. (N. Y.) 52; 1 Ld. Raym. 182; Bul. Ni. Pri. 34.

Consequently, although it may be inconsistent, and injurious, to sell growing corn, and therefore the general practice is to wait after the levy, until it shall be gathered; yet the legal right to sell it before it shall be gathered, results from its personal character and the right to levy on it. See Tidd. 91, and *Whipple* v. *Foote*, 2 Johns. (N. Y.) 422. The argument "ab inconvenienti" applies no more to this case than it would to the mere right to sell anything else which is immature, as a colt or a pig.

The creditor, therefore, is not a trespasser, by entering with the sheriff, to levy and to sell; nor for directing the sale, and purchasing the crop, if the process be regular, the judgment valid, and the sale fair, as they all seem to have been in this case.

Judgment affirmed.[29]

---

[29]Accord: *Penhallow* v. *Dwight*, 7 Mass. 34, 5 Am. Dec. 21 (1810); *Stewart* v. *Doughty*, 9 Johns. (N. Y.) 108 (1812); *Hartwell* v. *Bissell*, 17 Johns. (N. Y.) 128 (1819); *Peacock* v. *Purvis*, 2 Brod. & Bingh. 362 (1820); *Stambaugh* v. *Yeates*, 2 Rawle (Pa.) 161 (1828); *Craddock* v. *Riddlesbarger*, 2 Dana (Ky.) 205 (1834); *Smith* v. *Tritt*, 1 Dev. & Bat. (N. Car.) 241, 28 Am. Dec. 565 (1835); *Shepard* v. *Philbrick*, 2 Den. (N. Y.) 174 (1846); *Northern* v. *State*, 1 Ind. 113 (1848); *Wharton* v. *Naylor*, 12 Ad. & El. (N. S.) 673 (1848); *Bear* v. *Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 490 (1851); *State* v. *Gemmill*, 1 Houst. (Del.) 9 (1855); *McKenzie & Son* v. *Lampley*, 31 Ala. 526 (1858); *Bloom* v. *Welsh*, 27 N. J. L. 177 (1858); *Lindley* v. *Kelley*, 42 Ind. 294 (1873); *Pickens* v. *Webster*, 31 La. Ann. 870 (1879); *Gillitt* v. *Truax*, 27 Minn. 528, 8 N. W. 767 (1881); *Crine* v. *Tifts & Co.*, 65 Ga. 644 (1880); *Preston* v. *Ryan*, 45 Mich. 174, 7 N. W. 819 (1881); *Long* v. *Seavers*, 103 Pa. St. 517 (1883); *Willis* v. *Moore*, 59 Tex. 628, 46 Am. Rep. 284 (1883); *Selecman* v. *Kinnard*, 55 Mo. App. 635 (1893); *Polley* v. *Johnson*, 52 Kans. 478, 35 Pac. 8, 23 L. R. A. 258 (1893); *Voils* v. *Battin*, 6 Kans. App. 742, 50 Pac. 940 (1897); *Sims* v. *Jones*, 54 Nebr. 769, 75 N. W. 150, 69 Am. St. 749 (1898); *Gordon* v. *Gordon*, 45 Pa. Super. Ct. 95 (1911). In some states, however, it is only when severed or fit to be severed that crops are deemed subject to levy. *Heard* v. *Fairbanks*, 46 Mass. (5 Metc.) 111, 38 Am. Dec. 394 (1842); *Norris* v. *Watson*, 22 N. H. 364, 55 Am. Dec. 160 (1851); *Burleigh*

POOLE'S CASE

At Nisi Prius in Middlesex, 1703.

1 Salk. 368

Tenant for years made an under-lease of a house in Holborn to J. S., who was by trade a soap boiler. J. S., for the convenience of his trade, put up fats, coppers, tables, partitions, and paved the back-side, etc. And now upon a fieri facias against J. S., which issued on a judgment in debt, the sheriff took up all these things, and left the house stripped, and in a ruinous condition; so that the first lessee was liable to make it good, and thereupon brought a special action on the case against the sheriff, and those that bought the goods, for the damage done to the house. Et per Holt, C. J., it was held,

First.—That during the term the soap-boiler might well remove the fats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favor of trade and to encourage industry:[30] but after the term they become a gift in law to him in reversion, and are not removable.[31]

Secondly.—That there was a difference between what the soap-

---

v. *Piper*, 51 Iowa 649, 2 N. W. 520 (1879) *Scolley* v. *Pollock*, 65 Ga. 339 (1880); *Ellithorpe* v. *Reidesil*, 71 Iowa 315, 32 N. W. 238 (1887); *Tipton* v. *Martzell*, 21 Wash. 273, 57 Pac. 806, 75 Am. St. 838 (1889). In other states statutes expressly restrict the levy or sale to crops that have matured. *Gillitt* v. *Truax*, 27 Minn. 528, 8 N. W. 767 (1881); *Farmer's Bank* v. *Morris*, 79 Ky. 157 (1880); *Edwards* v. *Thompson*, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. 807 (1887); *Kesler* v. *Cornelison*, 98 N. Car. 383, 3 S. E. 839 (1887).

"*Fructus naturales*" while unsevered are not subject to execution as personalty. *Sparrow* v. *Pond*, 49 Minn. 412, 52 N. W. 36 (1892); *Adams* v. *Smith*, 1 Breese (Ill.) 283 (1828); *Bank of Lansingburgh* v. *Crary*, 1 Barb. (N. Y.) 542 (1847); *Rogers* v. *Elliott*, 59 N. H. 201, 47 Am. Rep. 192 (1879). As to peaches compare *State* v. *Gemmill*, 1 Houst. (Del.) 9 (1855), with *Wilson* v. *Fowler*, 88 Md. 601, 42 Atl. 201 (1898). As to trees in a nursery compare *Miller* v. *Baker*, 42 Mass. 27 (1840), with *Maples* v. *Millon*, 31 Conn. 598 (1863).

Quaere: Can a sheriff seize and sell crops of seed sown before they are sprung up? *Bagshaw* v. *Farnsworth*, 2 L. T. (N. S.) 390 (1860).

[30] A fixture erected by a tenant on demised premises, for the purpose of carrying on his trade is personal property and may be removed or levied on by *fieri facias* against him. *Cresson* v. *Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373 (1819); *Pitt* v. *Shew*, 4 B. & Ald. 206 (1821); *Winn* v. *Ingilby*, 5 B. & Ald. 625 (1822); *Farrant* v. *Thompson*, 5 B. & Ald. 826 (1822); *Doty* v. *Gorham*, 22 Mass. 487 (1827); *Wetherby* v. *Foster*, 5 Vt. 136 (1832); *Taffe* v. *Warnick*, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383 (1832); *Lemar* v. *Miles*, 4 Watts (Pa.) 330 (1835); *Ombony* v. *Jones*, 19 N. Y. 234 (1859); *State* v. *Bonham*, 18 Ind. 231 (1862); *Hey* v. *Bruner*, 61 Pa. St. 87 (1869); *Fifield* v. *Maine Cent. R. Co.*, 62 Maine 77 (1873); *Heffner* v. *Lewis*, 73 Pa. St. 302 (1873); *Antrim* v. *Dobbs*, L. R. 30 Ir. 424 (1891); *Gallagher* v. *Davis*, 179 Pa. St. 504, 36 Atl. 319 (1897); *Crossley Bros.* v. *Lee*, L. R. (1908) 1 K. B. 86.

[31] *Lyde* v. *Russell*, 1 B. & Ad. 394 (1830); *Minshall* v. *Lloyd*, 2 M. & W. 450 (1837); *Thropp's Appeal*, 70 Pa. St. 395 (1872); *Donnewald* v. *Turner Real Estate Co.*, 44 Mo. App. 350 (1891); *Morey* v. *Hoyt*, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611 (1893) accord.

boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney pieces, which he held not removable.[32]

Thirdly.—That the sheriff might take them in execution, as well as the under-lessee might remove them, and so this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is, because in that case the tenant hath only a bare power without an interest; but here the under-lessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell.

PETERSON *v.* SHERIFF OF SAN FRANCISCO

SUPREME COURT OF CALIFORNIA, 1896

115 Cal. 211[33]

MCFARLAND, J.: The appellant filed a petition in the superior court for a writ of mandate. He averred in his petition (briefly) that he had obtained a judgment in a justice's court against the Eureka Electric Company, a corporation, for two hundred and thirty-three dollars and fifty cents; that he had taken out an execution upon said judgment, which had been returned nulla bona; that upon an examination of the secretary of said company he discovered that it was the owner of two certain United States letters patent, and the inventions covered thereby; that thereupon he procured an alias execution, which he delivered to the sheriff with instructions "to levy upon, advertise, and sell all the right, title and interest of said defendant, the Eureka Electric Company,

[32]Real fixtures, articles so annexed to the freehold as to pass as a part thereof, are not subject to levy as personalty. The difficulty lies in deciding what is such a fixture, and can only be determined by reference to the substantive law of fixtures. Compare *Goddard* v. *Chase*, 7 Mass. 432 (1811); *Voorhis* v. *Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490 (1841); *Winslow* v. *Merchants Ins. Co.*, 45 (4 Metc.) Mass. 306, 38 Am. Dec. 368 (1842); *Rice* v. *Adams*, 4 Harr. (Del.) 332 (1845); *Harlan* v. *Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612 (1850); *Titus* v. *Mabee*, 25 Ill. 257 (1861); *Titus* v. *Ginheimer*, 27 Ill. 462 (1861); *Strickland* v. *Parker*, 54 Maine 263 (1866); *Latham* v. *Blakely*, 70 N. Car. 368 (1874); *Keve* v. *Paxton*, 26 N. J. Eq. 107 (1875); *Newhall & Stebbins* v. *Kinney*, 56 Vt. 591 (1884); *Hackett* v. *Amsden*, 57 Vt. 432 (1885); *McNally* v. *Connolly*, 70 Cal. 3, 11 Pac. 320 (1886); *Willis* v. *Morris*, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634 (1886); *Hopewell Mills* v. *Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. 235 (1889); *Friedlander* v. *Ryder*, 30 Nebr. 783, 47 N. W. 83, 9 L. R. A. 700 (1890); *Switzer* v. *Allen*, 11 Mont. 160, 27 Pac. 408 (1891), with *Sturgis* v. *Warren*, 11 Vt. 433 (1839); *Teaff* v. *Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634 (1853); *Hutchman's Appeal*, 27 Pa. St. 209 (1856); *Murdock* v. *Gifford*, 18 N. Y. 28 (1858); *Vaughen* v. *Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622 (1859); *Johnson* v. *Mehaffy*, 43 Pa. St. 308, 82 Am. Dec. 568 (1862).

[33]The arguments of counsel are omitted.

in and to said letters patent, and the inventions covered and protected thereby"; and that the said sheriff refused to advertise and sell said rights, etc., of said company to said patent rights. Wherefore, he prayed for a writ of mandamus requiring the sheriff "to advertise and sell all the right, title and interest" of said company in and to said patent rights. A general demurrer to the petition was sustained by the superior court, and judgment was entered for the respondent. From this judgment the petitioner appealed.

The demurrer was properly sustained. There is no method by which the sheriff could levy upon said property. It was neither "personal property, capable of manual delivery," which, under subdivision 3 of section 542 of the Code of Civil Procedure, must be attached by taking it into custody, nor does it come under the category of "debts and credits, and other personal property not capable of manual delivery," which must be attached by leaving notice with a third person owing such debts or having such credits or personal property in his possession. A patent right is a thing created entirely by federal legislation. It is a personal favor or monopoly granted to a particular person by the United States Government. It could not be transferred to another person at all, if the government had provided no method of transferring it; but the government has provided that it may be transferred by assignment, and that is the only method by which it can be transferred. And if a creditor of the patentee can have the patent right subjected to the satisfaction of his judgment at all, it can be done only by a court of equity, acting in personam and compelling the patentee to make an assignment. It can not be advertised and sold under a common execution; as before said, there is no way in which it can be levied upon; and the mere advertising and selling of it upon notice could convey nothing to the purchaser. *Carver* v. *Peck*, 131 Mass. 291, and cases there cited; *Pacific Bank* v. *Robinson*, 57 Cal. 520; 40 Am. Rep. 120. In *Carver* v. *Peck*, *supra*, the court says: "The incorporeal and intangible right of an inventor or an author in a patent or a copyright can not be taken on execution at law." In *Pacific Bank* v. *Robinson*, *supra*, the court says: "But a patent right is not tangible property. It is an incorporeal thing, subsisting in grant from the Government of the United States. Yet it is subjected to some of the legal incidents of ownership of tangible property, such as succession and transfer; but as a creation of legislation it is transferable only according to the provisions of the statutes which created it, and the only question is, has a court of equity power to compel its assignment and sale for the benefit of judgment creditors?"

The judgment appealed from is affirmed.[34]

---

[34]Accord: *Cooper* v. *Gunn*, 4 B. Mon. (Ky.) 594 (1844); *Stephens* v. *Cady*, 14 How. (U. S.) 528, 14 L. ed. 528 (1852); *Stevens* v. *Gladding*, 17 How. (U. S.) 447, 15 L. ed. 155 (1854); *Banker* v. *Caldwell*, 3 Minn. (Gil. 46) 94 (1859); *Carver* v. *Peck*, 131 Mass. 291 (1881); *Harrington* v. *Cambridge*, 14 W. N. Cas. (Pa.) 456 (1884); *Newton* v. *Bucks*, 72 Pa. St. 777 (1896); *Ball* v. *Coker*, 168 Fed. 304 (1909). In Pennsylvania a patent right owned by an insolvent corporation may be sold under the special *fieri facias* Act of

DENTON *v.* LIVINGSTON

SUPREME COURT OF NEW YORK, 1812

9 *Johns.* (*N. Y.*) 96

Assumpsit by the plaintiff against the defendant to recover money alleged to have been collected and received upon a writ of venditioni exponas, issued out of the Supreme Court and directed to the defendant as sheriff of the county of Columbia at the suit of the plaintiffs, against the goods of one Samuel Edmonds.

The plaintiffs proved that the amount of the sales was sufficient to satisfy their execution.

The defendant proved that among the goods and chattels sold was a share in the Bank of Columbia which sold for fifty dollars, and three shares in the Hudson Library, which sold for nine dollars. The defendant contended that the shares were not liable to be sold on execution, and that the defendant was not liable for them, Ashley, the purchaser, having refused to pay for them.

The judge charged the jury that the plaintiffs were not entitled to recover for the shares and that the jury must find for the plaintiffs after deducting these, and other, items. The jury accordingly found a verdict for the plaintiffs.[35]

KENT, C. J.: The bank stock and library shares were levied on by mistake, for these were mere choses in action, and not the subject of a levy and sale by fieri facias any more than bonds and notes; and such things can not be taken in execution. *Francis* v. *Nash*, 2 Geo. II K. B. cited in Com. Dig. tit. Execution, ch. 4.[36]

But, on other grounds, rule granted for new trial.

April 7, 1870, P. L. 58. *Erie Wringer Mfg. Co.* v. *National Wringer Co.*, 63 Fed. 248 (1894); *Flagg* v. *Farnsworth*, 12 W. N. Cas. (Pa.) 500 (1882).

A patent right or copyright although not subject to execution at law may be subjected by a court of chancery to the payment of a judgment debt of the patentee. *Ager* v. *Murray*, 105 U. S. 126, 26 L. ed. 942 (1881); *Gordon* v. *Anthony*, 16 Blatch. (U. S.) 234, Fed. Cas. No. 5605 (1897); *Gillett* v. *Bate*, 86 N. Y. 87, 10 Abb. N. Cas. 88 (1881); *Gorrell* v. *Dickson*, 26 Fed. 454 (1886); Pennsylvania Act of May 9, 1889, P. L. 172, P. & L. Dig. (2d ed.) 1361; *Doud & Miller* v. *Bonta Plate Glass Co.*, 28 Pitts. L. J. (N. S.) 358 (1898). And, in New York, also by proceedings supplementary to execution. *Barnes* v. *Morgan*, 3 Hun (N. Y.) 703 (1875).

In *Brooks* v. *Cassebeer*, 157 App. Div. (N. Y.) 683, 142 N. Y. S. 781 (1913), it is held that an execution will not lie against voluntary payments by husband to wife after separation.

[35]The statement of facts is paraphrased and only so much of the case as relates to the shares of stock printed.

[36]At common law shares of stock in a corporation were not subject to execution. *Cooper* v. *Dismal Swamp Canal Co.*, 2 Murphy (N. Car.) 195 (1812); *Williamson* v. *Smoot*, 7 Mart. (O. S.) (La.) 31, 12 Am. Dec. 494 (1819); *Nashville Bank* v. *Ragsdale*, Peck (Tenn.) 296 (1823); *Slaymaker* v. *Bank of Gettysburg*, 10 Pa. St. 373 (1849) at p. 375; *Foster* v. *Potter*, 37 Mo. 525 (1866); *Van Norman* v. *Jackson*, 45 Mich. 204, 7 N. W. 796 (1881); *Barnard* v. *Life Ins. Co.*, 4 Mackey (15 D. C.) 63 (1885); *Rhea* v. *Powell*, 24 Ill. App. 77 (1887); *In re Leavesley*, L. R. (1891), 2 Ch. Div. 1 at p. 7; *Fowler* v. *Dickson*, 1 Boyce (Del.) 113, 74 Atl. 601 (1909) at p. 122.

GUE *v.* THE TIDE WATER CANAL CO.

SUPREME COURT OF THE UNITED STATES, 1860

65 *U. S.* 257[1]

TANEY, C. J.: It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the Circuit Court of the United States for the District of Maryland, upon which he issued a fieri facias, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf, and sundry other lots; all of which property, it is admitted, belonged to the canal company in fee.

The canal company thereupon filed their bill in the circuit court, praying an injunction to prohibit the sale of this property under the fieri facias. The injunction was granted, and afterward, on final hearing, made perpetual. And from this decree the present appeal was taken.

In most jurisdictions the common-law rule has been changed by statute, but, where a levy upon and sale of stock is authorized by law, the provisions of the statute must be substantially observed or the sale will be treated as void. *Howe* v. *Starkweather*, 17 Mass. 240 (1821); *Princeton Bank* v. *Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254 (1850); *Blair* v. *Compton*, 33 Mich. 414 (1876); *Voorhis* v. *Terhune*, 50 N. J. L. 147, 13 Atl. 391, 7 Am. St. 781 (1887); *Feige* v. *Burt*, 118 Mich. 243, 77 N. W. 928, 74 Am. St. 390 (1898). The legislation upon this subject in the different states varies greatly. See Cook on Stock and Stockholders (3d ed.), § 483; Cal. Code Civ. Pro., § 688; N. J. Comp. Stat. (1910), p. 2244; Mass. Rev. L. (1902), ch. 177, §§ 46-51; *People* v. *Goss & P. Mfg. Co.*, 99 Ill. 355 (1881); *State* v. *First Nat. Bank*, 89 Ind. 302 (1883); *Nashville Trust Co.* v. *Weaver*, 102 Tenn. 66, 50 S. W. 763 (1808). In New York the stock of a debtor may be reached by attachment, Code Civ. Pro., § 647; *Plympton* v. *Bigelow*, 11 Abb. N. Cas. (N. Y.) 180, 63 How. Pr. (N. Y.) 484 (1882); *O'Brien* v. *Mechanics &c. Ins. Co.*, 56 N. Y. 52, 15 Abb. Pr. (U. S.) 222, 46 How. Pr. (U. S.) 429 (1874). In Pennsylvania, execution against the stock of a corporation held by a defendant may be, either by *fieri facias* under the Act of March 29, 1819, 7 Sm. L. 217, § 2, or by attachment execution under § 34 of the act of June 16, 1836, P. L. 755, P. & L. Dig. (2d ed.) 3417; *Commonwealth* v. *Watmough*, 6 Whart. (Pa.) 117 (1840); *Lex* v. *Potters*, 16 Pa. St. 295 (1851); *Weaver* v. *Huntingdon & B. T. M. R. &c. Co.*, 50 Pa. St. 314 (1865). Shares of national bank stock may be sold, *Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746 (1895); *Oldacre* v. *Butler*, 116 Ala. 652, 23 So. 3 (1897).

The situs of stock for the purpose of attachment is the domicile of the corporation issuing the shares. *Christmas* v. *Biddle*, 13 Pa. St. 223 (1850); *Plimpton* v. *Bigelow*, 93 N. Y. 592, 4 Civ. Pro. 189 (1883); *Jellenick* v. *Huron Copper Min. Co.*, 177 U. S. 1, 44 L. ed. 647 (1899); *Daniel* v. *Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884 (1902); *Gundry* v. *Reakirt*, 173 Fed. 167 (1909), see *Young* v. *South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202, 4 Am. St. 752 (1886); *Dean R. Tel. Co.* v. *Howell*, 162 Mo. App. 100, 144 S. W. 135 (1911).

In England by the statute of 1 & 2 Vict., ch. 110, § 14 and the rules of the Supreme Court, Order XLVI, rules 1 to 11, if a person against whom a judgment has been entered holds government stock, or stock or shares in any public company in England, the court may, on application of the judgment creditor, order such stock to stand charged with the payment of the amount due. *In re Hutchinson*, L. R. 16 Q. B. Div. 515 (1885); *In re Leavesley*, L R. (1891) 2 Ch. Div. 1.

[1] The arguments of counsel are omitted.

The Tide Water Canal is a public improvement situated in the State of Maryland, and constructed and owned by a joint stock company chartered by the State of Maryland for that purpose. The canal extends from Havre de Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal.

Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties, and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this fieri facias and consequently the circuit court was right in granting the injunction.

The Tide Water Canal is a great thoroughfare of trade, through which a large portion of the products ot the vast regions of country bordering on the Susquehanna river usually passes, in order to reach tide water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshall is of itself of scarcely any value, apart from the franchise of taking toll, with which it connected in the hands of the company, and if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, can not, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself, would most probably, realize scarcely anything from these useless canal locks, and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence.

In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of Assembly of the State of Maryland, referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the circuit court was right in granting the injunction, and its decree is therefore affirmed.[38]

---

[38]At common law a public franchise can not be taken and sold upon *fieri facias*. *Ammant* v. *New Alexandria & P. Turnpike Road Co.*, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593 (1825); *Seymour* v. *Milford & C. Tpk. Co.*, 10 Ohio 476 (1841); *Susquehanna Canal Co.* v. *Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315 (1845); *State* v. *Rives*, 5 Ired. (N. Car.) 297 (1844); *Winchester & L. Tpk. Co.* v. *Vimont*, 5 B. Mon. (Ky.) 1 (1844); *Thomas* v. *Armstrong*, 7 Cal. 286 (1857); *James* v. *Pontiac P. R. Co.*, 8 Mich. 91 (1860); *Richardson* v. *Sibley*, 93 Mass. 65 (11 Allen), 87 Am. Dec. 700 (1865); *Stewart* v. *Jones*, 40 Mo. 140 (1867); *Foster & Co.* v. *Fowler & Co.*, 60 Pa. St. 27 (1868); *Youngman* v. *Elmira R. Co.*, 65 Pa. St. 278 (1870); *Hatcher* v. *Toledo, Wabash & W. R. Co.*, 62 Ill. 477 (1872); *Randolph* v. *Larned*, 27 N. J. Eq. 557 (1876); *Palestine City* v. *Barnes*, 50 Tex. 538 (1878); *Baxter* v. *Nashville & H. Turnpike Co.*, 10 Lea. (Tenn.) 488 (1882); *East Ala. R. Co.* v. *Doe*, 115 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136 (1884); *Louisville &c. R. Co.* v. *Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 (1888); *Brady* v. *Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737 (1892). But in most jurisdictions statutes have provided a method by which franchises may be subjected to execution which must be strictly followed in order to make a valid sale. California Code Civ. Pro., § 388, *Gregory* v. *Blanchard*, 98 Cal. 311, 33 Pac. 199 (1893); 2 Consolidated Laws N. Y., "Corporations," §§ 70-6; Penna. Act of April 7, 1870, P. L. 58, § 1, P. & L. Dig. (2d ed.) 3517; *Mausel* v. *New York &c. R. Co.*, 171 Pa. St. 606, 33 Atl. 377 (1895); *Smith* v. *Altoona & P. R. Co.*, 182 Pa. St. 139, 37 Atl. 930 (1897); *Simmons* v. *Worthington*, 170 Mass. 203, 49 N. E. 114 (1897); *Williams* v. *East Wareham &c. R. Co.*, 171 Mass. 61, 50 N. E. 646 (1898); *Keystone Bank* v. *Donnelly*, 196 Fed. 832 (1912). As laid down in the principal case, property indispensably necessary for the exercise of a public or quasi public franchise is not subject to execution unless made so by statute. *Covey* v. *Pittsburgh, F. W. &c. R. Co.*, 3 Phila. (Pa.) 173 (1858); *Foster & Co.* v. *Fowler & Co.*, 60 Pa. St. 27 (1868); *Hackley* v. *Mack*, 60 Mich. 591, 27 N. W. 871 (1886); *Northern Pacific R. Co.* v. *Shimmel*, 6 Mont. 161, 9 Pac. 889 (1886), office safe not subject to execution; *Sherman County Irrigation Co.* v. *Drake*, 65 Nebr. 699, 91 N. W. 512 (1902). Contra: *Boston & C. & M. R.* v. *Gilmore*, 37 N. H. 410, 72 Am. Dec. 336 (1858); *Lathrop* v. *Middleton*, 23 Cal. 257, 83 Am. Dec. 112 (1863); *Risdon Iron & Locomotive Works* v. *Citizens' Traction Co.*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. 25 (1898); *Tulare I. Dist.* v. *Collins*, 154 Cal. 440, 97 Pac. 1124 (1908). So, where the franchise is no longer exercised the property becomes subject to execution. *Benedict* v. *Heineberg*, 43 Vt. 231 (1870); *Gardner* v. *Mobile & N. W. R. Co.*, 102 Ala. 635, 15 So. 271, 48 Am. St. 84 (1893).

The property of strictly private corporations is liable to be taken on execution precisely as the property of an individual debtor. *Overton Bridge Co.* v. *Means*, 33 Nebr. 857, 51 N. W. 240, 29 Am. St. 514 (1892); *Reynolds*

LYON *v.* CITY OF ELIZABETH

SUPREME COURT OF NEW JERSEY, 1881

43 *N. J. L.* 158

VAN SYCKEL, J.: The plaintiff having recovered a judgment against the city of Elizabeth in this court, caused a writ of fieri facias to be issued thereupon, by virtue of which the sheriff of Union county has levied upon eight several lots of land in said city, and advertised the same for sale to satisfy said judgment.

Lots numbers 1, 2, 3, 4 and 7 were purchased by the city at a sale made under the authority of the city charter for unpaid taxes assessed thereon. Lots numbers 5 and 6 were conveyed to the city for the purpose of erecting school houses thereon for public schools, but no school house has, as yet, been erected upon either lot. Lot number 8, upon which there is a dwelling house, is a lot lying within the exterior lines of a public street recently laid out by the city. The lot has been condemned for the purposes of the highway, but the house has not yet been removed, and is rented to a tenant.

On behalf of the city application is made to set aside this levy.

In England an action would not lie against a quasi political corporation for breach of duty except by force of positive law, as in the case of neglect to make hue and cry, for which an action was given against the hundred by the statute of Winton. 13 Edw. I. Upon the rendition of judgment the remedy for enforcing its payment was not by execution against the property of the corporation, but by levying the damages out of the property of any one or more of the persons within the limits corporate.[39]

Outside of the New England states it has never been held that the creditors of a municipal corporation can resort to the individual property of the inhabitants to satisfy a judgment obtained against the corporate body. The practical construction of the courts in New England has been that in an action by or against a municipal corporation, every member of it is a party to the suit, and upon that ground the practice there held has been maintained. *Chase* v. *Merrimack Bank,* 19 Pick. (Mass.) 564; *Beardsley* v. *Smith,* 16 Conn. 368.[40]

---

v. *Reynolds' Lumber Co.,* 169 Pa. St. 626, 32 Atl. 537 (1895); *East Side Bank* v. *Columbus Tanning Co.,* 170 Pa. St. 1, 32 Atl. 539 (1895); *Arnold* v. *Weimer,* 40 Nebr. 216, 58 N. W. 709 (1894); *Jones* v. *Bank,* 10 Colo. 464, 17 Pac. 272 (1887); *Poor* v. *Chapin,* 97 Maine 295, 54 Atl. 753 (1903).

[39] *Russell* v. *The Men Dwelling in the County of Devon,* 2 T. R. 667 (1788); *Cowley* v. *Newmarket Local Board,* L. R. (1892) App. Cas. 345; *Maguire* v. *Liverpool,* L. R. (1905), 1 K. B. 767; *Weightman* v. *Washington,* 1 Black (U. S.) 39, 17 L. ed. 52 (1861); *Brabham* v. *Hinds,* 54 Miss. 363, 28 Am. Rep. 352 (1877); *Kincaid* v. *Hardin Co.,* 53 Iowa 430, 5 N. W. 589, 36 Am. Rep. 236 (1880).

[40] By usage, peculiar to the New England States, the property of an inhabitant may be taken on execution upon a judgment against a town. *Brewer* v. *New Gloucester,* 14 Mass. 216 (1817); *Fernald* v. *Lewis,* 6 Maine 264 (1830); *Gaskill* v. *Dudley,* 47 Mass. 546 (6 Metc.), 39 Am. Dec. 750.

In *Rees* v. *City of Watertown,* 19 Wall. (U. S.) 107, this practice was pronounced to be indefensible, and contrary to the fundamental principle embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law. In suits against municipal corporations the individual citizen is not a party to the proceeding, he is not served with process and has no opportunity of being heard in his defense.

It seems to be clear, also, that a fieri facias against the public property of a municipal corporation is unknown to the common law. The reason why, in the absence of express legislative sanction, these political divisions of the state can not be subjected to such process, is obvious. Municipal corporations are erected for political purposes only, and are mere instrumentalities through which the legislature administers the civil policy of the state. The legislature delegates to them such measures of political power as may be deemed essential for the efficient administration of their local affairs and for the government of the people within the corporate limits. Their control of property is intended only for corporate purposes, and is to be applied only to promote the objects for which they are erected into governments. The taxing power ordinarily furnishes the only means they possess for raising the revenue essential to defray their expenses.

The municipality can not, in the absence of express legislation, be deprived of the means indispensable to the exercise of the functions with which it is charged. Otherwise a judgment creditor, by force of an execution, could destroy the corporate powers by withdrawing the resources, without which they can not be exercised. It would be manifestly contrary to the theory upon which a part of the sovereignty of the state is delegated to local governments to concede to an individual the right thus to arrest their operations. The unrestricted right in the creditor to pursue the corporation by execution could, for all practical purposes, as effectually annul a city charter as its absolute repeal. *Monaghan* v. *City of Philadelphia,* 28 Pa. St. 207; *Schaffer* v. *Cadwallader,* 36 Pa. St. 126; *Chicago* v. *Hasley,* 25 Ill. 595; Dill. on Mun. Corp., sections 446-686; *Commonwealth* v. *Perkins,* 43 Pa. St. 400; *Frank* v. *Chosen Freeholders of Hudson,* 10 Vroom (N. J.) 347.

In a recent decision by the Supreme Court of the United States, *Meriwether* v. *Garret,* 102 U. S. 472, the immunity from execution

---

(1843); *Beardsley* v. *Smith,* 16 Conn. 368, 41 Am. Dec. 148 (1844); *Union* v. *Crawford,* 19 Conn. 331 (1848); *Hill* v. *Boston,* 122 Mass. 344, 23 Am. Rep. 332 (1877), where it is said "payment of such a judgment has never been compelled by mandamus against the corporation, as in other parts of the United States"; *Eames* v. *Savage,* 77 Maine 212, 52 Am. Rep. 751 (1885); *Bloomfield* v. *Charter Oak Bank,* 121 U. S. 121, 30 L. ed. 923 (1887). But the general rule is that, in the absence of a statute, the private property of an individual within the limits of a municipality can only be subjected to the debts of the municipality by taxation. *Meriwether* v. *Garrett,* 102 U. S. 472, 26 L. ed. 197 (1880); *Emerick* v. *Gilman,* 10 Cal. 404, 70 Am. Dec. 742 (1858); *North Lebanon* v. *Arnold,* 47 Pa. St. 488 (1864); *Miller* v. *McWilliams,* 50 Ala. 427, 20 Am. Rep. 297 (1874); *Lilly* v. *Taylor,* 88 N. Car. 489 (1883).

of property held by a city for public uses was very broadly recognized. In *Emeric* v. *Gilman,* 10 Cal. 404, Justitce Field says:

"Whoever becomes a creditor of a county must look to its revenues alone for payment. The statute authorizes a suit against the county by which the demand may pass into judgment, but it has given no remedy by execution, and when the judgment is rendered the plaintiff must resort to mandamus."

Mr. Freeman, in his work on Executions, section 22, takes the same view: "A judgment against a county or municipal corporation is ordinarily no more than the mere establishment of a valid claim, for which it is the duty of the proper officers to provide means of payment out of the revenues of the defendant. It is error to award or issue execution on such judgment."

There are cases which hold that a political corporation is impressed with a dual character, the one public, the other private. In the exercise of their powers, governmental and public, they are clothed with the immunities of sovereignty. When they step outside of the domain where they are engaged strictly in the exercise of sovereign powers, and make contracts in their private capacity, they incur the responsibilities of individuals or private corporations. *Lloyd* v. *New York,* 1 Seld. (N. Y.) 369; *Clarke* v. *Rochester,* 24 Barb. (N. Y.) 466, 482. Assuming that when they make an agreement in their private capacity, the law will afford every remedy incident to the enforcement of ordinary contracts, property acquired for, and employed in the discharge of their sovereign functions, could not be diverted to the satisfaction of obligations resting upon them in their character of private corporations. Logically, property held in their private capacity, could alone be appropriated to the liquidation of such private claims, by process of execution.

But it is insisted that by force of the first section of the act concerning judgments (Rev., p. 520), all lands are liable to be levied on and sold by execution, whether the property of individuals or municipal corporations.

By the common law, execution went against lands or tenements of the defendant at the suit of the king only. The plaintiff could have satisfaction only of goods, chattels and the present profits of lands by fieri facias or levari facias, but not the possession of the lands themselves, in consequence of the feudal principles which prohibited alienation and the encumbering of the fief with the debts of the owner. In England the sale of lands by execution is the creature of statutory regulation since the restrictions upon alienation began to wear away.

The act to subject lands in this state to sale by execution was passed February 16, 1799 (Pat. L. 368), and was intended to bring within the reach of creditors, then entitled to make their money by execution, the landed property of their debtors. There is nothing in the act which expressly, or by necessary intendment, brings the public property of municipal corporations within its operation. Under it creditors had no more right to sell lands devoted to the public uses of the corporation than they had, prior to its passage,

to sell furniture necessary in the use of its public offices. It would be a startling proposition to hold that a creditor could seize and sell a court house or a jail, and that the sheriff could be required to put him in possession of it. To give the act so wide a range would be a constant menace to the life of the body corporate, and so clearly contrary to public policy, that it can not be conceived that it was intended to be so applied.

In *Monaghan* v. *Philadelphia*, 28 Pa. St. 210, the court said, "it was very clear that none of the property necessary for governmental purposes could be seized and sold, even if the usual process for collecting a judgment could issue against such corporation." It will be impossible for these political bodies to dispense the important functions of government committed to them, if they are, to the same extent as individuals, subject to the ordinary process of levy and sale by execution.

The practice in this state has uniformly been to issue execution against the municipal body, not to seize and sell its public property, but for the purpose of laying a foundation for mandamus proceedings. In aid of the judgment creditor legislation has been deemed necessary. Rev., p. 391, S. 9, repealed by Act of March 14, 1879 (Pamph. L., p. 293); Act of March 27, 1878 (Pamph. L., p. 182). An implication may arise from the language of these acts that a public corporation may possess property which shall be subject to seizure under a fieri facias, but there is nothing in their terms which presumably enables a creditor to deprive it of such property as is essential to the beneficial exercise of its granted powers. These statutory provisions should be strictly construed to prevent the mischief which would flow from the practice sought to be enforced in this case.

All the real estate levied on in this case is exempt from sale. Two lots were conveyed to and are held by the city for schoolhouse purposes. The house on one lot is, under the terms of the charter, to be sold and the proceeds appropriated to paying the damages on the street. It can not, at the will of the creditor be diverted from the use for which the law has marked it. The remaining lots were purchased by the city for unpaid taxes, and are held as a means of enabling it to raise the necessary revenues for current expenses. The lands are held for public uses, for out of them the city must realize the funds essential to the discharge of its obligations. A sale by execution would surely result in a ruinous sacrifice of the property, and would defeat the collection of taxes, without paying the city debt. Nothing could be more hurtful to the city than such an interference with the collection of its revenues.

What relief the court will give the judgment creditor on mandamus proceedings can not now be considered.

The levy must be set aside.[41]

---

[41]In some states the strictly private property of a municipal corporation charged with no public trusts may be taken in execution. *Birmingham* v. *Rumsey & Co.*, 63 Ala. 352 (1879); *Hart* v. *New Orleans*, 12 Fed. 292 (1882); *Murphree* v. *Mobile*, 108 Ala. 663, 18 So. 740 (1895); *School Dist. of Ft. Smith* v. *Board of Imp.*, 65 Ark. 343, 46 S. W. 418 (1898); *Dunham* v. *Angus*,

JONES *v.* JONES

HIGH COURT OF CHANCERY OF MARYLAND, 1827

1 *Bland.* (*Md.*) 443[a]

BLAND, Ch.: It was a well settled principle of the common law of England, that the real estate of a debtor could not be taken in execution at the suit of a citizen creditor, and sold for the satisfaction of the debt. This rule was considered as a fair and necessary result from the nature of the feudal tenures, according to which all the lands of that country were held. And, as the most liberal species of those tenures was expressly declared to be that by which all the lands of Maryland should be held, it followed that real estate could be no further subject to be taken in execution here than the same kind of estate was liable in England.

In the case of the king, however, an execution always issued against the lands as well as the goods of a public debtor; because the debtor was considered as being not only bound in person, but as a feudatory who held mediately or immediately from the king; and therefore, holding what he had from the king, he was from thence to satisfy what he owed to the king. As a consequence of this liability and for the public benefit, if a judgment was obtained against a public debtor by the king, he thereby acquired a lien upon the real estate of such debtor, which took effect not merely from the date of the judgment, but by relation from the commencement of the suit to the exclusion of all subsequent incumbrances. In

---

145 Cal. 165, 78 Pac. 557 (1904). Elsewhere it is held that the proper remedy of the creditor is by mandamus to compel payment or the collection of a tax for that purpose. *Emeric* v. *Gilman*, 10 Cal. 404, 70 Am. Dec. 742 (1858); *Commonwealth* v. *Perkins*, 43 Pa. St. 400 (1862); *Morrison* v. *Hinkson*, 87 Ill. 587, 29 Am. Rep. 77 (1877); *Darling* v. *Baltimore*, 51 Md. 1 (1878); *Emery* v. *Burresen*, 14 Utah 328, 47 Pac. 91, 37 L. R. A. 732, 60 Am. St. 898 (1896). The decisions are influenced by local statutes. But the authorities are in accord that property of a municipality owned or used for public purposes is not subject to sale on execution. III Dillon Municip. Corp. (5th ed.), § 992; *Davenport* v. *Peoria Marine & Fire Ins. Co.*, 17 Iowa 276 (1864); *Darlington* v. *New York*, 31 N. Y. 164, 28 How. Pr. (N. Y.) 352, 88 Am. Dec. 248 (1865); *Brinckerhoff* v. *Board of Education*, 6 Abb. Pr. (N. S.) 428, 2 Daly 443, 37 How. Pr. (N. Y.) 499 (1869); *Ransom* v. *Boal*, 29 Iowa 68, 4 Am. Rep. 195 (1870); *Klein* v. *New Orleans*, 99 U. S. 149, 25 L. ed. 430 (1878); *New Orleans* v. *Morris*, 105 U. S. 600, 26 L. ed. 1184 (1881); *Low* v. *Howard County*, 94 Ind. 553 (1883); *The Protector*, 20 Fed. 207 (1884), police boat; *Ellis* v. *Pratt City*, 111 Ala. 629, 20 So. 649, 33 L. R. A. 264, 56 Am. St. 76 (1895), proceeds of policy of insurance on public hall and market house; *Board of Directors* v. *Bodkin*, 108 Tenn. 700 (1902), money in bank to meet interest on levee bonds; *Kerr* v. *New Orleans*, 126 Fed. 920, 61 C. C. A. 450 (1903); *Equitable Loan &c. Co.* v. *Edwardsville*, 143 Ala. 182, 38 So. 1016, 111 Am. St. 34 (1904), stock of liquors in town dispensary; *People ex rel. Post* v. *San Joaquin Valley Agricultural Assn.*, 151 Cal. 797, 91 Pac. 740 (1907); *School Town of Windfall* v. *Somerville*, 181 Ind. 463, 104 N. E. 859 (1914); *Morganton Hardware Co.* v. *Morganton Graded Schools*, 151 N. Car. 507, 66 S. E. 583 (1909). Compare *Clarissy* v. *Metropolitan Fire Dept.*, 7 Abb. Pr. (N. S.) 352, 31 N. Y. Super. Ct. 224 (1869).

[a] An extract only from the opinion of the chancellor is printed.

England the king's debt is preferred in execution and in the administration of a deceased's estate, to that of a citizen; which right of preference was in Maryland extended to the lord proprietary. After our revolution it was held to have devolved, according to the principles of the common law, upon the state; and it has been expressly declared, that all lands and tenements belonging to any public debtor, after the commencement of suit against him, shall be liable to execution in whatever hands or possession they may be found.[43] By which legislative enactment the state's lien, as in England, relates not merely to the date of the judgment, but to the commencement of the action. Whence it follows, that the liability of the real estate of a debtor to the state to be taken in execution, and the lien of the state incident to such liability, are founded upon the common law and the acts of assembly passed in express relation to debts due to the state.

But the general rule of the common law in regard to the liability of real estate to be taken in execution as between party and party, was modified by a statute passed in the year 1285,[44] which made such estates liable to be partially taken in execution. This statute, which gave the writ of elegit enlarged the remedy of the creditor by declaring, that, when a debt was recovered or damages adjudged, it should be in the election of the plaintiff to have a fieri facias, or to have all the debtor's chattels and the one-half of his lands delivered to him until the debt was levied to a reasonable extent; which gave the election immediately that the debt was recovered; and therefore the whole land was held to be bound from the day of the rendition of the judgment; and those concerned, it was presumed, might easily ascertain from the record by what judgments the lands of the debtor were thus bound. But as some inconvenience arose, because, according to the common law, judgments took effect by relation from the first day of the term, it was in the year 1677 declared by the statute of frauds,[45] that the day on which judgments were rendered should be entered upon the record; and that purchasers should be charged from such time only, and not from the first day of the term whereof the judgment was entered. This then was the nature and extent of the judicial lien, as between party and party, with which the real estate of a debtor might become bound in Maryland as well as in England. And this judicial lien was afterward mainly fortified and enlarged by a statute passed in the year 1732,[46] applicable only

[43]Contra: *Evans* v. *Walsh*, 41 N. J. L. 281, 32 Am. Rep. 201 (1879).

[44]Statute of Westminster II (13 Edw. I), ch. 18, 1 Stat. of Realm 81. "When debt is recovered or knowledged in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fieri facias* unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plow, and the one half of his land, until the debt be levied upon a reasonable price or extent: And if he be put out of that tenement, he shall recover by a writ of novel disseisin, and after by writ of redisseisin, if need be."

[45]29 Car. II, ch. 3, §§ 14 and 15.

[46]Geo. II, ch. 7. For a further account of the act of 1732 see *Coombs* v. *Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236 (1831), at p. 304. In Massachusetts as early as 1696 and in Pennsylvania as early as 1700 lands were, by

to the then colonies of Great Britain, and received as law in Maryland, which subjected the whole of a debtor's real estate to be taken in execution and sold for the payment of his debts.

DALZELL *v.* LYNCH

SUPREME COURT OF PENNSYLVANIA, 1842

4 Watts and Serg. (Pa.) 255

Error to the District Court of Allegheny County.

This was an action of ejectment by Francis Lynch against William Dalzell, in which the plaintiff, inter alia, gave in evidence the record of a judgment against William Dalzell, a fieri facias issued upon it and a levy upon the house and lot in controversy, describing it as being "a leasehold property, with some nine or ten years to run." The property was sold by the sheriff upon the fieri facias, and he made a deed to the plaintiff for it, which was regularly acknowledged in open court.[47] Upon the trial of the cause the

---

colonial statutes, rendered liable to sale on execution for debts. Laws of Massachusetts (1742) p. 75; *Presbyterian Corporation* v. *Wallace*, 3 Rawle (Pa.) 109 (1831), at p. 141. By force of the express statutory provisions and codes of the different states the interest of a debtor in real estate may be sold on execution. For a summary of the practice, which varies greatly in the several jurisdictions, see 4 Kent's Commentaries 430, where it is said, "The general regulation, and one prevalent in most of the states is to require the creditor to resort, in the first instance, to the personal estate, as the proper and primary fund, and to look only to the real estate after the personal estate shall have been exhausted and found insufficient." But contra *Isham* v. *Downer*, 8 Conn. 282 (1830); *Pitts* v. *Magie*, 24 Ill. 610 (1860). In Massachusetts executions may be levied on lands and chattels contemporaneously, *Hoar* v. *Tilden*, 178 Mass. 157, 59 N. E. 641 (1901); Rev. Laws Mass. (1902), ch. 178, vol. 2, p. 1603. And see further New York Code Civ. Pro., § 1430 *et seq.*, *Ohio Gen. Code* (1910), 2495, § 11655; Penna. act of June 16, 1836, P. L. 755, § 43 *et seq.*, 2 P. & L. Dig. (2d ed.) 3453.

In England under the writ of *elegit* given by the statute of Westminster II the money due the creditor could be made by delivering to him all the chattels of the debtor and one half of the land. This was extended by the Judgments Act of 1838 (1 and 2 Vict., ch. 110), § 11 to the whole of the debtor's land and restricted by the Bankruptcy Act of 1883 (46 and 47 Vict., ch. 52), § 146 so as to exclude "goods." By the rules of the Supreme Court, Order XLIII, rule 1, writs of *elegit* are to be executed as heretofore. Under the Judgments Act of 1864 (27 and 28 Vict. ch. 112), § 4, where land has actually been delivered to the creditor under the writ of *elegit* he may apply, by originating summons, to the Chancery Division for an order for the sale of his debtor's interest in the land, the practice upon application to follow that of the court of chancery with respect to sales of the real estate of decedents for the payment of debts. Rules of Supreme Court, Order LV, rule 9b; *In re Duke of Newcastle*, L. R. 8 Eq. 700 (1869); *In re Bithray*, 59 L. J. Ch. 66 (1889); *In re Harrison and Bottomley*, L. R. (1899) 1 Ch. Div. 465.

[47] *Sowers* v. *Vie*, 14 Pa. St. 99 (1850); *Williams* v. *Downing*, 18 Pa. St. 61 (1851), hold that on a sheriff's sale of a term a deed is unnecessary. In England the sheriff assigns the judgment debtor's term in writing under his official seal. *Doe ex dem. James* v. *Brawn*, 5 B. & Ald. 243 (1821); *Doe ex dem. Hughes* v. *Jones*, 9 M. & W. 372 (1842); *Playfair* v. *Musgrove*, 14 M. & W. 239 (1845); *Coleman* v. *Rawlinson*, 1 F. & F. 330 (1858).

plaintiff offered this deed in evidence; it was objected to by the defendant on the ground that there was no inquisition upon or condemnation of the property. The same question was raised in a point put to the court by the defendants.

Judge Shaler overruled the objection to the evidence, and after a careful examination of the subject and the peculiar phraseology of our acts of assembly on the subject of taking lands in execution, ruled the point against the defendant. Verdict and judgment accordingly.[48]

PER CURIAM: It is said by Lord Coke, in his annotations on the British statute, that a term for years has been extended by force of the words medietatem terrae suae; but he has not said that such was the practice in his day, and indeed it would have been strange had a term been treated as land for the purposes of an elegit, and as a chattel for the purposes of a common-law extent, or of a fieri facias.[49] A lessee for years is not seised, nor is he a terre-tenant; and the land of which he is barely possessed, can not be called his in the technical, more than it can in the popular sense. But whatever may have been the practice under the British statute, it is certain that none such as that supposed to have been intimated by Lord Coke has prevailed under our own; and a practical interpretation for more than a century would alone be decisive of the question. But it is evident that any other than the one we have adopted, would have been inconsistent with the design of the legislature. A term for years is a chattel which might always be sold on a common-law execution; and our statute, which is an enabling and not a disabling one, was intended to subject land to sale for payment of debts in the aspect in which it had before been exempted. It left the writ of fieri facias, as to chattels, exactly where it found it. There was no motive to burden a leasehold interest, which is usually of little value beyond the rent reserved, with the costs of an inquisition; and that estates of freehold were subjected to execution only sub modo, arose from a lingering regard for feudal prejudices. There is reason to think that the penmen of our early statutes, who seem to have been bred to the law and more familiar with black-letter than the lawyers of our day, were peculiarly heedful of accuracy in the use of technical words; and it is said in the *Touchstone*, page 92, on the authority of Brooke, Done 41, that leases for years do not pass by a general grant of lands, though it seems they may be comprehended with the assistance of special description, or by force of the context. There is no reason to think the legislature meant to give that word a more

[48]The arguments of counsel are omitted.

[49]But see *Palmer's Case*, 4 Coke 74, Cro. Eliz. 584 (1597); *Fleetwood's Case*, 8 Coke 340 (1610); *Comyn* v. *Bradlyn*, Moore 873 (1614); *Richardson* v. *Webb*, 1 Morrell's Bankruptcy Cases 40 (1884); *Johns* v. *Pink*, L. R. (1900) 1 Ch. Div. 296, from which it appears that in England the judgment creditor may proceed by *fieri facias* and sale of the term, or, by *elegit* and either take the term at an annual valuation as lands extended, or take the term as a chattel at a valuation or have it sold to a third person at such valuation.

extended meaning; and the admission of the sheriff's deed, as well as the direction consequent on it, was entirely proper.[50]

Judgment affirmed.

NICHOLS *v.* GUTHRIE

SUPREME COURT OF TENNESSEE, 1902

109 *Tenn.* 535

Appeal from the Chancery Court of Maury county.

This case involves a controversy, growing out of the third clause of the will of Thomas Walker, made in 1852, which is as follows: "To my granddaughter, Elizabeth Sims, I give the tract of land on which she now resides, containing about one hundred acres, also another tract of about the same size adjoining William McLane

---

[50]A term of years is a chattel real and liable to execution as personalty. *King* v. *Deane*, 2 Shower 85 (1658); *Taylor* v. *Cole*, 3 T. R. 292 (1789); *Sparrow* v. *Earl of Bristol*, 1 Marsh. (Ky.) 10 (1813); *Doe ex dem. Westmoreland* v. *Smith*, 1 M. & Ry. 137 (1827); *Ronan* v. *King*, L. R. (1894) 2 Ir. R. 648; *Chapman* v. *Gray*, 15 Mass 439 (1819); *Adams* v. *French*, 2 N. H. 387 (1821); *Coombs* v. *Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236 (1831); *Thomas* v. *Blackemore*, 5 Yerg. (Tenn.) 113 (1833); *Barr* v. *Doe ex dem. Binford*, 6 Blackf. (Ind.) 335, 38 Am. Dec. 146 (1842); *Shelton* v. *Codman*, 57 Mass. 318 (1849); *Williams* v. *Downing*, 18 Pa. St. 60 (1851); *Doe ex dem. Uriah Glenn* v. *Peters*, 44 N. Car. 457, 59 Am. Dec. 563 (1853); *Bigelow* v. *Finch*, 17 Barb. (N. Y.) 394 (1853); *Buhl* v. *Kenyon*, 11 Mich. 249, 83 Am. Dec. 738 (1863); *Titusville Novelty Iron Works' Appeal*, 77 Pa. St. 103 (1874), levy out of view sufficient; *Bismark Building Assn.* v. *Bolster*, 92 Pa. St. 123 (1879); *Kile* v. *Giebner*, 114 Pa. St. 381, 7 Atl. 154 (1886); *Lerew* v. *Rinehart*, 3 Pa. Co. Ct. 50 (1887); *McCreery* v. *Berney Nat. Bank*, 116 Ala. 224, 22 So. 577, 67 Am. St. 105 (1896); *Smith* v. *Scanlon*, 106 Ky. 572, 51 S. W. 152, 21 Ky. L. 169 (1899); *Acklin* v. *Waltermier*, 19 Ohio C. Ct. 372 (1899); *Lefever* v. *Armstrong*, 15 Pa. Super. Ct. 565 (1901); *Gallagher* v. *Hicks*, 216 Pa. St. 243, 65 Atl. 623 (1907); *Powell* v. *Nichols*, 26 Okla. 734, 110 Pac. 762 (1910). Contra: *Mun* v. *Carrington*, 2 Root (Conn.) 15 (1793); *Hyatt* v. *Vincennes N. B.* (Ind.), 113 U. S. 408, 5 Sup. Ct. 573, 28 L. ed. 1009 (1884); *Loring* v. *Melendy*, 11 Ohio 355 (1842), permanent lease. Also contra under statutes forbidding assignment of terms without the landlord's consent, *Holliday* v. *Achle*, 99 Mo. 273, 12 S. W. 797 (1889); *Moser* v. *Tucker*, 87 Tex. 94, 26 S. W. 1044 (1894); *Boone* v. *First Nat. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594 (1897); *Mexican Nat. Coal, Timber & Iron Co.* v. *Frank*, 154 Fed. 217 (1907), although the general rule is that a clause forbidding assignments does not apply to executions. *Doe ex dem. Mitchinson* v. *Carter*, 8 T. R. 57 (1798); *Jackson ex dem. Schuyler* v. *Corliss*, 7 Johns. (N. Y.) 531 (1811); *Jackson ex dem. Stevens* v. *Silvernail*, 15 Johns. (N. Y.) 278 (1818); *Smith* v. *Putnam*, 3 Pick. (Mass.) 221 (1825); *Riggs* v. *Pursell*, 66 N. Y. 193 (1876); *Farnum* v. *Hefner*, 79 Cal. 575, 21 Pac. 955, 12 Am. St. 174 (1889); *Medina Temple Co.* v. *Currey*, 58 Ill. App. 433 (1895); *In re Bush*, 126 Fed. 878 (1904); *Powell* v. *Nicholls*, 26 Okla. 734, 110 Pac. 762 (1910).

A tenant at will has not such an interest in the land as can be sold on execution. *Waggoner* v. *Speck*, 3 Ohio 293 (1827); *Bigelow* v. *Finch*, 11 Barb. (N. Y.) 498 (1851), 17 Barb. (N. Y.) 394 (1853). Contra: *Gerber* v. *Hartwig*, 11 W. N. Cas. (Pa.) 197 (1881). By § 1430 of N. Y. Code Civ. Pro. the expression "real property," as used in reference to executions, includes leasehold property where the lessee is possessed of five years unexpired term. *United States O. Co.* v. *Buge*, 136 N. Y. S. 297 (1912).

* * * to have and to hold said property during her natural life, to be free from the debts, liabilities or contracts of her present * * * husband, and at her death all of said property is to be equally divided among the children of said Elizabeth then living, or the descendants of such children."

During the existence of the life tenancy of Elizabeth Sims, a judgment creditor of Walter Sims, who was a son of the life tenant, caused to be levied an execution upon his interest in the land, and, at the sale made under and by virtue of this levy, became the purchaser, and took from the sheriff a deed to the same. Whatever interest, if any, he acquired thereunder, was subsequently passed to one Hoge, who is defendant to this cause. After the levy, but before the sheriff's sale thereunder, Walter Sims aliened and conveyed all his interest in the same land to his sister, and she subsequently conveyed the same interest to one Nichols, who is one of the complainants in this cause. The life tenant died after these various transactions, and the present bill was filed for a partition, or a sale for partition, of this land. The only controversy in the case arises with regard to the Walter Sims interest.

The complainant Nichols insists that the levy and sale were ineffectual to vest any title or interest in the defendant Hoge, because of the fact that, at the date of such levy and sale, the interest of Walter Sims was a mere possibility or expectancy not subject to execution. His further insistence is that this expectancy, or possibility, could be alieniated, and, as an alienee, he was substituted to all the right and interest of Walter. The converse of these propositions is maintained by the execution purchaser, Hoge.[51]

BEARD, C. J.: The present certainly falls within the class of cases where the event on which the contingency depends is certain, while the person to take on the happening of the event is uncertain. For which one, if any, of the children of Elizabeth Sims would survive her, and then be capable of taking the remainder, was uncertain until her death occurred, and whatever interest either of these children had in the remainder was a pure expectancy.

It would seem, on principle, that such an interest or expectancy, not transmissible at common law, was beyond the reach of an execution creditor. Whether a contingent remainder of any kind can be subjected by a judgment creditor, may be regarded as an open question in this state, though in *Henderson* v. *Hill,* 9 Lea (Tenn.) 34, in the form of dictum, it is said: "The weight of authority seems to be that a legal contingent remainder is not subject to execution." Citing Freeman on Execution, section 175.

Upon examination of the cases, we think it will be found that this statement, though a dictum, is correct. At least, such was the holding in *Watson* v. *Dodd,* 68 N. Car. 528; *Haward* v. *Peavey,* 128 Ill. 430; *Ducker* v. *Burnham,* 146 Ill. 9; *Roundtree* v. *Roundtree,* 26 S. Car. 450; *Young* v. *Young,* 89 Va. 675; *Jackson* v. *Middleton,* 52 Barb. (N. Y.) 9.

---

[51]The statement of facts is from the opinion of the court, part of which is omitted.

Moore v. *Littel*, 41 N. Y. 66, and *Woodgate* v. *Fleet*, 44 N. Y. 9, are cited as contra, but the first of these cases simply held that an interest, vested or contingent, is alienable during the continuance of the antecedent estate, while in the second the argument of the court was mainly devoted to the determination of the question whether the remainder involved was contingent or vested.

But it is said that the effect of section 63 of Shannon's Code, which provides that the words "real estate," "real property," "lands," include lands, tenements and hereditaments, and all rights thereto, and interests therein, equitable as well as legal, is to change the rule, and make an interest purely contingent as the one in question, subject to the claim of an execution creditor. We are referred to the case of *White* v. *McPheeters*, 75 Mo. 286, where, in construing a statute similar to ours, this view is expressed.

But if we are right in our holding that, during the life tenancy, the remainder in the property in question vested in the class as a unit, and not severally in the members of that class, then there is no room for the application of this statute, as in such case no member of the class has an interest which can fairly be called legal or equitable. On the other hand if the other view obtains, that this was a mere possibility made, by reason of the contingency as to the person, the same results follow.

It results, therefore, that the execution purchaser, Hoge, took nothing by his purchase, while complainant Nichols, as alienee, if upon no other ground, upon that of estoppel, did acquire the interest of Walter Sims when it fell in upon the death of the life tenant.

Affirmed.[52]

---

[52]An estate in reversion is subject to execution. *Williams* v. *Amory*, 14 Mass. 20 (1817); *Burton* v. *Smith*, 13 Pet. (U. S.) 464, 10 L. ed. 248 (1839); *Den ex dem. Murrell* v. *Roberts*, 11 Ired. L. 33 N. Car. 424, 53 Am. Dec. 419 (1850); *Bangor* v. *Warren*, 34 Maine 324, 56 Am. Dec. 657 (1851); *Bean* v. *Kulp*, 7 Phila. (Pa.) 650 (1870); *Woodgate* v. *Fleet*, 44 N. Y. 1, 11 Abb. Pr. (N. S.) 41 (1870); *Atwater* v. *Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741 (1891). So, also, a vested remainder. *Roe* v. *Humphreys*, 2 Yeates (Pa.) 427, 2 Dall. 223 (1795); *Den ex dem. Rickey* v. *Hillman*, 7 N. J. L. 180 (1824); *Brown* v. *Gale*, 5 N. H. 416 (1831); *Kelly* v. *Morgan*, 3 Yerg. (Tenn.) 437 (1832); *Wiley* v. *Bridgman*, 1 Head. (Tenn.) 68 (1858); *Bonham* v. *Bishop*, 23 S. Car. 96 (1884); *Railsback* v. *Lovejoy*, 116 Ill. 442, 6 N. E. 504 (1886); *Shipp* v. *Gibbs*, 88 Ga. 184, 14 S. E. 196 (1891); *Stevens* v. *Mulligan*, 167 Mass. 84, 44 N. E. 1086 (1896); *Deadman* v. *Yantis*, 230 Ill. 243, 82 N. E. 592, 120 Am. St. 291 (1907); *Dunkerson* v. *Goldberg*, 162 Fed. 120 (1908); *Shirran* v. *Dallas*, 21 Cal. App. 405, 132 Pac. 454 (1913). As in the principal case, it has been frequently held that a contingent remainder is not subject to execution. *Baker* v. *Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600 (1853); *Penn* v. *Spencer*, 17 Grat. (Va.) 85, 91 Am. Dec. 375 (1866); *Jackson* v. *Middleton*, 52 Barb. (N. Y.) 9 (1866); *Watson* v. *Dodd*, 68 N. Car. 528 (1873); *Dodge* v. *Beattie*, 61 N. H. 101 (1881); *Haward* v. *Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. 120 (1889); *Young* v. *Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642 (1893); *Smith* v. *Gilbert*, 71 Conn. 149, 41 Atl. 284, 71 Am. St. 163 (1898); *Taylor* v. *Taylor*, 118 Iowa 407, 92 N. W. 71 (1902). But contra: *Cohalan* v. *Parker*, 138 App. Div. 849, 123 N. Y. S. 343 (1910); *White* v. *McPheeters*, 75 Mo. 286 (1882); *Peoples Trust Co. of Madison, Ind.* v. *Dewees*, 143 Ky. 730, 137 S. W. 201 (1911); *De Haas* v. *Bunn*, 2 Pa. St. 335, 44 Am. Dec. 201 (1845); *Drake* v. *Brown*, 68 Pa. St. 223 (1871); *Robbins'*

HUMPHREY *v.* GERARD

SUPREME COURT OF ERRORS OF CONNECTICUT, 1911

83 *Conn.* 346

Action to quiet and settle the title to real estate, and for other equitable relief, brought to and reserved by the Superior Court in New Haven County, Williams, J., upon an agreed statement of facts, for the advice of this court upon questions stipulated by counsel pursuant to sections 70-71 of the rules of this court.[53]

PRENTICE, J.: The plaintiffs claim that Mrs. Beecher was entitled to compensation from the other owners of the reversionary interest in the property, by reason of the improvements which, during the continuance of her life estate, she made upon it in the belief that upon her death it would pass to her heirs; and that the plaintiffs, by virtue of the foreclosure of their lien, are entitled to receive out of the proceeds of a sale, if ordered as prayed for, the amount of such compensation. They contend that they are in a position to be

---

Estate, 199 Pa. 500, 49 Atl. 233 (1901); *Kenyon* v. *Davis*, 219 Pa. 585, 69 Atl. 62 (1908); compare *Patterson* v. *Caldwell*, 124 Pa. St. 455, 17 Atl. 18, 10 Am. St. 598 (1889). See also *Moore* v. *Littel*, 41 N. Y. 66 (1869); *Sheridan* v. *House*, 43* N. Y. (4 Keyes) 569, 4 Abb. Dec. 218 (1868); *Packer's Estate* (No. 2), 246 Pa. 116, 92 Atl. 70 (1914).

In *Phillips* v. *Rogers*, 53 Mass. 405 (1847), it was held that an estate defeasible upon the debtor's dying without issue living at the time of his decease could be taken in execution and held until the happening of the contingency. And see *Kendall* v. *Lawrence*, 22 Pick. (Mass.) 540 (1839); *Harvey* v. *West*, 87 Ga. 553, 13 S. E. 693 (1891); *McClure* v. *Cook*, 39 W. Va. 579, 20 S. E. 612 (1894); *Bayer* v. *Walsh*, 166 Pa. St. 38, 30 Atl. 1039 (1895). In *Harber & Brother* v. *Nash*, 126 Ga. 777, 55 S. E. 928 (1906), land was devised to three daughters of testator with a provision that so soon as one of said daughters should "leave the land either by marriage, death or otherwise" she should have no further interest therein. *Held*, that a daughter had not such an interest as was subject to execution.

As to ground rents compare *Hurst* v. *Lithgrow*, 2 Yeates (Pa.) 24, 1 Am. Dec. 326 (1795), with *Payn* v. *Beal*, 4 Den. (N. Y.) 405 (1847).

[53]Only so much of the case as relates to executions is printed. The facts were, briefly, that Mrs. Maltby died in 1871 and by her will devised one fourth of her real estate in trust for her niece Mrs. Beecher for life and after her death to her "lawful heirs." On the distribution of Mrs. Maltby's estate the premises in dispute were set out to the trustee for Mrs. Beecher who was given a lease of the property. It was then supposed that the remainder in fee was vested in Mrs. Beecher's son, G. L. Gerard, and Mrs. Beecher at her own expense erected a valuable brick building upon the land. In 1901 Mary E. Ives (now Humphrey) and others filed judgment liens against Mrs. Beecher's interest in the property which were foreclosed and the judgment creditors put in possession. G. L. Gerard then brought proceedings to determine his interest in the property in which it was held that he took no interest under Mrs. Maltby's will, and that the remainder, subject to Mrs. Beecher's life estate, was in the intestate estate of Mrs. Maltby. Mrs. Beecher having died, the judgment plaintiffs and heirs of Mrs. Maltby ask for an adjudication upon their respective interests. See *Ives* v. *Beecher*, 75 Conn. 153, 52 Atl. 746 (1903); *Ives* v. *Beecher*, 75 Conn. 564, 54 Atl. 207 (1903); *Gerard* v. *Ives*, 78 Conn. 485, 62 Atl. 607 (1906); *Gerard* v. *Beecher*, 80 Conn. 363, 68 Atl. 438 (1908).

substituted for her in the enforcement of any claim of this character which could be enforced in her interest. This contention involves the maintenance of two independent propositions, to wit: (1) that the circumstances attending the making of the improvements by Mrs. Beecher were such as to justify the assertion of a claim in equity for compensation for them, and (2) that the plaintiffs by their foreclosure have come into the rights in that regard which otherwise would be enjoyed by her estate.

We have no need to enter upon an examination of the question as to what the rights of Mrs. Beecher's estate, arising out of the circumstances under which the improvements were made by her, or the conduct of the parties interested in the estate, or both together, might, in the absence of the foreclosure, be. It is sufficient for the negation of the plaintiff's contention that they have not succeeded in appropriating to themselves any claim of that character and in coming into a position to enforce such a claim. It is the policy of our law that all the property of a debtor should be responsible for his debts, and in consonance with this policy we have held that our statutes regulating attachments and executions subject to these processes certain equitable interests in property. The interests which have been thus brought within the reach of execution have included the equitable title which a cestui que trust has in lands or property, the legal title of which is held by another under a trust for his benefit, the equity of redemption in property subject to a mortgage,[54] the equity in shares of stock pledged as collateral for a loan, and the income of a trust fund which the cestui que trust is entitled to receive as of right. *Punderson* v. *Brown*, 1 Day (Conn.) 93, 96; *Davenport* v. *Lacon*, 17 Conn. 278, 281; *Middletown Sav. Bank.* v. *Jarvis*, 33 Conn. 372, 379; *Ives* v. *Beecher*, 75 Conn. 564, 568; *Loomer* v. *Loomer*, 76 Conn. 522, 528. These equitable interests are of a very different character,

[54]At common law an equity of redemption was not liable to sale on execution against the mortgagor. *Plunket* v. *Penson*, 2 Atk. 293 (1742); *Kelly* v. *Burnham*, 9 N. H. 20 (1837); *Van Ness* v. *Hyatt*, 13 Pet. (U. S.) 294, 10 L. ed. 168 (1839); *Woodside* v. *Adams*, 40 N. J. L. 417 (1878); *Cochrane* v. *Rich*, 142 Mass. 15, 6 N. E. 781 (1886). But in the majority of states, by statutes or otherwise, the interest of the mortgagor may be taken under an execution against him. *Jackson ex dem. Tousley* v. *Rhodes*, 8 Cow. (N. Y.) 47 (1827); *Garro* v. *Thompson*, 7 Watts (Pa.) 416 (1838); *Doughten* v. *Gray*, 10 N. J. Eq. 323 (1855); *Curd* v. *Wunder*, 5 Ohio St. 92 (1855); *Taylor* v. *Cornelius*, 60 Pa. St. 187 (1869); *Durfee* v. *Grinnell*, 69 Ill. 371 (1873); *Trimm* v. *Marsh*, 54 N. Y. 599, 13 Am. Rep. 623 (1874); *Walters* v. *Defenbaugh*, 90 Ill. 241 (1878); *Loomis* v. *Lewis*, 140 Mass. 208, 5 N. E. 488 (1885); *Bodwell* v. *Lane*, 83 Maine 168, 21 Atl. 829 (1891); *Second Nat. Bank* v. *Gilbert*, 174 Ill. 485, 51 N. E. 584, 66 Am. St. 306 (1898); *Due* v. *Bankhardt*, 151 Ky. 624, 152 S. W. 786 (1913). The great weight of authority is to the effect that the interest of a mortgagee in real property before foreclosure is not subject to sale on execution against him. *Jackson ex dem. Norton* v. *Willard*, 4 Johns. (N. Y.) 41 (1809); *Eaton* v. *Whiting*, 20 Mass. 484 (1826); *Rickert* v. *Madeira*, 1 Rawle (Pa.) 325 (1829); *Cooch* v. *Gerry*, 3 Harr. (Del.) 281 (1840); *Brown* v. *Bates*, 55 Maine 520, 92 Am. Dec. 613 (1868); *Morris* v. *Barker*, 82 Ala. 272, 2 So. 335 (1886). As to chattels see *Ferguson* v. *Lee*, 9 Wend. (N. Y.) 258 (1832); *Chapman* v. *Hunt*, 13 N. J. Eq. 370 (1861); *Prout* v. *Root*, 116 Mass. 410.

however, from that which it is sought to here appropriate. It is doubtless true, in a sense, that an equitable right to have compensation for betterments is one which charges the land with a lien which courts of equity will upon proper occasion recognize, and by appropriate processes enforce. This charge, however, does not in strictness constitute a lien on the estate. *Griswold* v. *Bragg*, 48 Conn. 577, 581; 1 Story's Equity Jurisp. (12th ed.) S. 655; Freeman on Cotenancy & Partition (2d ed.), section 510. But not all interests in property can be appropriated by a levy of execution upon the property. That of a mortgagee can not. *Huntington* v. *Smith*, 4 Conn. 235, 237; *McKelvey* v. *Creevey*, 72 Conn. 464, 467; *Pettus* v. *Gault*, 81 Conn. 415, 419. In like manner an interest which is so indeterminate, uncertain, or contingent that it is incapable of being appraised or sold with fairness to both the debtor and creditor, may not be thus levied upon. In *Smith* v. *Gilbert*, 71 Conn. 149, 154, this matter was fully discussed and passed upon, and we held that while an interest which was not strictly goods or lands might be taken, it was only when that interest was property capable of ascertainment, definition and valuation, that such was the case. The situation here is one which clearly brings any uncertain, undetermined equity which Mrs. Beecher may have had for compensation for her improvements, within these qualifying principles, and makes it certain that it was not open to a levy of execution upon the realty or interest therein, to satisfy the judgment of these plaintiffs.[55] That

[55]At common law an equitable estate in real or personal property could not be sold under a *fieri facias*. Hence the creditor was obliged to go into equity to subject such interest to the payment of the judgment. *Lyster* v. *Dolland*, 1 Ves. Jr. 431 (1792); *Scott* v. *Scholey*, 8 East 466 (1807); *Metcalf* v. *Scholey*, 2 B. & P. N. R. 461 (1807); *Wilson* v. *Beard*, 19 Ala. 629 (1851); *Smith* v. *McCann*, 24 How. (U. S.) 398, 16 L. ed. 714 (1860); *Newson* v. *Kurtz*, 86 Ky. 277, 5 S. W. 575, 9 Ky. L. 587 (1887); *Potter* v. *Couch*, 141 U. S. 296, 35 L. ed. 721, 11 Sup. Ct. 1005 (1890); *Bates* v. *Ledgerwood M. Co.*, 130 N. Y. 200, 29 N. E. 102 (1891); *Tyrrell* v. *Painton*, L. R. (1895) 1 Q. B. 202; *Tischler* v. *Robinson*, 56 Fla. 699, 48 So. 45, (1908); *Hunter* v. *Citizens' S. & T. Co.*, 157 Iowa 168, 138 N. W. 475 (1912); *Smith* v. *Collins*, 81 N. J. Eq. 348, 86 Atl. 957 (1913). By section 10 of the Statute of Frauds (29 Car. II, ch. 3) the interest of a cestui que trust in lands, tenements and hereditaments was made liable to execution. The tendency of the decisions was to restrict the operation of the statute to the estates therein clearly designated. *King* v. *Ballett*, 2 Vern. 248 (1691); *Harris* v. *Pugh*, 4 Bing. 335 (1827), such as a mere dry trust; *Doe ex dem. Hull* v. *Greenhill*, 4 B. & Ald. 684, 690 (1821); *Stevens* v. *Hince*, 110 L. T. 935 (1914). The statute did not extend to the provinces and in some of the states was not adopted. *Russell* v. *Lewis*, 2 Pick. (Mass.) 508 (1824). In other states the rule was established without statute that the equitable as well as the legal estate of the debtor might be taken in execution. *Flannagin* v. *Daws*, 2 Houst. (Del.) 476 (1862); *Atwater* v. *Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741 (1891); *Auwerter* v. *Mathiot*, 9 Serg. & R. (Pa.) 397 (1823); *Rickert* v. *Madeira*, 1 Rawle (Pa.) 325 (1829). In the last case it is said, in the opinion of the court: "In consequence of the want of a court of chancery, our law differs from the law of England, for in England a judgment only binds a legal interest; in Pennsylvania, a legal and an equitable interest. In England, the relief is in chancery; but here, we enforce payment by the common-law process of execution; and, hence, under the construction of the Act of 1705, for taking lands in execution for payment of debts, an equitable as well as a legal title to land, has been considered as subject to the lien of a judgment.

which can not be taken upon execution can not be reached by a judgment lien. General Statutes, section 4151; *Ives* v. *Beecher*, 75 Conn. 564, 567. The superior court is advised that the plaintiffs are not entitled to compensation out of the proceeds of any sale of the property in question, which may be ordered, by reason of any improvements Mrs. Beecher may have made thereon.

ROGERS *v.* KENNAY

COURT OF QUEEN'S BENCH, 1846

11 *Jur.* 14[a]

Issue under the Interpleader Act, tried before Coleridge, J., at the summer assizes at Chelmsford, in 1845, in the common form, to try whether certain goods, seized by the sheriff of Essex in an execution at the suit of the defendant, against one William Rowe, were, at the time of such seizure, the property of the plaintiff, Rogers, or not. On the trial, it appeared that Rowe, who was a builder, being indebted to Rogers, had deposited goods with him, under the following memorandum:

"Mr. Thomas Rogers. Sir,—In consideration of your having given cash for several bills of exchange, bearing my signature, and drawn by you upon my responsibility and recommendation, I herewith deposit about 500 slates; between thirty and forty slate chimney jambs, complete, and ready for fixing up; twenty sink stones; a quantity of stone paving; twelve large stone logs for laying down to given purposes; a quantity of Bath stone coping, and several

---

The extent of the decisions in Pennsylvania is to subject to execution all possible contingent titles in land, accompanied with an estate, property, or real interest in the land, whether that interest be legal or equitable."

The tendency of modern legislation is to subject equitable estates to levy and sale on execution but the statutes and the decisions interpreting them differ in the several jurisdictions. See *Davenport* v. *Lacon*, 17 Conn. 278 (1845); *Kennedy* v. *Nunan*, 52 Cal. 326 (1877); New York Code Civ. Pro., § 1431; *Laclede Bank* v. *Keeler*, 103 Ill. 425 (1882); *Poole* v. *French*, 71 Kans. 391, 80 Pac. 997 (1905); *Raymond* v. *Blancgrass*, 36 Mont. 449, 93 Pac. 648 (1908); *Chamblee* v. *Atlanta Brewing &c. Co.*, 131 Ga. 554, 62 S. E. 1032 (1908); *Robertson* v. *Howard*, 82 Kans. 588, 109 Pac. 696 (1910); *Peoples Trust Co.* v. *Deweese*, 143 Ky. 730, 137 S. W. 201 (1911). Compare *Gorham* v. *Wing*, 10 Mich. 486 (1862); *Starr* v. *United States*, 8 App. D. C. 552 (1896); *Hogan* v. *Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644 (1868); *Linn* v. *Davis*, 58 N. J. L. 29, 32 Atl. 129 (1895); *First Nat. Bank of Cortland* v. *Logue*, 89 Ohio St. 288, 106 N. E. 21, L. R. A. 1915 B, 340 n (1914). In *Williams* v. *Baker*, 62 N. J. Eq. 563, 51 Atl. 201 (1902), it is held that N. J. Comp. Stats. (1910), p. 4675, § 7, providing that on sale on execution of any interest in lands, the purchaser shall take such estate and interest as the debtor had, refers only to legal estates, and does not subject an equitable estate to execution and sale. See further Freeman on Executions (3d ed.), § 188; 17 Cyc. 957; 11 A. & E. Encyc. of Law (2d ed.) 632. As to trust estates, see Ames' Cases on Trusts, p. 433 et seq.; *Demuth* v. *Kemp*, 130 N. Y. App. Div. 546, 115 N. Y. S. 28 (1909).

[a] S. c. 9 Ad. & El. N. S. 592, 15 L. J. N. S. (Q. B.) 381.

stone steps and stone slabs; fourteen wheelbarrows, and fifty-six deal planks; and the whole of these things are now upon your land at Maryland Point, Stratford, Essex, as collateral security for any sum of money now due or owing, or which may become due hereafter or owing, by virtue of any bill of exchange, I O U's or in any other way whatsoever or howsoever; and I further authorize you, in default or nonpayment on my part, to sell, by private or public sale, the whole of the foregoing articles named, and account to me (in account of debit and credit for the same), showing how the account may then stand between us.

"WILLIAM ROWE."

Rowe removed some of the materials from time to time, and deposited others in lieu of them. On the tenth of March the sheriff seized the goods in execution upon the plaintiff's premises. The jury found a verdict for the plaintiff, on the question whether the memorandum was given bona fide, or was a colorable contrivance to protect the goods against an execution; but the learned judge directed a verdict to be entered for the defendant according to his construction of the memorandum, reserving leave to move to enter a verdict for the plaintiff. In the following, Michaelmas Term, a rule nisi accordingly was obtained, against which *Pearson* showed cause. First, some of the goods seized were not the same as had been deposited with Rogers under the memorandum; and the plaintiff is entitled to a verdict for them. The memorandum could not give the transferee a property in goods not upon the plaintiff's premises at the time of the assignment. *Topfield* v. *Hillman,* 6 Man. & G. 245; *Gale* v. *Burnell,* 10 Jur. 198. [PATTESON, J.: The memorandum does not seem to point to any future acquired property.] Secondly, a pledge or mortgage of goods and chattels does not confer a property in them to the pawnee or mortgagee. In detinue, the declaration in which states that the plaintiff was possessed, as of his own property, a lien must be pleaded specially; *Mason* v. *Farnell,* 12 M. & W. 674, overruling *Lane* v. *Tewson,* in note to *White* v. *Teal,* 12 Ad. & El. 116; 4 Per. & D. 43; 5 Jur. 1037; *Whitehead* v. *Harrison,* 6 Q. B. 423; 8 Jur. 894; *Barnewall* v. *Williams,* 7 Man. & G. 403; so also in trover, which involves the right of property and right of possession. *White* v. *Teal,* 12 Ad. & El. 113, 4 Jur. 890. The sheriff might have sold the goods subject to the lien of the plaintiff. "Goods pawned may be taken on an execution against the pawner, upon satisfaction of the pledge." Tidd. Pr. 1003, (9th ed.).

Montagu Chambers, contra: Part of the goods were deposited under the memorandum, and other part at different times, giving the plaintiff a lien upon them. As to the first, the plaintiff holds them as a pledge, with a power to sell. The sheriff has no right to seize goods held in right of a lien upon them. *Legg* v. *Evans,* 6 M. & W. 36. As to the question what is meant by the issue of property or no property, a lien confers a special property which entitles the party to detain the goods as against a stranger until his claim is satisfied. In trover, a plea of no property in the plaintiff means no property as against the defendant. *Nichols* v. *Bastard,*

2 Cr. M. & R. 659. [PATTESON, J.: In *Richards* v. *Symons*, 10 Jur. 6, a right of lien, conferred upon the defendant by the plaintiff, supported a plea in trespass, that the chattel was not the property of the plaintiff.] When the judge directed this issue, he meant to introduce the question as to special as well as general property.

LORD DENMAN, C. J.: If a debtor has pawned his goods the sheriff can do no more than sell the duplicates; they are all the interest of the execution debtor in the goods; he can not get the goods without paying the money for which they are pledged. *Legg* v. *Evans*, 6 M. & W. 36, is a case directly in point, and it was much considered.

PATTESON, J.: The case of *Legg* v. *Evans* is directly in point, because the action in that case was brought against the sheriff who had seized the goods in question, of which the plaintiff in trover stated that he was lawfully possessed as of his own property. If in this case any goods were taken which were not in the possession of the plaintiff, that would make a difference; no question of lien would then arise.

Williams, J., concurred. Rule absolute.[57]

---

[57]Chattels pledged are not, at common law, liable to seizure and sale on execution against the pledgor, at least until payment of the debt or other extinguishment of the pledgee's title. *Badlam* v. *Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202 (1823); *Jacobs* v. *Latour*, 5 Bing. 130 (1828); *Moore* v. *Hitchcock*, 4 Wend. (N. Y.) 292 (1830); *Wheeler* v. *McFarland*, 10 Wend. (N. Y.) 318 (1833); *Sexton* v. *Monks*, 16 Mo. 156 (1852); *Danforth* v. *Denny*, 25 N. H. 155 (1852); *Mower* v. *Stickney*, 5 Minn. 397 (Gil. 321) (1861); *Reeves* v. *Serben*, 16 Iowa 234, 85 Am. Dec. 513 (1864); *First Nat. Bank* v. *Pettit*, 9 Heisk. (Tenn.) 447 (1872); *Smith* v. *Jennings*, 74 Ga. 551 (1885); *Neill* v. *Rogers*, 41 W. Va. 37, 23 S. E. 702 (1895); *McClintock* v. *Central Bank*, 120 Mo. 127, 24 S. W. 1052 (1893); *First Nat. Bank* v. *Harkness*, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408 (1896); *Rice* v. *Gilbert*, 72 Ill. App. 649 (1897); *Sather Banking Co.* v. *Hartwig*, 23 Misc. 89, 51 N. Y. S. 677 (1898); *McClung* v. *Colwell*, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. 961 (1901). In many states, usually by statute, the interest of a pledgor may be sold subject to the pledgee's interest. *Pomeroy* v. *Smith*, 17 Pick. (Mass.) 85 (1835); *McConeghy* v. *McCaw*, 31 Ala. 447 (1858); *Mechanics Bldg. & Loan Assn.* v. *Conover*, 14 N. J. Eq. 219 (1862); *Hass* v. *Prescott*, 38 Wis. 146 (1875); *Horner* v. *Dennis*, 34 La. Ann. 389 (1882); *Fox* v. *Cronan*, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190 (1885); *Lewis* v. *Dillard*, 76 Fed. 688 (1896); *People's Nat. Bank* v. *Wheedon*, 115 Ga. 782, 42 S. E. 91 (1902); *Miliken Commission Co.* v. *Albers Commission Co.*, (Mo.) 147 S. W. 1065 (1912). By § 1412 N. Y. Code Civ. Pro. the interest of the debtor in property pledged may be sold "in the hands of the pledgee" by virtue of an execution against property. Under the earlier cases the sheriff took possession. *Bakewell & Cole* v. *Ellsworth*, 6 Hill (N. Y.) 484 (1844); *Stief* v. *Hart*, 1 N. Y. 20, 4 How. Pr. (N. Y.) 223 (1847). In Pennsylvania under the Act of June 16, 1836, P. L. 775, § 23, 2 P. & L. Dig. (2d ed.) 3388, the sheriff may sell the debtor's interest without disturbing the pledgee's possession. *Srodes* v. *Caven*, 3 Watts (Pa.) 258 (1834); *Baugh* v. *Kirkpatrick*, 54 Pa. St. 84, 93 Am. Dec. 675 (1867); *Freeman* v. *Simons*, 7 Phila. (Pa.) 307 (1869); *Reichenbach* v. *McKean*, 95 Pa. St. 432 (1880); *Waverly Coal &c. Co.* v. *McKennan*, 110 Pa. St. 599, 1 Atl. 543 (1855).

It has been held that the interest of the pledgee in the goods may be sold on execution against him. *Saul* v. *Kruger*, 9 How. Pr. (N. Y.) 569 (1854); *In re Rollason*, L. R. 34 Ch. Div. 495 (1887). Contra: *Goodyear* v. *Donnelly*, 13 W. N. C. (Pa.) 314 (1883), and see *Mores* v. *Conham*, Owen 123 (1609).

DAVIS *v.* BARNARD

SUPREME COURT OF NEW HAMPSHIRE, 1881

60 *N. H.* 550

Bill in equity to remove a cloud from the plaintiff's title to certain real estate. Facts agreed. The plaintiff and one John K. Davis were tenants in common of certain lands in Northfield; and the defendant, having a judgment against John K. Davis, levied the execution issued thereon upon the premises as if John K. Davis were sole tenant. The plaintiff claims that the levy is void, and that it creates a cloud on her title.[58]

SMITH, J.: One tenant can not convey a part of the land held in common with another, by metes and bounds, to a stranger. If he could, his grantee would become tenant in common of a particular part with the other tenant, who, in making a legal partition, might, notwithstanding the conveyance, have the whole of the part thus conveyed assigned as his property. *Porter* v. *Hill*, 9 Mass. 34. For the same reason an execution against one holding land as a tenant in common can not be extended on a part of the land so holden by metes and bounds. *French* v. *Lund*, 1 N. H. 42; *Thompson* v. *Barber*, 12 N. H. 563; *Smith* v. *Knight*, 20 N. H. 9; *Hall* v. *Young*, 37 N. H. 134; *Carter* v. *Beals*, 44 N. H. 413.[59]

The defendant levied his execution upon the whole estate, one moiety of which belonged to the plaintiff and the other to the judgment debtor. According to all the authorities, the levy was good against John K. Davis; and although the return shows that the whole tract was levied upon, in fact his moiety and that alone passed to the creditor by virtue of the levy. The levy did not affect the plaintiff's title to the other half of the premises. She was not a party to the levy, and is not bound by anything that was done affecting her interest. She remains seized of an undivided half, and the defendant became seized of the other half as tenant in common with her. Upon petition by either for partition, there will be nothing in the levy to prevent judgment that partition be made. The defendant claims to hold only the moiety that belonged to John K. Davis, and makes no claim to the moiety belonging to the plaintiff. As the levy can have no effect upon the plaintiff's rights, when partition is made it must be made regardless of the levy. The plaintiff is entitled to a decree that the defendant release to her one undivided half of the whole tract.

Case discharged.[60]

---

[58] The arguments of counsel and part of the opinion of the court are omitted.

[59] Accord: *Varnum* v. *Abbot*, 12 Mass. 474, 7 Am. Dec. 87 (1815); *Baldwin* v. *Whiting*, 13 Mass. 57 (1816). Contra: *Treon* v. *Emerick*, 6 Ohio St. 391 (1834).

[60] The interest of one of two or more joint tenants or tenants in common of land is subject to levy and sale upon execution against such tenant. *Starr* v. *Leavitt*, 2 Conn. 243, 7 Am. Dec. 268 (1817); *Bavington* v. *Clarke*,

RAINS *v.* McNAIRY

SUPREME COURT OF TENNESSEE, 1843

4 Humph. (Tenn.) 356

John McNairy and Francis McNairy were the joint owners of a jackass. A judgment was obtained in the Circuit Court of Davidson County by Stout against John McNairy, and a fieri facias was issued thereupon, and levied on the animal, by Rains, sheriff of

---

2 Pen. & W. (Pa.) 115, 21 Am. Dec. 432 (1830); *Galusha* v. *Sinclear*, 3 Vt. 394 (1831); *McCormick* v. *Harvey*, 9 Watts (Pa.) 482 (1840); *Jones* v. *Lewis*, 30 N. Car. (8 Ired.) 70, 47 Am. Dec. 338 (1847); *Argyle* v. *Dwinel*, 29 Maine 29 (1848); *Smith* v. *Knight*, 20 N. H. 9 (1849); *Arnold* v. *Cessna*, 25 Pa. St. 34 (1855); *Baker* v. *Shepherd*, 37 Ga. 12 (1867); *Thompson* v. *Stitt*, 56 Pa. St. 156 (1867); *Butler* v. *Roys*, 25 Mich. 53, 12 Am. Rep. 218 (1872); *Smith* v. *Crawford*, 81 Ill. 296 (1876); *Aycock* v. *Kimbrough*, 61 Tex. 543 (1884); *Frederick* v. *Missouri River &c. R. Co.*, 82 Mo. 402 (1884); *Brown* v. *Renfro*, 63 Tex. 600 (1885); *McClellan* v. *Solomon*, 23 Fla. 437, 2 So. 825, 11 Am. St. 381 (1887); *Small's Appeal*, 1 Monag. (Pa.) 664, 15 Atl. 767 (1888); *Ballard* v. *Scruggs*, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. 703 (1891); *Thornburg* v. *Wiggins*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. 422 (1893); *Midgley* v. *Walker*, 101 Mich. 583, 60 N. W. 296, 45 Am. St. 431 (1894).

In the case of estates by entireties the common law rule subjected the property to the husband's debts provided the wife's right of survivorship was not interfered with. *Barber* v. *Harris*, 15 Wend. (N. Y.) 615 (1836); *Stoebler* v. *Knerr*, 5 Watts (Pa.) 181 (1836); *Washburn & Campbell* v. *Burns*, 34 N. J. L. 18 (1869). Since the married women's property acts have freed the wife's property from liability to the husband's creditors it has been held in one line of cases that during their joint lives the land is free from judgment or execution against either of them. *Chandler* v. *Cheney*, 37 Ind. 391 (1871); *Bruce* v. *Nicholson*, 109 N. Car. 202, 13 S. E. 790, 26 Am. St. 562 (1891); *Naylor* v. *Minock*, 96 Mich. 182, 55 N. W. 664, 35 Am. St. 595 (1893); *Cole Mfg. Co.* v. *Collier*, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. 921 (1895); *McCubbin* v. *Stanford*, 85 Md. 378, 37 Atl. 214 (1897); *Dickey* v. *Converse*, 117 Mich. 449, 76 N. W. 80, 72 Am. St. 568 (1898); *Ray* v. *Long*, 132 N. Car. 891, 44 S. E. 652 (1903); *Jordan* v. *Reynolds*, 105 Md. 288, 66 Atl. 37, 9 L. R. A. (N. S.) 1026n, 121 Am. St. 578, 12 Ann Cas. 51 (1907); *Allens* v. *Lyon*, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463n, 116 Am. St. 791, 9 Ann. Cas. 137 (1907); *Meyer's Estate*, 232 Pa. 89, 81 Atl. 145 (1911); *Beihl* v. *Martin*, 236 Pa. 519, 84 Atl. 953, 24 L. R. A. (N. S.) 555n (1912); *In re Beihl*, 197 Fed. 870 Pa. (1912). Other cases hold that husband and wife may each encumber their undivided half of the property during their joint lives subject to their respective rights of survivorship. *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52 (1887); *Hiles* v. *Fisher*, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. 762 (1895); *Laird* v. *Perry*, 74 Vt. 454, 52 Atl. 1040, 59 L. R. A. 340 (1901). See 9 L. R. A. (N. S.) 1026; 61 U. of Pa. Law Review 476.

An execution against one of several joint tenants or tenants in common is levied on the debtor's undivided interest and not by taking a part of the tract as the debtor's share. *Bartlet* v. *Harlow*, 12 Mass. 348, 7 Am. Dec. 76 (1815); *Smith* v. *Benson*, 9 Vt. 138, 31 Am. Dec. 614 (1837); *Brown* v. *Bailey*, 1 Metc. (Mass.) 254 (1840); *Staniford* v. *Fullerton*, 18 Maine 229 (1841); *Campau* v. *Gogfrey*, 18 Mich. 27, 100 Am. Dec. 133 (1869); *Aycock* v. *Kimbrough*, 61 Tex. 543 (1884). Contra: *Treon* v. *Emerick*, 6 Ohio 391 (1834). In Massachusetts, a levy and sale on execution of land of a tenant in common, operates, after partition, by way of estoppel to transfer title to the purchaser, if the land described is allotted to the debtor. *Cressey* v. *Cressey*, 215 Mass. 65, 102 N. E. 314 (1913). "The application of this principle," says Rugg, C. J., "results in something like a wager or chance. The grantee gets nothing unless on partition the shares of the grantor should happen to include the parcel described by metes and bounds in the deed."

Davidson. F. McNairy attended on the day of the sale and forbade the same, but the sheriff sold the entire interest in the animal and delivered him to the purchaser.

Francis McNairy instituted thereupon this action of trover in the Circuit Court of Davidson County against Rains, and a verdict and judgment were rendered, Maney, Judge, presiding, in favor of the plaintiff, for the sum of $300, that being the estimated value of his interest in the animal. The defendant, Rains, appealed.[61]

GREEN, J.: Francis H. and John S. McNairy were joint owners of a jackass, upon which Rains, the sheriff, levied an execution in his hands against John S. McNairy. F. H. McNairy forbade the sale, claiming the ownership of one-half; but the sheriff sold and delivered to the purchaser the whole jack; whereupon this action of trover was brought. The plaintiff recovered for one-half the value of the jack in the circuit court, and Rains, the sheriff, appealed to this court.

It is now insisted that the sheriff had a right to take and deliver the jack to the purchaser, by virtue of the execution against John S. McNairy; that the purchaser became joint owner of the jack with F. H. McNairy, the sale of the entire property having in fact transferred only the one-half; and as a consequence of these propositions, it is contended that there has been no conversion, and that no action lies by one tenant in common against the other.

Each co-tenant having a right to the possession, can not be sued by the other part owner, unless there has been a conversion of the property; and the older elementary books hold, that a sale by one co-tenant of the entire property does not amount to a conversion, but that its destruction would.[62]

It is argued that as the sale by one tenant in common of his co-tenant's share, passes the interest of the vendor only, the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale. Bac. Abr. Trover; Salk. 292; 1 East 367; Littleton, section 323. And this doctrine was maintained in the case of *Morcereau* v. *Norton*, 15 Johns. (N. Y.) 179, where it was held that a sale was not such a destruction of the property as to destroy the tenancy in common.

But the more recent American cases hold that as the assumption of authority over, and actual sale of the property by a stranger, will constitute a conversion, so the assuming authority to sell, and actually making sale of the interest of another, under a claim of title in the vendor, although he be part owner, may be taken to be a conversion, for which an action of trover will lie. *Weld* v. *Oliver*, 21 Pick. (Mass.) 559; *White* v. *Osborne*, 21 Wend. (N. Y.) 72; *Melville* v. *Brown*, 15 Mass. 82; *Lucas* v. *Wasson*, 3 Dev. (N. Car.) 398.

It is true, such sale does not vest in the purchaser any greater interest than that of the party making the sale; and the co-tenant, who is not consulted, may so consider it, and take the property when opportunity offers; but he may sue in trover for the conversion,

---

[61]The arguments of counsel are omitted.
[62]*Trout* v. *Kennedy*, 47 Pa. 387 (1864).

and thereby vest in the purchaser the entire property. 21 Wend. (N. Y.) 77.

In a late case, *Waddell* v. *Cook*, 2 Hill (N. Y.) 47, an action of trespass was sustained against the marshal, Waddell, for seizing and selling goods of Cook under fieri facias against Bowne, who was a joint owner of the goods with Cook. The court held that though the marshal's authority extended to a total dispossession of both the co-tenants by an execution against one, yet the law denied him the right to sell the entire property. In attempting to do so, though the act be nugatory, yet the law may well treat it as such an abuse of legal authority, as renders him a trespasser ab initio. 2 Kent 351, note b, 4th ed.

We therefore think this action was well conceived, and affirm the judgment.[63]

---

[63]The interest of a tenant in common chattels may be taken and sold on execution against him alone. *Mersereau* v. *Norton*, 15 Johns. (N. Y.) 179 (1818); *Pettingill* v. *Bartlett*, 1 N. H. 87 (1817); *Whitney* v. *Ladd*, 10 Vt. 165 (1838); *M'Elderry* v. *Flannagan*, 1 Har. & G. (Md.) 308 (1827); *Thompson* v. *Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176 (1850); *Hopkins* v. *Forsyth*, 14 Pa. St. 34, 53 Am. Dec. 513 (1850); *Hayden* v. *Binney*, 73 Mass. (7 Gray.) 416 (1856); *Neary* v. *Cahill*, 20 Ill. 214 (1858). The general practice is for the officer to levy upon and take possession of the whole of the common property but to sell only the debtor's interest. *Melville* v. *Brown*, 15 Mass. 82 (1818); *Reed* v. *Howard*, 43 Mass. (2 Metc.) 36 (1840); *Waddell* v. *Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372 (1841); *Fiero* v. *Betts*, 2 Barb. (N. Y.) 633 (1848); *Ray* v. *Birdseye*, 5 Denio (N. Y.) 619 (1846); *Caldwell* v. *Auger*, 4 Minn. (Gil. 156) 217, 77 Am. Dec. 515 (1860); *Veach* v. *Adams*, 51 Cal. 609 (1877); *Burton* v. *Kennedy*, 63 Vt. 350, 21 Atl. 529, 25 Am. St. 769 (1891). *Henderson* v. *Brennecke*, 26 App. Div. 309, 49 N. Y. S. (1898); *Spalding* v. *Allred*, 23 Utah 354, 64 Pac. 1100 (1901). Unless naturally severable, *Newton* v. *Howe*, 29 Wis. 531, 9 Am. Rep. 616 (1872), see *Snyder* v. *Stehman*, 10 Pa. Super. Ct. 639 (1899). And in some states statutes forbid the sheriff from taking a chattel from a co-owner without his consent, in which case the levy may be made without possession. *Vicory* v. *Strausbaugh*, 78 Ky. 425 (1880); *Willis* v. *Loeb*, 59 Miss. 169 (1881); *Richart* v. *Goodpaster*, 116 Ky. 637, 76 S. W. 831, 25 Ky. L. 889 (1903); *Heydon* v. *Heydon*, 1 Salk. 392 (1693).

The principles applicable to cotenancies, were in the early cases, applied to partnerships. *Bachurst* v. *Clinkard*, 1 Show. 169 (1691); *Chapman* v. *Koops*, 3 Bos. & P. 289 (1802); *Johnson* v. *Evans*, 7 M. & G. 240 (1844); *Helmore* v. *Smith*, L. R. 35 Ch. Div. 449 (1885), and in America these precedents have been followed by courts. *Reed* v. *Shepardson*, 2 Vt. 120, 19 Am. Dec. 697 (1829); *Phillips* v. *Cook*, 24 Wend. (N. Y.) 389 (1840); *Newhall* v. *Buckingham*, 14 Ill. 405 (1853); *Wiles* v. *Maddox*, 26 Mo. 77 (1857); *Nixon* v. *Nash*, 12 Ohio St. 647, 80 Am. Dec. 390 (1861); *Robinson* v. *Tevis*, 38 Cal. 611 (1869); *Smith* v. *Orser*, 42 N. Y. 132 (1870); *Clements* v. *Jessup*, 36 N. J. Eq. 569 (1883); *Wright* v. *Ward*, 65 Cal. 525, 4 Pac. 534 (1884); *Felt* v. *Cleghorn*, 2 Colo. App. 4, 29 Pac. 813 (1892). But the interest acquired by the purchaser is no more than the interest of the execution debtor upon a settlement of the partnership's affairs. *United States* v. *Hack*, 8 Pet. (U. S.) 271, 8 L. ed. 941 (1834); *Garbett* v. *Veale*, 5 Ad. & El. (N. S.) 408 (1843); *Eighth Nat. Bank* v. *Fitch*, 49 N. Y. 539 (1872); *Farley, Spiar & Co.* v. *Moog*, 79 Ala. 148, 58 Am. Rep. 585 (1885); *Swan* v. *Gilbert*, 175 Ill. 204, 51 N. E. 604, 67 Am. St. 208 (1898); *Weber* v. *Herts*, 188 Ill. 68, 58 N. E. 676 (1900). Hence it has been held that the partnership goods can not be taken from the firm for the purpose of selling the interest of a member of the firm. *Sanborn* v. *Royce*, 132 Mass. 594 (1882); *Russell* v. *Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. 432 (1896); *Levy & Sugar* v. *Cowan*, 27 La. Ann. 556 (1875); *Haynes* v. *Knowles*, 36 Mich. 407 (1877); *Ernest* v. *Woodworth*, 124 Mich. 1, 82 N. W.

SECTION 3. LIEN OF EXECUTIONS

DUNCAN *v.* M'CUMBER

SUPREME COURT OF PENNSYLVANIA, 1840

10 *Watts (Pa.)* 212

Error to the Common Pleas of Erie County.

This was an action of trespass de bonis asportatis, brought by Solomon M'Cumber, the defendant in error, against James Duncan, plaintiff in error. The goods in question were part of the personal estate of Moses Fellows at the time of his decease; and as such were thereupon taken into possession by Rebecca Fellows, his executrix and widow. Upon a judgment obtained against her, as the executrix of Moses Fellows, in favor of James Duncan, the plaintiff in error, in the common pleas of Erie County, a writ of fieri facias was sued out to May term, 1839, directed to the sheriff of Erie county, and delivered to him to be executed on the twenty-seventh day of March, 1839, in the borough of Erie; at which place, it seems, that the sheriff, without going to the residence of Rebecca Fellows about fourteen miles from the borough, where the goods then were, endorsed a seizure of them upon the back of the writ, without seeing them, or having them in his power; and without attempting to take the possession of them, until twenty days or more afterwards, when, in the meanwhile, they had come into the hands and possession of the defendant in error, as a purchaser thereof at constable's sale, made under the following circumstances: On the first of April, 1839, an execution was issued by Thomas Greenwood, a justice of the peace of Erie county, against Rebecca Fellows, in her own right, as it would appear by the execution, at the suit of Ezra Thompson, for $70.79, besides costs of suit; also, on the next day, another execution was issued by P. Wells, another justice of the peace of Erie county, against Rebecca Fellows, as executrix of Moses Fellows, deceased, at the suit of Timothy J. Newton, for a debt of $6.20, besides eighty-two cents cost; both of these executions were directed to the constable of Harborcreek

661 (1900); *Morrison* v. *Blodgett*, 8 N. H. 238, 29 Am. Dec. 653 (1836); *Treadwell* v. *Brown*, 43 N. H. 290 (1861); *Garvin* v. *Paul*, 47 N. H. 158 (1866); *Deal* v. *Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702 (1853); *Reinheimer* v. *Hemingway*, 35 Pa. St. 432 (1860); *Durborrow's Appeal*, 84 Pa. St. 404 (1877), Pa. Act of April 8, 1873, P. L. 65, P. & L. Dig. (2d ed.) 3572; *Hare* v. *Comm.*, 92 Pa. St. 141 (1879); *Richard* v. *Allen*, 117 Pa. St. 199, 11 Atl. 552, 2 Am. St. 652 (1887); *White* v. *Rech*, 171 Pa. St. 82, 32 Atl. 1130 (1895); *In re Spackman's Appeal*, 4 Pa. Super. Ct. 221 (1897); *Jones* v. *Lawrence* (Tex.) 151 S. W. 584 (1912). In England under the act of 1890 (53 and 54 Vict.) ch. 39, § 23, a writ of execution can not issue against partnership property except on a judgment against the firm. But the judgment creditor of a partner may obtain an order charging the partner's interest in the firm and appointing a receiver of his share of the profits. *Brown, Janson & Co.* v. *Hutchinson*, L. R. (1895) 2 Q. B. 126.

township, in Erie county, whose name, as it appears, was G. W. Walker. Having them in his hands on the second day of April, 1839; he, by virtue thereof, actually took the goods from the possession of Rebecca Fellows where he found them, and in the course of ten or twelve days afterwards, sold them at public auction to the defendant in error, after giving due notice thereof. The goods, upon the defendant in error's paying for them, were accordingly delivered by the constable to him; from whom the plaintiff in error, in company with the deputy sheriff, afterwards, but before the return day of the fieri facias, took the goods by virtue thereof.

Upon the trial of the cause below, after the evidence was given to the jury, the counsel of the defendant requested the court to charge the jury, first, that the execution in favor of James Duncan and against Rebecca Fellows, executrix of Moses Fellows, deceased, bound the personal property of the deceased, from the delivery of the same to the sheriff. Second, that the levy and sale of the goods by the constable, Walker, upon an execution issued by a justice, and received by the constable after the lien of the fieri facias in the sheriff's hands had attached, did not release the goods from the sheriff's levy and lien; and that notwithstanding the action of the constable, the sheriff was justified in taking and selling the goods upon the fieri facias in his hands. Third, that the execution in the constable's hands, being against Rebecca Fellows for her individual debt, the constable could not levy upon and sell the goods late of Moses Fellows, deceased, in her possession as executrix, so as to release them from the previous lien of the fieri facias, in favor of James Duncan against Rebecca Fellows, as the executrix of Moses Fellows, deceased.

The court in their charge to the jury considered the defendant's first proposition to be correct in general; but denied his second, unless the purchaser at the constable's sale had full notice of the sheriff's claim to the goods under the fieri facias, and his indorsement thereon of having levied on the same; whether he had such notice or not, the court left as a question of fact to the jury to be decided by them. The defendant's third proposition the court answered in the negative. The counsel of the defendant below excepted to the answers and charge of the court on his second and third proposition; which have been assigned for error.

KENNEDY, J.: At common law, in England, the writ of fieri facias bound the defendant's goods from its teste, so that a sale of the goods made thereafter by the defendant, though bona fide, might have been avoided by a seizure of the goods under the writ at any time before it became returnable. *Anonymous*, Cro. Eliz. 174; Cro. Car. 149, 181, 440; 1 Mod. 188; Gilb. on Executions, 13, 14.[64] It was no doubt presumed, when such writ was awarded, that

[64]The common-law rule prevails in Tennessee. *Coffee* v. *Wray*, 8 Yerg. (Tenn.) 464 (1835); *Edwards* v. *Thompson*, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. 807 (1887); *Cecil* v. *Carson*, 86 Tenn. 139, 5 S. W. 532 (1887), and formerly prevailed in North Carolina; *Palmer* v. *Clarke*, 13 N. Car. (2 Dev. L.) 354, 21 Am. Dec. 340 (1830). Cf. *Weisenfield* v. *McLean*, 96 N. Car. 248, 2 S. E. 56 (1887).

it would not only be issued, but would be immediately put into the hands of the sheriff, and be by him executed. This, however, was not always the case. On the contrary, the notion of the goods being retrospectively bound from the teste of the writ, as frequently abused by taking out writs of fieri facias one after the other, without ever delivering them to the sheriff, whereby the goods of the de-defendants therein named became bound, which consequently made the sales thereof by the defendants, and all commerce in regard to them, somewhat uncertain. To prevent this, as Chief Baron Gilbert observes, Gilb. on Executions 14, it was enacted, among other things, by the Statute of Frauds, 29 Car. 2, ch. 3, section 16, "that no writ of fieri facias, or other writ of execution, shall bind the property of the goods, against whom such writ of execution shall be sued forth, but from the time that such writ shall be delivered to the sheriff, under sheriff, or coroners to be executed; and for the better manifestation of the said time, the sheriff, under sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same), indorse upon the back thereof, the day of the month, or year, whereon he or they received the same." 1 Mod. 188; 1 Sid. 271.[65] But neither before

[65] Repealed by the act of 19 and 20 Vict., ch. 97, § 1, but substantially revived by the Sales of Goods Act of 1893 (56 and 57 Vict., ch. 71, § 26) as follows:

"A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same.

"Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."

See *Hutchinson* v. *Johnston*, 1 T. R. 729 (1787); *Samuel* v. *Duke*, 3 M. & W. 622 (1838); *Guest* v. *Cowbridge R. Co.*, L. R. 6 Eq. 619 (1868); *McGivern* v. *McCausland*, 19 U. C. C. P. 460 (1869); *Clifford* v. *Logan*, 9 Manitoba 423 (1894). Where several writs are delivered to the sheriff at the same time there is no priority between them. *Ashworth* v. *Earl of Uxbridge*, 12 L. J. Q. B. 39 (1842). And as to county courts see *Murgatroyd* v. *Wright*, L. R. (1907) 2 K. B. 333.

Section 16 of the statute of frauds was at an early date adopted by many of the states, and, while the modern tendency is toward the abolition of an execution lien before levy, the statute is still substantially in force in about one half of the states. 2 Freeman on Executions (3d ed.) 1017; *Haggerty & Nobles* v. *Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321 (1819); *Lambert* v. *Paulding*, 18 Johns. (N. Y.) 311 (1830); *Cowden* v. *Brady*, 8 Serg. & R. (Pa.) 505 (1822); *Shafner* v. *Gilmore*, 3 Watts & S. (Pa.) 438 (1842); *Johnson* v. *McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102 (1845); *James* v. *Burnet*, 20 N. J. L. 635 (1846); *Ray* v. *Birdseye*, 5 Denio (N. Y.) 619 (1846); *Taylor* v. *Horsey*, 5 Har. (Del.) 131 (1849); *Love* v. *Williams*, 4 Fla. 126 (1851); *Marshall* v. *Cunningham*, 13 Ill. 20 (1851); *Newcombe* v. *Leavitt*, 22 Ala. 631 (1853); *Gott* v. *Williams*, 29 Mo. 461 (1860); *French* v. *Allen*, 50 Maine 437 (1862); *Whitehead* v. *Woodruff*, 11 Bush (Ky.) 209 (1874); *McCrisaken* v. *Osweiler*, 70 Ind. 131 (1880); *Sawyer* v. *Bray*, 102 N. Car. 79, 8 S. E. 885, 11 Am. St. 713 (1889); *Hanchett* v. *Ives*, 133 Ill. 332, 24 N. E. 396

nor since the passage of this statute, is the property of the goods altered by the mere delivery of the writ to the sheriff, but continues, notwithstanding, in the defendant, till the execution thereof. The meaning of these words, "that the goods shall be bound from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution. *Lathal* v. *Tomkins*, 2 Eq. Ca. Abr. 381, pl. 14; *Smallcomb* v. *Cross*, 1 Ld. Raym. 252; per Holt, C. J. This statute, however, only protects goods in the hands of purchasers or strangers, where the goods are sold bona fide; for if the party die after the teste, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors or administrators; for this is not a change of property by sale, or for a valuable consideration; Comb. 145; so that in this respect the law is still the same that it was before the statute, which was made for the benefit of strangers, who might have acquired a title to the goods between the teste of the writ of execution, and the time of the delivery thereof to the sheriff, and not for the benefit of the party, or his executors, or administrators. Bac. Abr. tit. Execution, 716, 733; Gilb. on Executions, 15, 16.[66] That the principle of the common law of England in regard to the goods of a defendant, in an execution, being bound thereby from its teste, was introduced into and adopted in Pennsylvania, upon its first settlement as a province, is evidenced very clearly by our act of Assembly, passed for the prevention of frauds and perjuries, in

---

(1890); *In re Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746 (1895); *Gillig* v. *George C. Treadwell Co.*, 148 N. Y. 177, 42 N. E. 590 (1896); *Hall* v. *Nash*, 58 N. J. Eq. 554, 43 Atl. 683 (1890); *Boisseau* v. *Bass*, 100 Va. 207, 40 S. E. 647, 57 L. R. A. 380, 93 Am. St. 956 (1902); *Spicks* v. *Prospect Br. Co.*, 19 Pa. Super. Ct. 399 (1902); *Starbuck* v. *Gebo*, 59 N. Y. Misc. 332, 112 N. Y. S. 312 (1908); N. Y. Code Civ. Pro., §§ 1363, 1405; *McAdams* v. *Mundy*, 79 N. J. L. 480, 76 Atl. 1031 (1910); *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354, 56 L. ed. 231 (1911 Ill.); *Schneider* v. *Schmidt*, 82 N. J. Eq. 81, 88 Atl. 179 (1913). In some jurisdictions bona fide purchasers without notice of the execution are protected before actual levy. *Van Waggoner* v. *Moses*, 26 N. J. L. 570 (1857); *Evans* v. *Walsh*, 41 N. J. L. 281, 32 Am. Rep. 201 (1879); *Williams* v. *Shelly*, 37 N. Y. 375 (1867); *Osborn* v. *Alexander*, 40 Hun (N. Y.) 323 (1886); N. Y. Code Civ. Pro. § 1409; *Huling, Brockerhoff & Co.* v. *Cabell*, 9 W. Va. 522, 27 Am. Rep. 562 (1876); *Trevillian* v. *Guerrant*, 31 Grat. (Va.) 525 (1879); *Weisenfield* v. *McLean*, 96 N. Car. 248, 2 S. E. 56 (1887). In other jurisdictions actual levy is made the test of priority. *Princeton Bank* v. *Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254 (1850), as to bank stock; *Mercein* v. *Burton*, 17 Tex. 206 (1856), personal property; *Johnson* v. *Gorham*, 6 Cal. 195, 65 Am. Dec. 501 (1856); *Tullis* v. *Brawley*, 3 Minn. 277 (1859); *Knox* v. *Webster*, 18 Wis. 406, 86 Am. Dec. 779 (1864); *Reeves* v. *Sebern*, 16 Iowa 234, 85 Am. Dec. 513 (1864); *Bagley* v. *Ward*, 37 Cal. 121, 99 Am. Dec. 256 (1869); *McMahan* v. *Hall*, 36 Tex. 59 (1871); *Sawyers* v. *Sawyers*, 93 N. Car. 321 (1885). In Ohio there is no preference among executions sued out of the same court against the same debtor during the term at which the judgment is rendered or within ten days thereafter. *Meier* v. *First Nat. Bank*, 55 Ohio St. 446, 45 N. E. 907 (1896).

[66] Changed in Penna. as to debtor's dying after the teste but before delivery of the writ by the act of Feb. 24, 1834, P. L. 70, § 33, 2 P. & L. Dig. (2d ed.) 2659; *Hoskins* v. *Huston*, 2 Clark (Pa.) 489 (1844). But where the writ is delivered, the sheriff has priority although the debtor die before levy. *In re Avery's Estate*, 1 C. P. Rept. (Pa.) 151 (1877).

1772.[67] The fourth section of this act is an exact transcript of the sixteenth section of 29 Car. 2, ch. 3, already recited, with the exception of the words "of the person," which appear to have been omitted in the English statute, evidently from oversight. Had not the rule of the common law of England on this subject been in force here, the passage of our act would have been wholly unnecessary. But being in force here, and the like evils experienced from it, as were there, it became necessary to apply a similar remedy. It is evident, therefore, since the writ of fieri facias in this case was delivered to the sheriff before the executions were issued, under which the constable took and sold the goods, that they were bound by the fieri facias, when the executions came into the hands of the constable, whether the sheriff had actually then made a seizure of the goods or not; and as against a purchaser from the defendant in the execution, the sheriff would, by virtue of the lien thus acquired, have had a right to seize or take the goods at any time before the return day of the fieri facias had passed by, and to sell them afterwards, for the purpose of satisfying the debt mentioned in the writ.[68] But whether he had such right, as against a purchaser without notice of the lien under the fieri facias from a constable, where the latter took and sold the goods under executions authorizing him to do so, seems to present a different question. Under the statute of 29 Car. 2, it has been held, that goods bought at a sale made under an execution, delivered to the sheriff subsequently to the delivery of a prior execution, were protected from the prior execution, in the hands of the purchaser under the second execution; although, as to any other party, the goods were bound by the prior delivery of the first writ, under which the sheriff ought to have taken and sold them. This distinction seems to have been considered necessary, in order that the ends of justice might be advancd, which it was thought would be frustrated, should the sales made under execution be suffered to be invalidated by other executions, in being before or at the same time.

[67] Re-enacted by the Act of June 16, 1836, P. L. 755, §§ 39 and 40, 2 P. & L. Dig. (2d ed.) 3434; *Shafner* v. *Gilmore*, 3 Watts & S. (Pa.) 438 (1842); *Schuylkill's Appeal*, 30 Pa. St. 358 (1858). But a levy must be made before the return day of the writ. *Sturges' Appeal*, 86 Pa. St. 413 (1878); *In re Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746 (1895). And a writ of fieri facias without levy creates no lien on real estate independent of the judgment lien, *Wilson's Appeal*, 90 Pa. St. 370 (1879). Hence, where neither of two judgments is a lien upon land, the first levy has the first grasp on the fund raised by the sale. *Sherrard* v. *Johnson*, 193 Pa. St. 166, 44 Atl. 252, 74 Am. St. 680 (1899). Accord: *Lowry* v. *Reed*, 89 Ind. 442 (1883). As to life estates see *Near* v. *Watts*, 8 Watts (Pa.) 319 (1839).

[68] In *Atwood* v. *Pierson*, 9 Ala. 656 (1846), it is said "the right which the sheriff, or other officer acquires, gives a special property only, and this for the sole purpose of enabling him to perform the duty which the law enjoins. But the general property, as well as the title, remains in the debtor, clogged, it is true, with the lien created by the levy; and so it would be, in like manner, if instead of actual seizure the execution was in the sheriff's hands. It can not be said, therefore, that the seizure creates an adverse title to the debtor, for the general property remains with him, capable of disposition in any way which does not impair the lien."

See *Harrison* v. *Wilson*, 2 A. K. Marsh. (Ky.) 547 (1820); *Butler* v. *Maynard*, 11 Wend. (N. Y.) 548, 27 Am. Dec. 100 (1834); *Mumper* v. *Rushmore*, 79 N. Y. 19 (1879); *Steffin* v. *Steffin*, 4 Civ. Proc. R. (N. Y.) 179 (1883).

Smallcomb v. *Cross,* 1 Ld. Raym. 252; *Hutchinson* v. *Johnson,* 1 T. R. 729. It is certainly of the first importance in order that the ends of justice may be fully met and answered, that personal, as well as real estate, should bring fair prices at judicial sales, which can not be affected with any degree of certainty, without giving all reasonable protection to the purchasers thereof. And seeing such sales are not only made publicly, but at a certain time and place, fixed on for that purpose by the proper officer of which he is required to give a certain previous notice, either by written or printed handbills set up in the most public places, or advertisements published in the newspapers of the country, so that all wishing to buy may be informed of the sale about to be made, and that other officers, having judicial process in their hands, which they ought to execute, may be advised of what is going on, and assert their claims of preference, if they have any, it would seem to be both expedient and reasonable, that property once sold, in this manner, should not be liable to be sold a second time, under judicial process against the same defendant, after it shall have gone into the hands of the purchaser, at the first sale. If an officer, who has judicial process placed in his hands to be executed, shall through neglect of duty, or want of proper vigilance upon his part, suffer a sale of property to be made, under judicial process of later date, as to lien, whereby an injury or loss shall accrue to the party in whose favor he holds such process, it is better that he should be held liable for such loss than that the purchaser should be disturbed in his enjoyment of the property after having bought and paid for it. Under this view of the case, and the law applicable to it, we are of opinion that the sale of the goods in question, so far as the constable took and sold them, under the execution against Rebecca Fellows, as the executrix of Moses Fellows, deceased, was good, and that the sheriff could not afterwards take the same goods out of the possession of the purchaser at constable's sale. Consequently, if Duncan, the defendant below, either advised the sheriff or his deputy to take the goods, or aided in doing so, he thereby became a trespasser, and liable to be sued by the plaintiff below as such. But in regard to the goods taken and sold by the constable, under the execution against Rebecca Fellows, individually in her own right, we think the constable had no right to take the goods in her possession belonging to the estate of Moses Fellows, the testator, as long as the sheriff had in his hands an execution against her, as executrix of the testator, which bound the goods. *Farr* v. *Newman,* 4 T. R. 621.[69] The court below, however, instructed the jury otherwise.

Judgment reversed, and a venire facias de novo awarded.[70]

[69] A levy upon property of a person other than the judgment debtor is a trespass. *Hazard* v. *Israel,* 1 Binn. 240, 2 Am. Dec. 438 (1808); *Farrant* v. *Thompson,* 2 D. & Ry. 1 (1822); *Phillips* v. *Hall,* 8 Wend. (N. Y.) 610, 24 Am. Dec. 108 (1832); *Carson* v. *McCormick Harvesting Mach. Co.,* 18 Tex. Civ. App. 225, 44 S. W. 406 (1898); *Harris* v. *Nelson,* 113 Ill. App. 487 (1902); *Graham* v. *Lane,* 3 Brewst. (Pa.) 92 (1869).

[70] In *Rogers* v. *Dickey,* 6 Ill. (1 Gilm.) 636, 41 Am. Dec. 204 (1844), the court extracts the following principles from the decisions: "First, that where

RICE *v.* SERGEANT

COURT OF KING'S BENCH, 1702

7 Mod. 37

A man having obtained a judgment for a just debt against A took out a fieri facias and got the sheriff to seize the goods, but would not let him proceed farther; but suffered the goods to remain in the custody of A, the debtor. B, who had also obtained a judgment against A for a just debt, took out a fieri facias.

The question was whether he could seize upon the same goods.

And PER CURIAM he may, for the former was a fraudulent execution and the sheriff might very well return nulla bona upon the first execution.[71]

---

two or more writs of fieri facias are delivered at different times, either to the same or different officers, and no sale is actually made of the defendant's goods, the execution first delivered must have the priority, though the first seizure may have been made on a subsequent execution. Second, but where the goods are actually sold by virtue of a levy made under a junior execution, the sale will be good, and the property can not afterward be taken from the purchaser by the senior execution. The only remedy of the party injured is against the officer." Accord: *Smallcomb* v. *Buckingham*, 5 Mod. 376, 1 Ld. Raym. 251, 1 Salk. 320 (1696); *Payne* v. *Drew*, 4 East 523 (1804); *Hotchkiss* v. *McVickar*, 12 Johns. (N. Y.) 403 (1815); *Marsh* v. *Lawrence*, 4 Cow. (N. Y.) 461 (1825); *McCall* v. *Trevor*, 4 Blackf. (Ind.) 496 (1838); *Duncan* v. *McCumber*, 2 Watts & S. (Pa.) 264 (1841), retrial of principal case; *McClelland* v. *Shingluff*, 7 Watts & S. (Pa.) 434, 42 Am. Dec. 224 (1844); *Miller* v. *Grady*, 76 Ark. 270, 88 S. W. 963 (1905); *Love* v. *Williams*, 4 Fla. 126 (1851); *Faircloth* v. *Ferrell*, 63 N. Car. 640 (1869); *Evans* v. *Walsh*, 41 N. J. L. 281, 32 Am. Rep. 201 (1879); *Speelman* v. *Chaffee*, 5 Colo. 247 (1880); *Stroudsburg Bank's Appeal*, 126 Pa. St. 523, 17 Atl. 868 (1889); *In re J. R. Richardson Co.*, 26 Del. 336, 83 Atl. 1034 (1912). Contra: *Kerr* v. *Montgomery*, 1 Hill (S. Car.) 277 (1833); *Robinson* v. *Cooper*, 1 Hill (S. Car.) 286 (1833), and see *Lancaster* v. *Jordan*, 78 Ala. 197 (1884).

In *Simpson* v. *Snyder*, 4 Pa. D. R. 641 (1895), a constable who sold under his levy after notice by the sheriff of a prior execution in his hands, was held liable to the sheriff in assumpsit for the proceeds of his sale to an amount sufficient to satisfy his writ.

[71]At common law, goods taken in execution and suffered to remain in the debtor's custody could be seized at the suit of another creditor. *Twyne's Case*, 3 Coke 82, 1 Sm. L. Cas. 1 and note (1601); *West* v. *Skip*, 1 Ves. Sr. 456 (1749); *Smith* v. *Russell*, 3 Taunt. 400 (1811); *Lovick* v. *Crowder*, 8 B. & C. 132 (1828); *Christopherson* v. *Burton*, 3 Exch. 160 (1848). The rule has been so stated in American cases. *United States* v. *Conyngham*, Fed. Cas. No. 14850, 4 Dall. 358, 1 L. ed. 865, Wall. Sr. 178 (1802); *Berry* v. *Smith*, 3 Wash. (C. C.) 60, Fed. Cas. No. 1359 (1811); *Roberts* v. *Scales*, 1 Ired. L. (N. Car.) 88 (1840); *Wilson* v. *Hensley*, 4 Ired. L. (N. Car.) 66 (1843); *Border* v. *Benge*, 12 Iowa 330 (1861); *Parker* v. *Waugh*, 34 Mo. 349 (1864). And, undoubtedly, if the property is left with the defendant not merely as custodian but with the ordinary powers of an owner (such as the power to sell), the levy will be regarded as merely colorable and fraudulent. *Knox* v. *Summers*, 4 Yeates (Pa.) 477 (1807); *Farrington* v. *Sinclair*, 15 Johns. (N. Y.) 429 (1818); *Dickenson* v. *Cook*, 17 Johns. (N. Y.) 332 (1820); *Cook* v. *Wood*, 16 N. J. L. 254 (1837); *In re Keyser's Appeal*, 13 Pa. St. 409, 53 Am. Dec. 487 (1850); *Webster* v. *Denison*, 25 Vt. 493 (1853); *Truitt* v. *Ludwig*, 25 Pa. St.

ORCHARD *v.* WILLIAMSON

COURT OF APPEALS OF KENTUCKY, 1831

6 *J. J. Mar.* (*Ky.*) 558

In the fall of 1828, Williamson being the owner of a bay mare, swapped her with Mark Millian for a black mare. At the time the exchange took place, Tudder, then a constable of the county in which the parties resided, had two small executions in his hands against Millian, which he levied on the bay mare in the possession of Millian. On the same day, finding the black mare in the possession of Williamson, he levied them on her also, and carried them off. After the exchange had taken place, he received a third execution against Millian, which he also levied on each of the mares.

On the execution of bonds for the delivery of the property, to the officer on the day of sale, by Millian with Orchard as his surety, both mares were delivered to Millian; who, to indemnify Orchard,

---

145 (1854); *Jayne* v. *Dillon*, 28 Miss. 283 (1854); *Parys & Co.'s Appeal*, 41 Pa. St. 273, 80 Am. Dec. 615 (1861); *Davidson* v. *Waldron*, 31 Ill. 120, 83 Am. Dec. 206 (1863); *Sage* v. *Woodin*, 66 (N. Y.) 578 (1876); *Acton & Woodnutt* v. *Knowles*, 14 Ohio St. 18 (1862); *Murphy* v. *Swadener*, 33 Ohio St. 85 (1877); *Wunderlich* v. *Roberts*, 67 Ind. 421 (1879); *Wunsch* v. *McGraw*, 4 Wash. 72, 29 Pac. 832 (1892); *Glazier* v. *Sawyer*, 11 Pa. Co. Ct. Rep. 34 (1892); *Mulligan* v. *Barnes*, 171 Pa. St. 53, 32 Atl. 1109 (1895); *Dunham* v. *Rundle*, 4 Pa. Super. Ct. 174 (1897). But the mere fact that the goods are left in the possession of the debtor does not, in some American jurisdictions, alone constitute fraud in itself; there must be further evidence of *mala fides* to deprive the creditor of his lien. *Doty* v. *Turner*, 8 Johns. (N. Y.) 20 (1811); *Rew* v. *Barber*, 3 Cow. (N. Y.) 272 (1824); *Howell* v. *Alkyn*, 2 Rawle (Pa.) 282 (1830); *Swigert* v. *Thomas*, 7 Dana (Ky.) 220 (1838); *Cumberland Bank* v. *Hann*, 19 N. J. L. 166 (1842); *Lantz* v. *Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682 (1846); *Dutertre* v. *Driard*, 7 Cal. 549 (1857); *Weidensaul* v. *Reynolds*, 49 Pa. St. 73 (1865); *Elias* v. *Farley*, 42 N. Y. (3 Keyes.) 398, 2 Abb. App. 11, 5 Abb. Pr. (N. S.) 39 (1867); *Dancy, Hyman & Co.* v. *Hubbs*, 71 N. Car. 424 (1874); *Carlisle* v. *Wathen*, 78 Ky. 365 (1880). So, creditors may, without destroying their lien, agree that the debtor's assignee for creditors may sell the goods and pay them out of the proceeds. *In re Kent, Santee & Co.'s Appeal*, 87 Pa. St. 165 (1878); *Mathew's Estate*, 144 Pa. St. 139, 22 Atl. 903 (1891); *In re Leidich's Estate*, 161 Pa. St. 451, 29 Atl. 89, 90 (1894); *Broadhead* v. *Cornman*, 171 Pa. St. 322, 33 Atl. 360 (1895).

In *Power* v. *Van Buren*, 7 Cow. (N. Y.) 560 (1827), a levy was made in December upon hides in vats undergoing the process of tanning and which could not be sold before spring without sacrifice and the sheriff was directed not to sell until May. *Held*, that the fieri facias was not dormant as to subsequent executions. A postponement to avoid sacrificing the property was reasonable. *Whipple* v. *Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442 (1807); *Lantz* v. *Worthington*, 4 Pa. St. 153, 45 Am. Dec. 682 (1846); *Connell* v. *O'Neil*, 154 Pa. St. 582, 26 Atl. 607 (1893). Compare *Burleigh* v. *Piper*, 51 Iowa 649, 2 N. W. 520 (1879); *Sweetser* v. *Matson*, 153 Ill. 568, 39 N. E. 1086, 27 L. R. A. 374, 46 Am. St. 911 (1894).

Where a proper order to proceed with the execution is given before a second execution is delivered to the sheriff, the first has priority. *Deacon* v. *Govett*, 4 Phila. (Pa.) 7 (1860); *In re Freeburger's Appeal*, 40 Pa. St. 244 (1861).

permitted him to keep possession of them. Previous to the day of sale, Williamson, without the consent of Millian or Orchard, obtained possession of the black mare, and carried her to another county; but Orchard having pursued him, regained possession; and on the day of sale, delivered each mare to the officer. He sold the bay mare first, for a sum more than sufficient to discharge the two executions which the constable had received, previous to the exchange between Millian and Williamson. He then sold the black mare, under the third execution; whereupon Williamson as an infant, by Detheridge his next friend, instituted an action of trover and conversion against Orchard, claiming in his declaration, damages for an illegal conversion of each of the mares. Verdict for Williamson for $20 and motion for new trial overruled. Orchard prosecutes this writ of error.[72]

BUCKNER, J.: Whether the constable had a right to sell the black mare under the execution which he had not received until after Millian and the defendant in error had made the exchange, is a question in the solution in which we apprehend not the least difficulty; but it is not presented in the present record, and to decide it would be premature and useless. But the authority on the part of the constable to levy the two executions which first came to his hands, upon both of the mares, is directly involved; because, if he had not authority to levy on both, it must result from the fact that the defendant in error, being the owner of one or the other of them, she was not subject to those executions; and in that event it is clear that he was entitled to a verdict.

But if the levy made by the constable was valid, Williamson had no right to demand the possession of either mare until the money was made, by the sale, to discharge the two executions which were rightfully levied. And having no right to the possession, Orchard can not be properly charged with an illegal conversion, for delivering possession of property to the officer, for the delivery of which he was bound by his written obligation. Were the two mares then subject to the two executions referred to? That they were, we are satisfied. By the provisions of the statute on the subject, all the property of a defendant in an execution, which is subject to execution, is bound by it from the time of its delivery to the sheriff. That the black mare, being the property of Millian, and in his possession, in the county of Madison, whilst the officer had in his hands two executions against his property, was subject to them at the time Tudder made the levy, can not be questioned, unless, by the transfer of her to the plaintiff in error, the lien, which the law creates, had been released; a position which has not been even contended for. But the argument is, that the levy on the bay mare, made by the constable previously to that on the black, was an affirmance of the exchange between Millian and the defendant in error, and rendered that valid which had been previously voidable at the option of the plaintiffs in the executions, but not

[72]The statement of facts is taken from the opinion of the court, part of which is omitted.

void. This argument seems to be based on the supposition that the constable had a right to levy on either one of the mares, but not on both; a position, which is considered as entirely untenable. Both of them, if necessary for the payment of the two executions mentioned, were properly levied on, and might have been sold, if the first one sold had failed to bring the amount required. Suppose the levy had been made on the black mare first, would the contract of exchange between Millian and Williamson have been thereby vacated, so that the latter would have had a right to demand from the constable the bay mare, after he had taken her into possession under levy? It is clear that he would not. Williamson would, in such case, have his action against Millian for passing property to him which had been subsequently taken and sold by a paramount claim; but he would have no more right to the property, with the title to, and possession of which he had parted, than he would have had to it, if, instead of receiving by way of exchange the black mare, Millian had assigned him a note on some insolvent man; for, in either case, Millian would be presumed to have acted in good faith, until the contrary should be made to appear. It is, to be sure, a misfortune for an individual to lose the property parted with, as well as the consideration which he supposes he has received; but his misfortune, in such a case, is similar to those which must be necessarily encountered, in many cases, by persons contracting for property with men who have not a valid title to it, and may be unable to make compensation for the injuries sustained. Suppose that Millian had given to Williamson, in the exchange, $50 as an estimated difference in the value of the two mares, and so soon as he got the bay mare, had swapped her to a third person, who had exchanged her with a fourth, for another horse; and under such circumstances, the constable had levied on the mare in Williamson's possession; would he, in such case, have a right to retake the bay mare? It is evident that he would not. And why? Because, although once the owner of her, he had parted with his title to her, and delivered possession; and Millian would then have an unquestionable right to dispose of her as he might think proper. In this case he had not sold her, but she was taken under execution by an officer of the law, and the right of the plaintiff in such execution to have sold her, if necessary to the discharge of his executions, was as undeniable as would be the right of the individual, in the case put, to retain possession of her as his own property.[78]

Reversed and remanded for further proceedings.

---

[78]The general lien of an execution binds property acquired by the debtor after the writ has come into the hands of the sheriff and while the writ is current and unsatisfied. *Shafner* v. *Gilmore*, 3 Watts & S. (Pa.) 438 (1842); *Brown v. Burrus*, 8 Mo. 26 (1843); *Ray v. Birdseye*, 5 Denio (N. Y.) 619 (1846); *Grooms* v. *Dixon*, 5 Strob. (S. Car.) 149 (1850); *Wilson, Sieger & Co.'s Appeal*, 13 Pa. St. 426 (1850); *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495 (1857); *Schuylkill's Appeal*, 30 Pa. St. 358 (1858); *State* v. *Blundin*, 32 Mo. 387 (1862); *Roth* v. *Wells*, 29 N. Y. 471 (1864); *Carrier* v. *Thompson*, 11 S. Car. 79 (1878), before code; *Blatchford* v. *Boyden*, 122 Ill. 657, 13 N. E. 801 (1887); *Clifford* v. *Logan*, 9 Manitoba 423 (1894); *Second Nat. Bank* v. *Gilbert*, 174 Ill. 485, 51 N. E. 584, 66 Am. St. 306 (1898); *Boisseau* v. *Bass*,

SECTION 4. THE LEVY

SEMAYNE'S CASE

IN THE KING'S BENCH, 1604

5 *Coke* 91 [a]

In an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, the case was such: the defendant and one George Berisford were joint tenants of a house in Blackfriars in London for years; George Berisford acknowledged a recognizance in the nature of a statute-staple to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship, in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London; the sheriffs returned the conusor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London and told them that divers goods, which were the said George Berisford's at the time of his death, were in the said house; and thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry according to the said writ, and the sheriffs and jury accesserunt ad domum

---

100 Va. 207, 40 S. E. 647, 57 L. R. A. 380, 93 Am. St. 956 (1902); *Birch River Boom &c. Co.* v. *Glendon Boom &c. Co.*, 71 W. Va. 507, 76 S. E. 972 (1912); *Postell* v. *Avery*, 12 Ga. App. 507, 77 S. E. 666 (1913). Articles acquired after the return of the writ are not bound. *Lloyd* v. *Wyckoff*, 11 N. J. L. 218 (1830); *Mathews* v. *Warne*, 11 N. J. L. 295 (1830); *Cook* v. *Wood*, 16 N. J. L. 254 (1837); *Farrel* v. *Copeland*, 18 W. N. C. (Pa.) 94 (1886). And a specific lien acquired by a levy on particular property will not bind after-acquired property. *Caldwell* v. *Fifield*, 24 N. J. L. 150 (1853). "Where the sheriff levies on a specific article, or articles, naming them, without more, he will be confined to his levy; as for example, where he levies on a horse, he will not be permitted to sell a cow, or other article of property." *Wilson, Sieger Co.'s Appeal*, 13 Pa. St. 426 (1850). The lien of an execution on domestic animals attaches to their young after they are born. *Talbot* v. *Magee*, 59 Mo. App. 347 (1894). Compare: *Blum* v. *Light*, 81 Tex. 414, 16 S. W. 1090 (1891). So a levy on sheep includes the wool that may grow during the existence of the lien of the execution. *Young* v. *Williams*, 21 N. Y. W. Dig. 249 (1885).

The lien of an execution without levy expires with the return day. *Cook* v. *Wood*, 16 N. J. L. 254 (1837); *Hathway* v. *Howell*, 54 N. Y. 97 (1873); *Sturges' Appeal*, 86 Pa. St. 413 (1878); *Walker* v. *Henry*, 85 N. Y. 130 (1881); *Boyer* v. *Miller*, 200 Pa. 589 (1901); *Olden* v. *Sassman*, 72 N. J. Eq. 637, 66 Atl. 603 (1907). But by levy on personalty the officer acquires a special property in the goods seized which he may sell before or after the return day in satisfaction of the writ. *Religious Society of Roman Catholics* v. *Hitchcock*, 2 Browne (Pa.) 333 (1811); *Taylor* v. *Mumford*, 3 Humph. (Tenn.) 66 (1842); *West* v. *Shockley*, 4 Harr. (Del.) 287 (1845); *Paxson's Appeal*, 49 Pa. St. 195 (1865); *Herrell* v. *Sixeland*, 81 Ill. 457 (1876); *Spencer* v. *Haug*, 45 Minn. 231, 47 N. W. 794 (1891); *Ansonia Brass &c. Co.* v. *Conner*, 103 N. Y. 502, 9 N. E. 238, 11 Civ. Proc. R. 371 (1886).

[a] Same case Cro. Eliz. 908; Yelv. 28; F. Moore 668; 1 Smith's L. Ca. (11th ed.) 104.

praedictam, ostio domus praedict' aperto existen' et bonis praedictis in praedicta domo tunc existen' and they offered to enter the said house, to extend the goods according to the said writ; and the defendant praemissorum non ignarus intending to disturb the execution, ostio praed' domus tunc aperto existen', claudebat contra vicecom' & jurator' praed'; whereby they could not come, and extend the said goods, nor the sheriff seize them, by which he lost the benefit and the profit of his writ, etc. And in this case these points were resolved:

1. That the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose;[75] and although the life of a man is a thing precious and favored in law; so that although a man kills another in his defense, or kills one per infortun, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, 305, and 26 Ass. pl. 23. So it is held in 21 H. 7, 39, every one may assemble his friends and neighbors to defend his house against violence; but he can not assemble them to go with him to the market or elsewhere for his safeguard against violence; and the reason of all this is, because domus sua cuique est tutissimum refugium.

2. It was resolved, when any house is recovered by any real action, or by eject' firmae, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff for the words of the writ are, habere facias seisinam, or possessionem, and after judgment it is not the house in right and judgment of law of the tenant or defendant.[76]

3. In all cases when the king is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he can not enter. But before he breaks it, he ought to signify the cause of his

[75] "The forbearance of the borough law in refusing to allow officers to enter a burgess's house to arrest, attach or distrain, was the forbearance of early folk-law, which made a man's house his castle, or rather his temple, for the sanctity of the house seems to have been due to the religious origin of the house-peace." Bateson, Introduction to Borough Customs, Vol. II, Selden Society. See Cicero Pro Domo, 41.

London (1122), Liber Albus, p. 69. *"De quibus ita solet esse quod accusati non solent attachiari nisi in medio vico et in via; quia non in domibus nec sub appenticiis."*

Northampton (*circa* 1190), Custumal, I, cap. 19, § 1. *"Nullus ballivus potest capere naman in domo probi hominis neque super stallis ejus pro aliquo planctu neque pro ullo debito nisi pro debito domini regis nisi per judicium quod pertinet ad coronam domini regis."* Borough Customs, Selden Society, Vol I, p. 103.

[76] Accord: *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 303, 50 Am. Dec. 785 (1849). See note to *Upton* v. *Wells* infra page 810. So also where the writ is for the recovery of specific chattels. *Keith* v. *Johnson*, 1 Dana (31 Ky.) 604, 25 Am. Dec. 167-n (1833); *Howe* v. *Oyer*, 50 Hun 559, 3 N. Y. S. 726, 20 N. Y. St. 685 (1880); *Jones v. Herron*, 1 Pa. Dist. R. 475 (1892). Contra: *State v. Beckner*, 132 Ind. 371, 31 N. E. 950, 32 Am. St. 257 (1892).

coming, and to make request to open doors; and that appears well by the statute of Westm. I, ch. 17 (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house, which is for the habitation and safety of man, by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which if he had notice, it is to be presumed that he would obey it; and that appears by the book in 18 E. 2 Execut. 252, where it is said that the king's officer who comes to do execution, etc., may open the doors which are shut, and break them, if he can not have the keys; which proves, that he ought first to demand them, 7 E. 3, 16. J beats R so as he is in danger of death, J flees, and thereupon hue and cry is made, J retreats into the house of T they who pursue him, if the house be kept and defended by force (which proves that first request ought to be made) may lawfully break the house of T for it is at the king's suit. 27 Ass. p. 66, the king's bailiff may distrain for issues in a sanctuary. 27 (28) Ass. p. 35, by force of a capias on an indictment of trespass the sheriff may break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is on request made, or if he may open the door without breaking), he is a trespasser, 41 Ass. 15, on issue joined on a traverse of an office in chancery, venire facias was awarded returnable in the king's bench, without mentioning non omittas propt' aliquam libertat'; yet forasmuch as the king is party, the writ of itself is non omittas propt' aliquam libertat', 9 E. 4, 9, for felony or suspicion of felony, the king's officer may break the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the king has interest, and where the king has interest the writ is non omittas propter aliquam libertatem; and so the liberty or privilege of a house doth not hold against the king.[77]

4. In all the cases when the door is open the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house and distrain for his rent or service, 38 H. 6, 26a. 8 E. 2 Distr. 21 & 33 E. 3. Avow. 256, the lord may distrain in the house, although lands are also held in which he may distrain.[78] Vide 29 Ass. 49. But the great question in this case was, if by

---

[77]Accord: *Brigg's Case*, 1 Rolle 336 (1615); *Burdett* v. *Abbott*, 14 East 1 (1811); *Launock* v. *Brown*, 2 B. & Ald. 592 (1819); *Harvey* v. *Harvey*, L. R. (1881) 26 Ch. Div. 644.

[78]*Ryan* v. *Shilcock*, 7 Exch. 72 (1851), holds that the lifting of the fastening by which a door is kept closed is not unlawful in making a distress, Pollock, C. B., saying: "The landlord has authority by law to open the door in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go on the premises." Accord: *Dent* v. *Hancock*, 5 Gill (Md.) 120 (1847). Contra: *Curtis* v. *Hubbard*, 4 Hill (N. Y.) 437, 40 Am. Dec. 292 (1842). See *State* v. *Armfield*, 2 Hawks (N. Car.) 246, 11 Am. Dec. 762 (1822); *Long* v. *Clarke*, L. R. (1894) 1 Q. B. 119.

force of a capias or fieri facias at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house to do execution if the door be not opened. And it was objected, that the sheriff might well do it for divers causes. 1. Because it is by process of law; and it was said, that it would be granted on the other side, that a house is not a liberty, for if a fieri facias or a capias be awarded to the sheriff at the suit of a common person, and he makes a mandate to the bailiff of a liberty who has return of writs, who nullum dedit respons' in that case another writ shall issue with non omittas propter aliquam libertatem; yet it will be said on the other side that he shall not break the defendant's house as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury, and the other of St. Etheldred of Ely, suppose a capias comes at the suit of A, to the sheriff of Suffolk to arrest the body of B, the sheriff makes a mandate to the bailiff of the liberty of St. Etheldred, who makes no answer, in that case the plaintiff shall have a writ of non omittas, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him. 2. Admitting it to be a liberty, the defendant himself shall never take advantage of a liberty; as if the bailiff of a liberty be defendant in any action, and process of capias or fieri facias comes to the sheriff against him, the sheriff shall execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as is aforesaid, for at the common law a man should not have any execution for debt, but only of the defendant's goods. Suppose then the defendant would keep all his goods in his house, and so the defendant himself by his own act would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book in 18 E. 2. Execution 252, was cited to prove it where it is said, that it is not lawful for any one to disturb the king's officer, who comes to execute the king's process; for if a man might stand out in such manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had custodiam comitat, and therefore it should not be presumed that they would abuse the house of any one by color of doing their office in execution of the king's writ against the duty of their office, and their oath also, but it was resolved, that it is not lawful for the sheriff (on request made and denial) at the suit of a common person, to break the defendant's house, *sc.* to execute any process at the suit of any subject; for thence would follow great inconvenience that men as well in the night as in the day should have their houses (which are their castles) broke, by color whereof, great damage and mischief might ensue; for by color thereof, on any

feigned suit, the house of any man at any time might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses.[79] And although the sheriff be an officer of great authority and trust, yet it appears by experience, that the king's writs are served by bailiffs, persons of little or no value; and it is not to be presumed, that all the substance a man has in his house, nor that a man would lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove, that when the process concerns the king, that the sheriff may break the house, imply that at the suit of the party, the house may not be broken, otherwise the addition (at the suit of the king) would be frivolous. And with this resolution agrees the book in 13 E. 4. 9, and the express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said in 18 E. 4. 4a. by Littleton and all his companions it is resolved that the sheriff can not break the defendant's house by force of a fieri facias, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good.[80] And it was said, that the said book of 18 E. 2 was but a short note, and not any case judicially ad-

---

[79] *Penton* v. *Brown*, 1 Keb. 698, 1 Sid. 186 (1664); *Anonymous*, 6 Mod. 105 (1703); *Buckenham* v. *Francis*, 11 Moore 40 (1825); *Ilsley* v. *Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425 (1831); *Keith* v. *Johnson*, 1 Dana (31 Ky.) 604, 25 Am. Dec. 167-n (1833); *Prettyman* v. *Dean*, 2 Harr. (Del.) 494 (1839); *State* v. *Hooker*, 17 Vt. 658 (1845); *Hooker* v. *Smith*, 19 Vt. 151, 47 Am. Dec. 679 (1847); *Snydaker* v. *Brosse*, 51 Ill. 357, 99 Am. Dec. 551 (1869); *Welsh* v. *Wilson*, 34 Minn. 92, 24 N. W. 327 (1885); *State* v. *Whitaker*, 107 N. Car. 802, 12 S. E. 456 (1890); *Jones* v. *Herron*, 1 Pa. Dist. R. 475 (1892). But the sheriff may break open the outer door of a workshop or other building not part of the dwelling. *Penton* v. *Brown*, *supra*; *Haggerty & Nobles* v. *Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321 (1819) *McGee* v. *Givan*, 4 Blackf. (Ind.) 16 (1835); *Hobson v. Thelluson*, L. R. (1867) 2 Q. B. 642; *Stearns* v. *Vincent*, 50 Mich, 209, 15 N. W. 86, 45 Am. Rep. 37 (1883); *Hodder* v. *Williams*, L. R. (1895) 2 Q. B. 663. Where a sheriff gains peaceful entrance, he may break open inner doors and closets if they are not opened on demand. *King* v. *Bird*, 2 Show. 87 (1680); *State* v. *Thackam*, 1 Bay (S. Car.) 358 (1794); *Ratcliffe* v. *Burton*, 3 Bos. & P. 223 (1802); *Hutchison* v. *Birch*, 4 Taunt. 619 (1812). In *Swain* v. *Mixner*, 74 Mass. 182, 69 Am. Dec. 244 (1857), where a building was leased in distinct portions to several tenants, the sheriff who had entered the outer door was held to have no authority to break into one of the apartments. Contra: *Cantrell* v. *Conner*, 6 Daly (N. Y.) 39 (1875), and contra in the case of a lodger; *Lee* v. *Gansel*, 1 Cowp. 1 (1774); *Williams* v. *Spencer*, 5 Johns. (N. Y.) 352 (1810).

[80] Accord: *Percival* v. *Stamp*, 9 Exch. 167 (1853). Compare *Duke of Brunswick* v. *Slowman*, 8 C. B. 319 (1849). An arrest on civil process after breaking the outer door entitles the debtor to his release. *Hodgson* v. *Towning*, 5 Dowl. 410 (1836); *Kerbey* v. *Denby*, 1 M. & W. 336 (1836); *State* v. *Hooker*, 17 Vt. 658 (1845). Otherwise where the debtor has been arrested and closes the door. *Mahomed* v. *Queen*, 4 Moore P. C. 239 (1843); *Sandon* v. *Jervis*, E. B. & El. 935 (1859). The dictum in the principal case is criticised in *Curtis* v. *Hubbard*, 4 Hill. (N. Y.) 437, 40 Am. Dec. 292 (1842), where an execution after an illegal entry was held invalid. Accord: *Ilsley* v. *Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425 (1831); *People* v. *Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628 (1840); *Closson* v. *Morrison*, 47 N. H. 482, 93 Am. Dec. 459 (1867); *Bailey* v. *Wright*, 39 Mich. 96 (1878); *Welsh* v. *Wilson*, 34 Minn. 92, 24 N. W. 327 (1885).

judged, and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a quo minus or other action in which the king is party, or is to have benefit, the book is good law.

5. It was resolved, that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there;[81] and therefore in such cases after denial on request made, the sheriff may break the house; and that is proved by the statute of Westm. 1. c. 17, by which it is declared, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle, to prevent the owner to have a replevin of his goods; which act is but an affirmance of the common law in such points. But it appears there, that before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him for the words of the statute are, "after that the cattle shall be solemnly demanded by the sheriff," etc.

6. It was resolved, admitting that the sheriff, after denial made, might have broke the house, as the plaintiff's counsel pretended he might, then it follows that he has not done his duty, for it doth not appear, that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, scil. to shut the door of his own house.

"Lastly, the general allegation, praemisorum non ignarus, was not sufficient in this case where the notice of the premises is so material; but in this case it ought to have been certainly, and directly alleged; for without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And judgment was given against the plaintiff.

---

[81]The debtor's dwelling house is alone privileged. The sheriff may break the outer door of a third person's house to execute a fieri facias against the debtor, but he acts at his peril and if there are no goods of the debtor on the premises, he is a trespasser. *Biscop* v. *White*, Cro. Eliz. 759 (1600); *White* v. *Whitshire*, Palm. 52 (1619); *Stanhope* v. *Dawson*, 2 Lutw. 1428 (1736); *Johnson* v. *Leigh*, 1 Marshall 565, 6 Taunt. 246 (1815); *De Graffenreid* v. *Mitchell*, 3 McCord (S. Car.) 506, 15 Am. Dec. 648 (1826); *Fullerton* v. *Mack*, 2 Aik. (Vt.) 415 (1828); *Douglass* v. *State*, 6 Yerg. (Tenn.) 525 (1834); *Stitt* v. *Wilson*, Wright (Ohio) 505 (1834); *Platt* v. *Brown*, 16 Pick. (Mass.) 553 (1835); *McGee* v. *Givan*, 4 Blackf. (Ind.) 16 (1835); *Morrish* v. *Murrey*, 13 M. & W. 52 (1844); *Burton* v. *Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145 (1846). So, as to a box in a trust company, *United States* v. *Graff*, 67 Barb. (N. Y.) 304, 4 Hun 634 (1875); *Klett* v. *Craig*, 1 W. N. C. (Pa.) 28 (1873); *Tillinghast* v. *Johnson*, 34 R. I. 136, 82 Atl. 788 (1812). Compare *Gregg* v. *Hilson*, 8 Phila. (Pa.) 91 (1871).

DUNCAN'S APPEAL

SUPREME COURT OF PENNSYLVANIA, 1860

37 Pa. 500

This was an appeal from the decree of the Common Pleas of Cambria County, confirming the report of the auditor, appointed to distribute the proceeds of the sheriff's sale of the personal property of George McCann.

The facts are these: A writ of fieri facias was issued out of the Court of Common Pleas of Cambria County, upon a judgment in favor of Francis Christy, against the defendant, George McCann, and placed in the sheriff's hands on the twenty-fifth of July, 1859. On the twenty-ninth of August, 1859, four other writs of fieri facias were issued and placed in the hands of the sheriff—one at the suit of Thomas Duncan; one at the suit of Peter Ford; one at the suit of A. H. Rosenheimer & Brook; and the other at the suit of Mrs. Sarah Duncan, upon which the sheriff on the said day, indorsed the following levy: "August 29, 1859, levied on a planing machine, with all the fixtures thereto belonging, as the property of George McCann. The above levy given in by John Fenelon, Esq., at Ebensburg." On the same day (also at Ebensburg) the sheriff indorsed the same levy on the writ in favor of Francis Christy. On the fifth day of September, 1859, a writ of fieri facias, at the suit of Morris L. Hallowell & Co. against the same defendant (McCann) was placed in the sheriff's hands on said day at seven o'clock a. m., on which, on the nineteenth day of the same month, the sheriff made a levy (inter alia) of the said "planing machine, with all the fixtures thereto belonging," being at the time, where the property was, and having it in view. On the said nineteenth of September the sheriff advertised the property, and sold the "planing machine" on the twenty-eighth of September, 1859, for $500. An auditor appointed to make distribution of the proceeds of the sale awarded the fund to Morris L. Hollowell & Co., first satisfying (with the consent of the attorney for Hallowell & Co.) the balance of the writ in favor of Christy. This appeal was then taken by the execution-creditors, whose claims were rejected by the auditor and the court, who assigned for error here the confirmation of the auditor's report.[82]

STRONG, J.: It is plain that the levy indorsed upon the appellant's execution on the twenty-ninth of August, 1859, and also upon the other writs returnable to September term, was of no avail against subsequent execution-creditors. Whatever may have been its effect as between the sheriff and George McCann, the debtor,[83] it was no

---

[82]Part of the statement of facts and the arguments of counsel are omitted.

[83]It has been held that the endorsement of a levy upon property not in view may be good, as between the parties, where the judgment debtor assents. *McGirr* v. *Hunter*, 13 Ill. App. 195 (1883); *Trovillo* v. *Tilford*, 6 Watts (Pa.) 468, 31 Am. Dec. 484 (1837); *Dresser* v. *Ainsworth*, 9 Barb. (N. Y.) 619 (1850); *Rhame* v. *McRoy*, 7 Rich. (S. Car.) 37 (1853); *Caldwell*

levy at all, to create a lien upon the planing machine, as against the appellees. In no sense can it be said to have been a seizure, either actual or constructive. The property was neither in the power nor in the view of the sheriff. It was ten miles distant, and was not seen by the officer until after the return day of the executions, when he had no power to make or complete a levy under them. Nor was it seen by him until he made an actual levy under the execution of the appellees.

We have departed from the strictness required by the English courts to constitute a levy.[84] We do not require the sheriff in all cases to take actual and exclusive possession of personal property, but it never yet has been held that a levy can be made upon property not in the power or at least in the view of the officer. The indorsement upon an execution is itself no levy; it is but evidence. The levy is an assertion of title by the sheriff, amounting at least to a legal divestiture of the possession of the defendant, and such as would subject the officer making it to an action of trespass, but for the protection of the execution. It should be public, open and unequivocal, not depending for proof of its having been made upon a mere office entry. This is necessary in order to prevent fraud and litigation in regard to the title to property. Secret liens are a hardship to the community, and are not to be encouraged.

---

v. *Fifield*, 24 N. J. L. 150 (1853); *Jayne* v. *Dillon*, 28 Miss. 283 (1854); *Roebuck* v. *Thornton*, 19 Ga. 149 (1855); *Dean* v. *Thatcher*, 32 N. J. L. 470 (1865); *Fox* v. *Cronan*, 47 N. J. L. 493. 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190 (1885). Contra: *Perry* v. *Hardison*, 99 N. Car 21, 5 S. E. 230 (1888) semble; *Crawford* v. *Newell*, 23 Iowa 453 (1867).

[84] *Rice* v. *Sergeant*, 7 Mod. 37 (1702); *Bradley* v. *Wyndham*, 1 Wils. 44 (1743); *Blades* v. *Arundale*, 1 M. & S. 711 (1813); *Ackland* v. *Paynter*, 8 Price 95 (1820); *Gladstone* v. *Padwick*, L. R. 6 Exch. 203 (1871); *Bissicks* v. *Bath Colliery Co.*, L. R. 2 Exch. D. 459 (1877), 3 Exch. D. 174 (1878); *Ex parte Jones*, 42 L. T. 157, (1880); *Bower* v. *Hett*, L. R. (1895) 2 Q. B. 51.

In *Beekman* v. *Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707 (1830), it is said per Marcy, J.: "In England the officer enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them, or he causes an inventory to be taken and removes them. We are not disposed to go this length, but are of opinion that the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them, if they are such of which possession can be taken. The goods should be brought within his view, and subjected to his control, and it is proper also, if not necessary, that an inventory should be taken of them; the officer should assert his title to the goods by virtue of the execution; and we are inclined to think that his acts, as to the asserting of his rights and the divesting of the possession of the defendant, should be of such a character as would subject him to an action of trespass but for the protection of the execution; they should be public, open and unequivocal, and nothing should be done by him to cast concealment over the transaction. But it is not necessary that an assistant of the officer should be left in possession of the goods, or that the goods should be removed; they may be left in the custody of the defendant, at the risk of the plaintiff or of the sheriff, or on obtaining, as is customary, a receiptor for their delivery on demand." See also *Cox* v. *McDougal*, 2 Yeates (Pa.) 434 (1799); *Westervelt* v. *Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516 (1835); *Moss* v. *Moore*, 3 Hill (S. Car.) 276 (1837); *Williamson* v. *Johnston*, 12 N. J. L. 86 (1830); *Polite* v. *Jefferson*, 5 Harr. (Del.) 388 (1852); *Quackenbush* v. *Henry*, 42 Mich. 75, 3 N. W. 262 (1879); *Auby* v. *Rathbun*, 11 S. Dak. 474, 78 N. W. 952 (1899); *Gilfillan* v. *King*, 239 Pa. 395, 86 Atl. 925 (1913).

If it were necessary to refer to authorities for the doctrine that a levy can not be made upon personal property which is not at the time in the power of the officer, so that he can take immediate possession, or at least in his view, such authorities are abundant and at hand. It was said in *Wood* v. *Vanarsdale*, 3 Rawle (Pa.) 401, that it (a levy upon such property) "can not be made without the sheriff has it within his power and control, or at least within his view; and if having it so he makes a levy upon it, it will be good if followed up afterwards within a reasonable time by his taking possession in such manner as to apprise everybody of the fact of its having been taken in execution." It would seem that the learned judge who delivered the opinion in that case, thought that to make effective such a constructive seizure, viz., an assertion of title to the property while it is in full view of the officer, or in his power, it is necessary that it be followed up within a reasonable time by taking actual and notorious possession.[85] Whether the levy can be thus completed after the return day of the writ, need not now be considered, for in this case the goods having been ten miles distant, a levy was not commenced. The doctrine of *Wood* v. *Vanarsdale* was reasserted in *Lowry* v. *Coulter*, 9 Barr (Pa.) 349, and in the *Schuylkill Court's Appeal*, 6 Cas. (Pa.) 358.

Such also are the decisions in other states, the courts of which, like ours, have departed from the rigor of the English rule; *Hagerty* v. *Wilber*, 16 John. (N. Y.) 288; *Beeckman* v. *Lansing*, 3 Wend. (N. Y.) 440; *Westervelt* v. *Pinckney*, 14 Wend. (N. Y.) 123; *Vanwycke* v. *Pine*, 2 Hill (N. Y.) 666; *Barker v. Binninger*, 4 Kern. (N. Y.) 271; 8 B. Monr. (Ky.) 300; 4 Wis. 573.

Upon principle and authority, therefore, it must be held that the appellant had no lien upon the planing machine by virtue of any levy, and as his execution had no force after its return day without a levy, the writ of the appellees was entitled to the money arising from the sale. And as the appellant had no right to the money he can not be heard to complain that a portion of it was applied to the execution of Francis Christy, with the consent of the appellees.[86]

Decree affirmed.

---

[85] *Logsdon* v. *Spivey*, 54 Ill. 104 (1870); *Murphy* v. *Swadener*, 33 Ohio St. 85 (1877); *Dixon* v. *White Sewing Mach. Co.*, 128 Pa. St. 397, 18 Atl. 502, 5 L. R. A. 659, 15 Am. St. 683 (1889); *In re Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746 (1895); *Trimble* v. *Hunt*, 169 Ill. App. 259 (1912); *Higdon* v. *Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938 (1913).

[86] Accord: *Brian* v. *Strait*, Dud. (S. Car.) 19 (1837); *Ray* v. *Harcourt*, 19 Wend. (N. Y.) 495 (1838); *Van Wyck* v. *Pine*, 2 Hill (N. Y.) 666 (1842); *Morse* v. *Hurd*, 17 N. H. 246 (1845); *Cawthorn* v. *McCraw*, 9 Ala. 519 (1846); *Lowry* v. *Coulter*, 9 Pa. St. 349 (1848); *Camp* v. *Chamberlain*, 5 Den. (N. Y.) 198 (1848); *Brown* v. *Pratt*, 4 Wis. 513, 65 Am. Dec. 330 (1856); *Taffts* v. *Manlove*, 14 Cal. 47, 73 Am. Dec. 610 (1859); *Minor* v. *Herriford*, 25 Ill. 344 (1861); *Minor* v. *Smith*, 13 Ohio St. 79 (1861); *Carey* v. *Bright*, 58 Pa. St. 70 (1868, per Sharswood, J.: "A mere paper levy is no levy at all, and a sale under it is a nullity as to subsequent execution-creditors and purchasers. A man might have his bed sold from under him, by that means without knowing it"); *Newman* v. *Hook*, 37 Mo. 207, 90 Am. Dec. 378 (1866); *Wilson* v. *Powers*, 21 Minn. 193 (1875); *Dorrier* v. *Masters*, 83 Va. 459, 2 S. E. 927

MORGAN *v.* KINNEY

SUPREME COURT OF OHIO, 1883

38 Ohio St. 610

LONGWORTH, J.: The decision in this case depends entirely upon legal issues, the judgment below having been rendered upon demurrer. The facts of the case are correctly stated in the brief of the plaintiff in error, and are as follows:

On October 10, 1878, the defendants, Gray & Smith, obtained a judgment in the Court of Common Pleas of Cuyahoga County against A. W. Anderson and others, and execution was at once issued thereon to the sheriff of Belmont County. On October 12, 1878, the sheriff, without leaving St. Clairsville, twelve miles distant from Bellaire, indorsed upon the writ of execution in his hands, that for want of goods and chattels whereon to levy, he levied upon certain real estate, describing the town lots in Bellaire, as the property of A. W. Anderson. But no record, other than this, was made in the sheriff's office; and no entry of any kind was made on the foreign execution docket, until after the filing of the assignment deed hereinafter mentioned. On October 12, 1878, there was, in Belmont county, belonging to A. W. Anderson and his co-defend-

---

(1887); *Nelson* v. *Van Gazelle Valve Mfg. Co.*, 45 N. J. Eq. 594, 17 Atl. 943 (1889); *Sawyer* v. *Bray*, 102 N. Car. 79, 8 S. E. 885, 11 Am. St. 713 (1889); *Windmiller* v. *Chapman*, 139 Ill. 163, 28 N. E. 979 (1891); *State* v. *Beckner*, 132 Ind. 371, 31 N. E. 950, 32 Am. St. 257 (1892); *Jones* v. *Howard*, 99 Ga. 451, 27 S. E. 765, 59 Am. St. 231 (1896); *Nighbert* v. *Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. 736 (1897); *In re Pond*, 21 Misc. 114, 46 N. Y. S. 999 (1897); *Meyer* v. *Missouri Glass Co.*, 65 Ark. 286, 45 S. W. 1062, 67 Am. St. 927 (1898); *Samuel* v. *Knight*, 9 Pa. Super. Ct. 352 (1899); *Hopke* v. *Lindsay*, 83 Mo. App. 85 (1899); *Avon-by-the-Sea Land &c. Co.* v. *McDowell*, 71 N. J. Eq. 116, 62 Atl. 865 (1906) semble, but otherwise where officer is not entitled to take possession; *Sanders* v. *Carter*, 124 Ga. 676, 52 N. E. 887 (1905); *Cupples* v. *Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519 (1909); *Peppers* v. *Harris*, 145 Iowa 635, 124 N. W. 625 (1910); *Hartman* v. *Heffleſinger*, 47 Pa. Super. Ct. 1 (1911); *Russell* v. *State*, 13 Ga. App. 561, 79 S. E. 495 (1913); *Hobbs* v. *Williams*, 175 Mo. App. 409, 162 S. W. 334 (1914). Contra: *Flinn* v. *Fennimore*, 7 Houst. (Del.) 206, 31 Atl. 586 (1885). While the officer may permit ponderous and unwieldy chattels to remain where he finds them he must, nevertheless, assume control over them by some open and unequivocal act. *Davidson* v. *Waldron*, 31 Ill. 120, 83 Am. Dec. 206 (1863); *Hill* v. *Harris*, 10 B. Mon. (Ky.) 120, 50 Am. Dec. 542 (1849); *Gallagher* v. *Bishop*, 15 Wis. 276 (1862); *Harris* v. *Evans*, 81 Ill. 419 (1876); *Kile* v. *Giebner*, 114 Pa. St. 381, 7 Atl. 154 (1886); *Johnson* v. *Iron Belt Min. Co.*, 78 Wis. 159, 47 N. W. 363 (1890); *Stanley* v. *Moyniham*, 45 Ill. App. 192 (1892); *Field* v. *Fletcher*, 191 Mass. 494, 78 N. E. 107 (1906); *Grace* v. *Finleyson*, 10 Ga. App. 480, 73 S. E. 689 (1911). The principle has been applied to cattle on range, *Sheffield* v. *Key*, 14 Ga. 528 (1854); *Gunter* v. *Cobb*, 82 Tex. 598, 17 S. W. 848 (1891), and growing crops, *State* v. *Poor*, 4 Dev. & B. (N. Car.) 384, 34 Am. Dec. 387 (1839); *Godfrey* v. *Brown*, 86 Ill. 454 (1877); *Barr* v. *Cannon*, 69 Iowa 20, 28 N. W. 413 (1886); *Bilby* v. *Hartman*, 29 Mo. App. 125 (1888); *State* v. *Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. 452 (1898). See also *Olden* v. *Sassman*, 72 N. J. Eq. 637, 66 Atl. 603 (1907); *Higdon* v. *Warrant Warehouse Co.*, 10 Ala. App. 496, 63 So. 938 (1913).

ants, personal property subject to levy, amply sufficient to satisfy said execution. On October 21, 1878, A. W. Anderson made an assignment for the benefit of creditors, and his assignment deed was duly filed with the probate judge the same day, and the assignee gave bond and qualified according to law; and as such assignee brought this suit. At the time this suit was brought, the sheriff had made no return of any of his proceedings under said execution, to the court from which the execution issued.

The suit was to enjoin the sheriff from selling the land under this execution, the petition of plaintiff was dismissed in the court of common pleas and judgment rendered for defendant, which judgment was afterward affirmed in the district court.

It seems to us that the decision of this case depends entirely upon the question whether the indorsement by the sheriff upon the writ of execution constituted in itself a valid levy upon the land. The doctrine is well settled that in respect to real estate the assignee for the benefit of creditors stands in the shoes of his assignor, and takes no greater estate than that held by him. He takes subject to all liens and incumbrances existing at the time of the assignment and is not to be regarded in equity as a bona fide purchaser without notice. See Burrill on Assignment, section 391, and numerous cases cited in the notes to the third edition.

By force of statute, an entry by the sheriff upon the foreign execution docket operates as notice to the world; and it is plain that its omission in the present case, whatever might be its effect as against a bona fide purchaser without actual notice, can not be taken advantage of by the assignor who can not protect himself by want of notice, either actual or constructive.

Neither can the assignor complain that at the time of the levy he was possessed of personal property sufficient to satisfy the judgment. If he did not choose to apply such property to its payment he can not complain that the sheriff, failing to find goods and chattels whereon to levy, proceeded to levy upon land.[87]

Was then this levy a valid one? Clearly it was, unless under our statute the expression "seized in execution" shall be construed as making an actual seizure of some kind essential. See 75 Ohio L. 680, S4.[88] In Gwynne on Sheriffs, 308, the law is stated thus:

---

[87]In *First Nat. Bank* v. *Black Hills Fair Assn.*, 2 S. Dak. 145, 48 N. W. 852 (1891), it is said, "If judgment debtors have personal property, let them turn it over, or put it out to the sheriff; and then if he persists in selling the realty, they have cause for complaint." Accord: *Allen* v. *Gleason*, 4 Day (Conn.) 376 (1810); *Maybury* v. *Jones*, 4 Yeates (Pa.) 21 (1804) semble; *Graves* v. *Merwin*, 19 Conn. 96 (1848); *Sloan* v. *Stanly*, 11 Ired. (N. Car.) 627 (1850); *Pitts* v. *Magie*, 24 Ill. 610; *Stancill* v. *Branch*, 61 N. Car. 306, 93 Am. Dec. 592 (Phil. L. 1867) (1860); *Levan* v. *Millholland*, 114 Pa. St. 49, 7 Atl. 194 (1886) semble; *Landrum* v. *Broadwell*, 110 Ga. 538, 35 S. E. 638 (1900); see *Cloud* v. *Lore*, 5 Houst. (Del.) 163 (1876).

[88]Gen. Code Ohio (1910), § 11657 provides: "A judgment of the Supreme Court for money shall bind the lands and tenements of the debtor within the county in which the suit originated, from the first day of the term at which the judgment is entered, and all other lands, and the goods and chattels of the debtor, from the time they are seized in execution." In the principal case the land was in a county other than that in which the judgment was recovered.

"No entry by an officer on real estate is necessary to constitute a levy. The officer may remain in his own office and not even go within view of the land; he need not seize upon any twig, turf, or other part thereof as symbolical of the whole. His indorsement upon the execution of a levy will constitute one to all intents and purposes."

From the time that a valid levy is made, the land is in legal sense "seized in execution"—that is, rendered liable for its satisfaction. Nowhere in the statutes is the officer directed to make any actual seizure, which it would seem could only be done by taking possession of the land and ousting the judgment debtor. It would be contrary to all previous notions concerning the duties of such officers to hold that prior to sale or appraisement, and upon the mere receipt of the writ it becomes their duty to enter upon the debtor's land and take possession.[89]

Judgment affirmed.

Where the judgment is itself a lien, the argument for a paper levy would seem stronger. In *Wood* v. *Colvin*, 5 Hill (N. Y.) 228 (1843), it is said, per Bronson, J.: "When the judgment is a lien upon the land, it is not necessary that the sheriff should make any formal levy or seizure before proceeding to advertise and sell. It would be an idle ceremony for him to go to the land or make an inventory of it, or do any other act of the like nature. The judgment binds the land, which is already in the custody of the law before the execution issues. The execution comes as a power to enable the creditor to reap the fruits of the seizure already made."

[89]Accord: *Catlin* v. *Jackson ex dem. Gratz*, 8 Johns. (N. Y.) 520 (1811); *Cowden* v. *Brady*, 8 Serg. & R. (Pa.) 505 (1822), per Gibson J., at p. 509, and see Troubat & Haly's Practice (1880), § 1216; *Hammatt* v. *Bassett*, 2 Pick. (Mass.) 564 (1824); *Doe ex dem. Barden* v. *McKinne*, 4 Hawks (N. Car.) 279, 15 Am. Dec. 519 (1826); *Hall* v. *Crocker*, 44 Mass. (3 Metc.) 245 (1841); *Wood* v. *Colvin*, 5 Hill (N. Y.) 228 (1843); *Fitch* v. *Tyler*, 34 Maine 463 (1852); *Smith* v. *Morse*, 2 Cal. 524 (1852); *Fenno* v. *Coulter*, 14 Ark. 38 (1853); *Dunnica* v. *Coy*, 28 Mo. 525, 75 Am. Dec. 133 (1859); *Duncan* v. *Matney*, 29 Mo. 368, 77 Am. Dec. 575 (1860); *Bidwell* v. *Coleman*, 11 Minn. (Gil. 45) 78 (1865); *Lockwood* v. *Bigelow*, 11 Minn. (Gil. 70) 113 (1865); *Blood* v. *Light*, 38 Cal. 649, 99 Am. Dec. 441 (1869); *Rodgers* v. *Bonner*, 45 N. Y. 379 (1871); *Isam* v. *Hooks*, 46 Ga. 309 (1872); *Hamblen* v. *Hamblen*, 33 Miss. 455, 69 Am. Dec. 358 (1857); *Cavanaugh* v. *Peterson*, 47 Tex. 197 (1877); *Bank of British Columbia* v. *Page*, 7 Ore. 454 (1879); *Sanger* v. *Trammell*, 66 Tex. 361, 1 S. W. 378 (1886); *Kile* v. *Giebner*, 114 Pa. St. 381, 7 Atl. 154 (1886) semble; *Lynch* v. *Earle*, 18 R. I. 531, 28 Atl. 763 (1894); *Herr* v. *Broadwell*, 5 Colo. App. 467, 36 Pac. 70 (1895); *Union Nat. Bank* v. *Lane*, 177 Ill. 171, 52 N. E. 361, 69 Am. St. 216 (1898); *Acklin* v. *Waltermier*, 10 Ohio C. D. 629, 19 Ohio C. C. 372 (1899); *Jones* v. *Olson*, 17 Colo. App. 144, 67 Pac. 349 (1902); *Brittania Mining Co.* v. *United States Fidelity &c. Co.*, 43 Mont. 93, 115 Pac. 46 (1911); *Hunneman* v. *Phelps*, 207 Mass. 439, 93 N. E. 697 (1911). Contra: *Morgan* v. *Johnson*, 27 La. Ann. 539 (1875); *Watson* v. *Bondurant*, 21 Wall. (U. S.) 123, 22 L. ed. 509 (1874); *Carlson* v. *Smith* (Minn.), 149 N. W. 199 (1914); *Waters* v. *Duvall*, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693 (1839); *Elliott* v. *Knott*, 14 Md. 121, 74 Am. Dec. 519 (1859); *Langley* v. *Jones*, 33 Md. 171 (1870).

So also in England, under a writ of *elegit*, the sheriff does not deliver actual possession of the land to the judgment creditor, and the latter, if not peaceably admitted, is driven to an action to obtain possession. *Jefferson* v. *Dawson*, 3 Keb. 243 (1673); *Taylor* v. *Cole*, 3 T. R. 292 (1789) at p. 295; *Addison* v. *Tate*, 11 Exch. 250 (1855); *Hatton* v. *Haywood*, 9 Ch. App. 229 (1874), at p. 236. And while a leasehold interest in land is sold as a chattel

CHENERY *v.* STEVENS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867

97 Mass. 77

Writ of entry brought by the demandant as trustee of Almira Richards, wife of Asa F. Richards, for possession of two tracts of land in New Salem, declaring on his seisin for her life. Plea, nul disseisin.[90]

The tenant claimed title by virtue of a levy of an execution in favor of himself against Asa F. Richards, the husband of Almira, and contended that the consideration for the conveyance of the land to Almira was paid by Asa F., and the conveyance was void as against his creditors. The whole of the demanded premises were set off by the officer, on the levy, October 2, 1865, and by his return it appeared that they were appraised at the value of two thousand dollars, while the amount needful to satisfy the execution, interest and charges of levy, was nineteen hundred and ninety-four dollars and eleven cents.[91]

The judge ruled that the levy was invalid, and instructed the

---

the sheriff does not take possession. *King* v. *Deane*, 2 Show. 85 (1679); *Playfair* v. *Musgrove*, 14 M. & W. 239 (1845); *Titusville Novelty Iron Works' Appeal*, 77 Pa. 103 (1874); *Maurer* v. *Sheafer*, 116 Pa. St. 339, 9 Atl. 869 (1887).

The essentials of a valid levy or attachment of land is a matter of statutory provision in many jurisdictions. See Freeman on Executions (3d ed.), § 280 b.

[90] Only so much of the case as relates to the levy is printed.

[91] Massachusetts in 1716 adopted a statutory method of subjecting land to the payments of debts differing from the common law *elegit*. *Gordon* v. *Lewis*, 1 Sumner 525, Fed. Cas. No. 5612 (1834). According to this practice, which, with some variations, is followed in other New England states, the officer, on taking land on execution, causes it to be appraised by three persons, one appointed by the creditor, one by the debtor and the third by the officer. The appraisers view the land, determine its value and set off by metes and bounds to the creditor a sufficient quantity of land to satisfy the execution. If the land can not be divided without damage to the whole, the levy is made on such undivided portion as will satisfy the execution to be held in common with the debtor. The officer delivers seisin to the creditor or his attorney and if a person other than the debtor is seised, he delivers such momentary seisin as will enable the creditor to maintain an action therefor. The officer returns the execution and appraisement to the court and within three months after the levy has been completed causes the execution and return to be recorded. The debtor may within one year after the levy redeem by paying the amount for which the land was set off with interest, as well as taxes, liens and expenses for repairs and improvements, receiving credit for the rents and profits, whereupon the creditor shall deliver to the debtor a deed of release. Mass. Rev. Laws (1902), ch. 178, p. 1603; Maine Rev. Stat. (1903), ch. 78, p. 668; Gen. Stat. Conn. (1902), § 921; Pub. Stat. N. H. (1891), ch. 233. To obtain title by such proceedings every requirement of the statute must be strictly followed. *Ladd* v. *Blunt*, 4 Mass. 402 (1808); *Pierce* v. *Strickland*, 26 Maine 277 (1846); *Ellison* v. *Wilson*, 36 Vt. 60 (1863); *Pickering* v. *Reynolds*, 111 Mass. 83 (1872); *Schroeder* v. *Tomlinson*, 70 Conn. 348, 39 Atl. 484 (1898); Freeman on Executions (3d ed.), § 372. In Massachusetts the creditor if he so elects may now sell the land on the execution. *Hackett* v. *Buck*, 128 Mass. 369 (1880). The Vermont statutes provide for a sale. Vt. Pub. Stat. (1906), §§ 2170-76.

jury that the demandment was entitled to recover upon the deed to him from Almira Richards. A verdict was thereupon returned for the demandant; and the tenant alleged exceptions.

BIGELOW, C. J.: Taking the return of the officer as it stands, the levy was clearly invalid by reason of a seizure of more land than was sufficient to satisfy the execution by the sum of five dollars and eighty-nine cents. No amendment to the return has been properly made by an application to the court since the execution has become matter of record. *Welsh* v. *Joy*, 13 Pick. (Mass.) 477, 482. But the proposed amendment would not cure the difficulty. There would still have been more land set off than the officer had a right to take in order to satisfy the execution with all lawful fees. This is fatal to the validity of the levy. *Pickett* v. *Breckenridge*, 22 Pick. (Mass.) 297, is a decisive authority on this point, and also that the amount of the excess for which the levy was made is not so inconsiderable as to fall within the maxim de minimis non curat lex. The counsel for the tenant is in error in supposing that the validity of a levy, where land has been set off for too large a sum, may be made to depend on the proportion which such excess bears to the whole amount of the execution; or, in other words, that if the error is relatively small as compared with the debt, it is immaterial that more land has been set off to the creditor than he is justly entitled to. But this can not be so. In the transfer of title to real estate by virtue of a statute power, the requisitions of law must be strictly complied with. The sheriff can take no more land than is exactly sufficient to satisfy the execution. If he errs in this respect, as a levy can not be void in part and valid in part, the whole is void.[92]

Exceptions overruled.

---

[92]Accord: *Huntington* v. *Winchell*, 8 Conn. 45, 20 Am. Dec. 84 (1830); *Skinner* v. *McDaniel*, 5 Vt. 539 (1833); *Pickett* v. *Breckenridge*, 22 Pick. (Mass.) 297, 33 Am. Dec. 745 (1839); *French* v. *Eaton*, 15 N. H. 337 (1844); *Bates* v. *Willard*, 51 Mass. 62 (1845); *Thayer* v. *Mayo*, 34 Maine 139 (1852), where the excess was fifty-two cents; *McGregor* v. *Williams*, 64 Mass. (10 Cush.) 526 (1852); *Glidden* v. *Chase*, 35 Maine 90, 56 Am. Dec. 690 (1852), where the excess was fourteen cents; *Webster* v. *Hill*, 38 Maine 78 (1854); *Bachelder* v. *Thompson*, 41 Maine 539 (1856); *Prescott* v. *Prescott*, 62 Maine 428 (1873). But a levy is not to be avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law. In such case the officer is liable to the debtor, but the creditor is not to suffer for the error or extortion of the officer. *Sturdivant* v. *Frothingham*, 10 Maine 100 (1833); *Odiorne* v. *Mason*, 9 N. H. 24 (1837); *Camp* v. *Bates*, 13 Conn. 1 (1838); *Holmes* v. *Hall*, 45 Mass. (4 Metc.) 419 (1842); *Keen* v. *Briggs*, 46 Maine 467 (1859); *Avery* v. *Bowman*, 40 N. H. 453, 77 Am. Dec. 728 (1860); *Wilson* v. *Gannon*, 54 Maine 384 (1867).

Aside from statutes while an excessive levy may be set aside by the court from which the execution issued, it is not, unless set aside, invalid and will support a sale. *Dezell* v. *Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628 (1842); *Donaldson* v. *Bank of Danville*, 20 Pa. St. 245 (1853); *Brown* v. *Allen*, 3 Head (Tenn.) 429 (1859); *Pugh* v. *Calloway*, 10 Ohio St. 488 (1860); *Black* v. *Nettles*, 25 Ark. 606 (1869); *Campau* v. *Godfrey*, 18 Mich. 27, 100 Am. Dec. 133 (1869); *Drake* v. *Murphy*, 42 Ind. 82 (1873); *Bogle* v. *Bloom*, 36 Kans. 512, 13 Pac. 793 (1887); *McConnell* v. *Kaufman*, 5 Wash. 686, 32 Pac. 782 (1893); *Backus* v. *Barber*, 107 Mich. 468, 65 N. W. 379 (1895); *Hunt* v. *Lavender*, 140 Ga. 157, 78 S. E. 805 (1913); see also *Cary Brick Co.* v. *Tilton*, 208 Fed. 497 (1913).

SECTION 5. EXEMPTIONS

FINK *v.* FRAENKLE

CITY COURT OF NEW YORK, 1891

20 N. Y. Civ. Proc. 402

Appeal by the judgment creditor from an order of the special term denying a motion made by them to punish the judgment debtor for contempt in refusing to deliver to the referee appointed in proceedings supplementary to execution, certain property owned by him.

VAN WYCK, J.: The plaintiff issued an execution against the property of defendant, which was duly returned unsatisfied, whereupon he obtained an order in supplementary proceedings for the examination of defendant, and upon his examination the judgment debtor testified that he was a physician in active practice; lived at 115 Second street; was unmarried; had no children; and owned a set of furniture for his waiting-room, a set for his bedroom, a library of about two hundred volumes, and his surgical instruments; and that all his furniture was worth about $200, and the surgical instruments about $150; and that the books and office furniture were used by him in his business, and, though he does not so testify, it is to be presumed that he also used the instruments in his business. He made no attempt to show that he was a householder, or that he had a family or any person for whom he provided.

At common law neither a judgment debtor nor his family had any way of exempting any portion of his property from execution for his or their benefit,[98] so that any privileges that he may now have

[98] At common law, under a writ of fieri facias, the sheriff had authority to seize everything that was a chattel belonging to the defendant except necessary wearing apparel. Tidd's Practice (1828) 1001; *Hardistey* v. *Barney*, Comb. 356 (1695). But in distress for rent beasts of the plow could not be taken when there were other sufficient subjects of distress on the premises. *Piggott* v. *Birtles*, 1 M. & W. 442 (1836); *Keen* v. *Priest*, 4 H. & N. 235 (1859); or as Cooke puts it: "Beasts belonging to the plow, *averia carucae*, shall not be distrained, which is the ancient common law of England, for no man shall be distrained by the utensils or instruments of his trade or profession, as the axe of a carpenter, or the books of a scholar, while goods or other beasts which Bracton calls the *animalia* (or *catella*) *otiosa* may be distrained." Co. Litt. 47a. By the act of 1888 (51 and 52 Vict.), ch. 51, § 4, the same goods are exempt from distress as are protected from seizure on execution by § 95 of the County Courts Act of 1846 (9 and 10 Vict., ch. 95). These articles are the same as those exempted from execution by the Small Debts Act of 1845 (8 and 9 Vict., ch. 127), § 8 namely: "The wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, the value of such apparel, bedding, tools and implements not exceeding in the whole the value of five pounds." *In re Dawson*, L. R. (1899) 2 Q. B. 54; *Davis* v. *Harris*, L. R. (1900) 1 Q. B. 729; *Masters* v. *Fraser*, 85 L. T. 611 (1902). In *Lavell* v. *Richings*, L. R. (1906) 1 K. B. 480, a cab, the only article on the premises, was held exempt from distress, as an implement of trade although above the value of £5, as the debtor must be left at least £5 worth of tools.

in that direction must be sought for in the statutory law, and in this state the laws which exempt from execution the judgment debtor's personal property are to be found in the Code of Civil Procedure, section 2463, which exempts his earnings for personal service within sixty days, when "necessary for the use of a family, wholly or partly supported by his labor;" section 1390 which exempts certain articles of personal property therein enumerated, "when owned by a householder;" and section 1391, which exempts "furniture, professional instruments, library, and certain other articles, not exceeding in value $250, owned by a person being a householder, or having a family for which he provides." The judgment debtor in this case is left to the necessity of seeking and finding his justification for refusing to deliver his property to his receiver in these three sections of the code.

Perhaps it would be well to state in passing that when the judgment debtor is a woman, she has, by section 1392, the same exemptions as a householder has under sections 1390 and 1391.

The concensus of judicial thought is that the harsh rule of the common law, which stripped judgment debtors of everything except the clothes upon their backs, was mollified by statutory provisions, "as a protection for poor and destitute families," and "to mitigate the consequences of men's thoughtlessness and improvidence."[94] Judge Selden, in the Crawford case, in the Supreme Court, 9 How. Pr. (N. Y.) 548, says: "Although our statutes exempting certain articles of prime necessity, belonging to householders, from levy and sale upon execution, were intended for the benefit of the entire family and not of its head alone, still I entertain no doubt that the master of the family may waive the exemption." However, the court of appeals in the Kneettle case, *22* N. Y. 240, has held that the householder can not even waive the right of exemption, as it is for the benefit of the family for which he provides.[95] In the Kneettle case

[94]In several decisions statutes granting exemptions are regarded as in derogation of the common law and to be construed strictly. *Rue* v. *Alter*, 5 Denio (N. Y.) 119 (1847); *Knabb* v. *Drake*, *23* Pa. St. 489, 62 Am. Dec. 352 (1854); *Grimes* v. *Bryne*, *2* Minn. (1 Gil. *72*) 89 (1858); *Garaty & Armstrong* v. *DuBose*, 5 S. Car. 493 (1874); *White* v. *Heffner*, 30 La. Ann. 1280, 31 Am. Rep. 238 (1878); *London & Canadian Loan Agency Co.* v. *Connell*, 11 Manitoba 115 (1896). But the doctrine more generally accepted is that such statutes, being remedial, beneficial and humane, will be liberally construed. *Parkerson* v. *Wightman*, 4 Strob. (S. Car.) 363 (1850); *Montague* v. *Richardson*, *24* Conn. 338, 63 Am. Dec. 173 (1856); *Deere* v. *Chapman*, 25 Ill. 610, 79 Am. Dec. 350 (1861); *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578 (1867); *Pond* v. *Kimball*, 101 Mass. 105 (1869); *Good* v. *Fogg*, 61 Ill. 449, 14 Am. Rep. *71* (1871); *Heath* v. *Keyes*, 35 Wis. 668 (1874); *Astley* v. *Capron*, 89 Ind. 167 (1883); *Commonwealth* v. *Boyd*, 56 Pa. St. 402 (1867); *Byous* v. *Mount*, 89 Tenn. 361, 17 S. W. 1037 (1890); *Yates County Nat. Bank* v. *Carpenter*, 119 N. Y. 550, 23 N. E. 1108, 7 L. R. A. 557, 16 Am. St. 855 (1890); *Kennedy* v. *Smith*, 99 Ala. 83, 11 So. 665 (1892); *Ferguson* v. *Speith*, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. 459 (1893); *Noyes* v. *Belding*, 5 S. Dak. 603, 59 N. W. 1069 (1894); *Hutchinson* v. *Whitmore*, 99 Mich. 255, 51 N. W. 451, 30 Am. St. 431 (1892); *Nelson* v. *Fightmaster*, 4 Okla. 38, 44 Pac. 213 (1896); *Cook* v. *Allee*, 119 Iowa 226, 93 N. W. 93 (1903); *In re Swanson*, 213 Fed. 353 (1914).

[95]Accord: *Crawford* v. *Lockwood*, 9 How. Pr. (N. Y.) 547 (1854); *Harper* v. *Leal*, 10 How. Pr. (N. Y.) *276* (1854); *Maxwell* v. *Reed*, 7 Wis.

the execution was issued upon a judgment recovered on a promissory note containing this provision: "And I hereby waive and relinquish all right of exemption of any property I may have from execution on this debt;" and Judge Denio in that case, writing in support of the contention that the right of exemption can not be waived, reiterates the oft-repeated construction given to these statutes, as follows: "These exemption laws apply only to householders who have families for which they provide."

All of this judicial reasoning goes to establish that only a household's property is exempt; that a householder is the master of a household; and that a household is a family living together, however not necessarily wife and children, but it must be a family, small or large, for which he provides.

This judgment debtor has not in any way shown himself a householder, or a man having a family for which he provides, and hence it follows that he should have been forced to yield up his property to his receiver in order that it might reach his creditor, the plaintiff.[96]

The order appealed from must be reversed, with costs.

Ehrlich, C. J., concurred.

---

582 (1859); *Denny* v. *White*, 2 Cold. (Tenn.) 283, 88 Am. Dec. 596 (1865); *Curtis* v. *O'Brien*, 20 Iowa 376, 89 Am. Dec. 543 (1866); *Moxley* v. *Ragan*, 10 Bush (Ky.) 156 (1873); *Recht* v. *Kelly*, 82 Ill. 147, 25 Am. Rep. 301 (1876); *Branch* v. *Tomlinson*, 77 N. Car. 388 (1877); *Wallingsford* v. *Bennett*, 1 Mackey (D. C.) 303 (1881); *Green* v. *Watson*, 75 Ga. 471, 45 Am. Rep. 479 (1885); *Mills* v. *Bennett*, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. 763 (1895); *Powell* v. *Daily*, 61 Ill. App. 552 (1895); *Roach* v. *Curtis*, 191 N. Y. 387, 84 N. E. 283 (1908) semble. Contra: *Hewes* v. *Parkman*, 20 Pick. (Mass.) 90 (1838); *Case* v. *Dunmore*, 23 Pa. St. 93 (1854); *Laucks' Appeal*, 24 Pa. St. 426 (1855); *Bowman* v. *Smiley*, 31 Pa. St. 225, 72 Am. Dec. 738 (1858); *Stockett* v. *Johnson*, 22 La. Ann. 89 (1870); *Patterson* v. *Taylor*, 15 Fla. 336 (1875); *Fogg* v. *Littlefield*, 68 Maine 52 (1877); *Keybers* v. *McComber*, 67 Cal. 395, 7 Pac. 838 (1885); *Beatty* v. *Rankin*, 139 Pa. St. 358, 21 Atl. 74 (1890); *Moss* v. *Jenkins*, 146 Ind. 589, 45 N. E. 789 (1896); *Kroenert* v. *Mead*, 59 Kans. 665, 54 Pac. 684 (1898); *Wright* v. *Wright* (Pa.), 103 Fed. 580 (1900).

[96] The statutes giving the right of exemption usually confine it to resident "householders" or "heads of families." For the construction of these terms see Herman on Executions, § 94; Freeman on Executions (3d ed.), § 222; 18 Cyc. 1397; 7 A. & E. Encyc. of Law 133, and see further *Woodward* v. *Murray*, 18 Johns. (N. Y.) 400 (1820); *Bowne* v. *Witt*, 19 Wend. (N. Y.) 475 (1838); *Bonnel* v. *Dunn*, 28 N. J. L. 153 (1859); *Marsh* v. *Lazenby*, 41 Ga. 153 (1870); *Bunnell* v. *Hay*, 73 Ind. 452 (1881); *Linton* v. *Crosby*, 56 Iowa 386, 9 N. W. 311, 41 Am. Rep. 107 (1881); *Zimmerman* v. *Franke*, 34 Kans. 650, 9 Pac. 747 (1886); *Chamberlain* v. *Darrow*, 46 Hun 48, 11 N. Y. St. 100 (1887); *Pettit* v. *Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900 (1889); *Boelter* v. *Klossner*, 74 Minn. 272, 77 N. W. 4, 73 Am. St. 347 (1898); *Webster* v. *McGauvran*, 8 N. Dak. 274, 78 N. W. 80 (1899); *Rolater* v. *King*, 13 Okla. 37, 73 Pac. 291 (1903); *Duffey* v. *Reardon*, 70 Ohio St. 328, 71 N. E. 712 (1904). The exemption in some jurisdictions extends to inhabitants whether married or single. *Brown* v. *Wait*, 36 Mass. 470, 31 Am. Dec. 154 (1838); *Cobbs* v. *Coleman*, 14 Tex. 594 (1855); *Dieffenderfer* v. *Fisher*, 3 Grant (Pa.) 30 (1859).

In a number of states constitutional provisions exempt certain property from sale on execution, in others homestead exemptions are provided and in some states both. Stimson's Amer. Stat. Law, §§ 83 and 84. The kind, value and amount of property exempt varies in the different states. Herman

POND *v.* KIMBALL

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869

101 *Mass.* 105

Tort by Sylvanus W. Pond and Hamon E. Leland against the sheriff of Middlesex, for the act of his deputy in attaching, on a writ against the plaintiffs, property belonging to them, but alleged to be exempt from attachment.

At the trial in the superior court, before Brigham, J., it appeared that the plaintiffs were copartners; that all the property attached was partnership property; and that some, if not all, of it came within the exemption of the statute, part as tools and implements, part as materials and stock, unless the fact that it was partnership property prevented its coming within such exemption. The presiding judge ruled that the fact that it was partnership property did not render it liable to attachment if it would otherwise have been exempt; ordered a verdict for the plaintiffs and reported the case to this court.[97]

AMES, J.: This report finds that the property described in the plaintiffs' declaration belonged to them as copartners. It had been procured by them to be used in their shop, as appropriate to and usual in the prosecution of their joint business. A portion of it falls within the description of "tools and implements" necessary to the prosecution of their trade and business, and another portion under that of "materials and stock" necessary for the same purpose, and intended to be used or wrought therein.[98] The claim of

---

on Executions, § 97; N. Y. Code Civ. Proc., §§ 1389-1404; Mass. Rev. Laws (1902), 1598, ch. 177, § 34; N. J. Comp. Stat. (1910) 2745, §§ 10-17; Pa. Act of April 9, 1849, P. L. 533, P. & L. Dig. (2d ed.) 3342, Mar. 4, 1887, P. L. 4, April 4, 1889, P. L. 23.

In some jurisdictions the exemption is allowed only in actions on contracts. *State* v. *Melogue*, 9 Ind. 196 (1857); *Kirkpatrick* v. *White*, 29 Pa. St. 176 (1857); *Kenyon* v. *Gould*, 61 Pa. St. 292 (1869); *Massie* v. *Enyart*, 33 Ark. 688 (1878); *Northern* v. *Hanners*, 121 Ala. 587, 25 So. 817, 77 Am. St. 74 (1898); *De Hart* v. *Haun*, 126 Ind. 378, 26 N. E. 61 (1890). Contra: *Smith* v. *Omans*, 17 Wis. 395 (1863); *Conroy* v. *Sullivan*, 44 Ill. 451 (1867); *Dellinger* v. *Tweed*, 66 N. Car. 206 (1872); *Loomis* v. *Gerson*, 62 Ill. 11 (1871).

[97] Part of the statement of facts is omitted.

[98] Many exemption laws specify tools of trade but there is great diversity of opinion as to what articles come within that description. See *Kilburn* v. *Demming*, 2 Vt. 404, 21 Am. Dec. 543 (1829), spinning machine exempt; *Richie* v. *McCauley*, 4 Pa. 471 (1846), expensive stamping blocks not exempt; *Goddard* v. *Chaffee*, 84 Mass. (2 Allen) 395, 79 Am. Dec. 796 (1861), musicians' violin exempt; *Wallace* v. *Bartlett*, 108 Mass. 52 (1871), shop furnishings not exempt; *Wilkinson* v. *Alley*, 45 N. H. 551 (1864), farming implements exempt; *Allen* v. *Thompson*, 45 Vt. 472 (1873), barbers' chair exempt; *Amend* v. *Murphy*, 69 Ill. 337 (1873), music teacher's piano exempt; *Bitting* v. *Vanderburgh*, 17 How. Pr. (N. Y.) 80 (1859), watch exempt. Contra: *In re Turnbull*, 106 Fed. 667 (1901); *Allman* v. *Gann*, 29 Ala. 240 (1856); *McCue* v. *Tunstead*, 65 Cal. 506, 4 Pac. 510 (1884); *Kirksey* v. *Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. 65 (1902), work horse exempt.

the plaintiffs is, that on both these grounds a portion at least of the property was exempt from attachment; and that the defendant is liable in this action for the wrongful act of his deputy in making such attachment.

This claim, then, raises the question whether the exemption of certain property from attachment, provided for in the General Statutes, chapter 133, section 32, clause 5, 6 and chapter 123, section 32, applies to the case of property belonging jointly to two or more copartners. It does not appear that, at the time of the attachment, the plaintiffs had dissolved partnership, or had divided their joint property, or had had a general settlement and winding up of their business. We agree with the plaintiffs' counsel, that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it, consistently with its true and just interpretation. There are many difficulties, however, in the way of applying it to the case of copartners and joint owners, and these difficulties we find to be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. On the decease of one member of the firm, it would go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern, and paying its debts. In the case of numerous partners can it be said that each would have the right to claim, as exempt from attachment for the joint debts, one hundred dollars' worth of tools and implements, and another hundred dollars' worth of materials and stock; or is the whole firm to be considered as one debtor only? Does the exempted property in that case belong to the partners jointly, or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless possibly the clause as to fishermen (Gen. Stats., chapter 133, section 32, clause 9) be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessaries,

---

Compare *Robert* v. *Adams*, 38 Cal. 383, 99 Am. Dec. 413 (1869); *Fowler* v. *Gilmore*, 30 Tex. 432 (1867); *Brown* v. *Hoffmeister*, 71 Mo. 411 (1880); *Equitable Life Assur. Soc.* v. *Goode*, 101 Iowa 160, 70 N. W. 113, 35 L. R. A. 690, 63 Am. St. 378 (1897); *State* v. *St. Paul*, 111 La. 71, 35 So. 389 (1903), professional books; *Patten* v. *Smith*, 4 Conn. 450, 10 Am. Dec. 166 (1823); *Sallee* v. *Waters*, 17 Ala. 482 (1850); *Prather* v. *Bobo*, 15 La. Ann. 524 (1860); *Green* v. *Raymond*, 58 Tex. 80, 44 Am. Rep. 601 (1882); *Bliss* v. *Vedder*, 34 Kans. 57, 7 Pac. 599, 55 Am. Rep. 237 (1885); *Brummage* v. *Kenworthy*, 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607n (1910); *Harris* v. *Townley*, (Tex.) 161 S. W. 5 (1913), printing press exempt. Contra: *Buckingham* v. *Billings*, 13 Mass. 82 (1816); *Spooner* v. *Fletcher*, 3 Vt. 133, 21 Am. Dec. 579 (1830); *Danforth* v. *Woodward*, 10 Pick. (Mass.) 423, 20 Am. Dec. 531 (1830); *Oliver* v. *White*, 18 S. Car. 235 (1882); *Frantz* v. *Dobson*, 64 Miss. 631, 2 So. 75, 60 Am. Rep. 68 (1887). In *Peevehouse* v. *Smith* (Tex. Civ. App.), 152 S. W. 1196 (1913), an automobile was held a "carriage" within an exemption law allowing the head of a family one carriage or buggy.

out of his property. But property belonging to the firm can not be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and can not in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm.

The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership and combine his means with those of one or more than one other person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemptions as to that kind of property.

The result is, that the plaintiffs are not entitled to maintain their action; the verdict must be set aside, and judgment entered for the defendant.[99]

---

[99]Accord: *Clegg* v. *Houston*, 1 Phila. (Pa.) 352 (1852); *Bonsall* v. *Comly*, 44 Pa. St. 442 (1863); *Gaylord, Son & Co.* v. *M. Imhoff & Co.*, 26 Ohio St. 317, 20 Am. Rep. 762 (1875); *State* v. *Spencer*, 64 Mo. 355, 27 Am. Rep. 244 (1877); *Spiro* v. *Paxton*, 3 Lea. (Tenn.) 75, 31 Am. Rep. 630 (1879); *Love* v. *Blair*, 72 Ind. 281 (1880); *Baker* v. *Sheehan*, 29 Minn. 235, 12 N. W. 704 (1882); *State* v. *Bowden*, 18 Fla. 17 (1881); *State* v. *Emmons*, 99 Ind. 452 (1884); *Cowan* v. *Their Creditors*, 77 Cal. 403, 19 Pac. 755, 11 Am. St. 294 (1888); *Schlapback* v. *Long*, 90 Ala. 525, 8 So. 113 (1889); *Ex parte Karish*, 32 S. Car. 437, 11 S. E. 298, 17 Am. St. 865 (1889); *Thurlow* v. *Warren*, 82 Maine 164, 19 Atl. 158, 17 Am. St. 472 (1889); *Fingerhuth* v. *Lachman*, 37 Ill. App. 489 (1890); *State* v. *Pruitt*, 65 Mo. App. 154 (1895); *Green* v. *Taylor*, 98 Ky. 330, 32 S. W. 945, 17 Ky. Law Rep. 897, 56 Am. St. 375 (1895); *In re Spitz*, 8 N. Mex. 622, 45 Pac. 1122, 34 L. R. A. 604 (1896); *Bateman* v. *Edgerly*, 69 N. H. 244, 45 Atl. 95, 76 Am. St. 162 (1897); *Gazette Pub. Co.* v. *McMurtrie*, 7 Pa. Super. Ct. 617 (1898). Contra: *Stewart* v. *Brown*, 37 N. Y. 350, 93 Am. Dec. 578 (1867); *Radcliff* v. *Wood*, 25 Barb. (N. Y.) 52 (1857); *McCoy* v. *Brennan*, 61 Mich. 362, 28 N. W. 129, 1 Am. St. 589 (1886); *Blanchard, Williams & Co.* v. *Pascal*, 68 Ga. 32, 45 Am. Rep. 474 (1881); *St. Louis Type Foundry* v. *International Live-Stock Journal Printing &c. Co.*, 74 Tex. 651, 12 S. W. 842, 15 Am. St. 870 (1889), and contra, if other partners consent, *Burns & Smucker* v. *Harris*, 67 N. Car. 140 (1872); *O'Gorman* v. *Fink*, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58 (1883); *Richardson* v. *Redd*, 118 N. Car. 677, 24 S. E. 420 (1896); *In re Seabolt*, 113 Fed. 766 (1902), or there is a severance of interest, *Goudy* v. *Werbe*, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114 (1888); *Lee* v. *Bradley Fertilizer Co.*, 44 Fla. 787, 33 So. 456 (1902).

In some cases a distinction is made in favor of claims out of partnership property when the execution is against one of the firm for his individual debt. *Moyer* v. *Drummond*, 32 S. Car. 165, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. 850 (1889); *Dennis* v. *Kass & Co.*, 11 Wash. 353, 39 Pac. 656, 48 Am. St. 880 (1895); *Southern Jellico Coal Co.* v. *Smith*, 20 Ky. L. 1594, 105 Ky. 769, 49 S. W. 807 (1899). Contra: *State* v. *Bowden*, 18 Fla. 17 (1881); *Wills* v. *Downs*, 38 Ill. App. 269 (1890); *Porch* v. *Arkansas Milling Co.*, 65 Ark. 40, 45 S. W. 51, 67 Am. St. 895 (1898).

In *Heckle* v. *Grewe*, 125 Ill. 58, 17 N. E. 437, 8 Am. St. 332 (1888), it is held that the interest of a tenant in common in personal property "stands on the same footing, in respect to exemption laws, as like interests in other property where the possession as well as the title is several." Accord: *Servanti* v. *Lusk*, 43 Cal. 238 (1872); *Newton* v. *Howe*, 29 Wis. 531, 9 Am. Rep. 616

FROST *v.* SHAW

SUPREME COURT OF OHIO, 1854

3 *Ohio St.* 270

Trespass by the plaintiff in error for the recovery of damages, for the levy and sale by execution, of certain chattels, consisting of one yoke of work cattle, one ox-yoke with the bows and irons, six sheep, and one cow, which he claimed to be exempted by law from seizure on execution. The plaintiff being indebted to Vangorder & Canfield in the sum of $68.83 gave them a promissory note for that amount, and, as security, a chattel mortgage of the property above, with the exception of the ox-yoke with the bows and irons. Vangorder & Canfield obtained judgment on the note and the defendant Shaw, as constable, by direction of Birchard, the agent of the plaintiffs in the execution, levied on and sold said chattels. On the trial of the case in the court of common pleas there was a verdict and judgment for defendants. Plaintiff brought error.[1]

BARTLEY, J.: Although the humane provisions of the law exempting certain articles of necessity from execution for the payment of debts, may be entitled to a liberal construction, the settled principles which govern the right of private property, are not to be overlooked. The owner of the chattels exempted from execution, is not divested of the right of disposing of property himself, either by sale, or by pledge in security of the payment of his debts. And in case of a pledge or chattel mortgage, the owner clearly waives the benefit of the exemption, so far as the encumbrance extends, or is operative.[2]

But it is urged, with much force and ingenuity, by the counsel for the plaintiff, that the seizure and sale, on execution, of one of the chattels, consisting of an ox-yoke with its appendages, which was not covered by the mortgage, sustained the action; and that the court of common pleas erred in the charge to the jury, in reference to this article. The statute authorizes a person of a family, "if he be engaged at the time in the business of agriculture, to select one work horse, or mare, or one yoke of work oxen, with the necessary gearing for the same," which he may hold exempt from execution or sale by debt. Swan's Rev. Stat., page 710. We are saved the

---

(1872); *Rutledge* v. *Rutledge*, 8 Baxt. (Tenn.) 33 (1874); *Sterman* v. *Hann* 160 Iowa 356, 141 N. W. 934 (1913). Compare *Wright* v. *Pratt*, 31 Wis. 99 (1872). In *Hawley* v. *Hampton*, 160 Pa. St. 18, 28 Atl. 471 (1894), it is held that the joint owners of a certificate of stock pledged for a joint debt could not claim their exemptions out of the proceeds of a sheriff's sale of the stock. And in *Sharpe* v. *Baker*, 51 Ind. App. 547, 99 N. E. 44 (1912), a tenant by entirety was held not entitled to claim an exemption out of the joint property.

[1]The statement of facts is abridged and part of the opinion omitted.

[2]Accord: *Harvey* v. *Ford*, 83 Mich. 506, 47 N. W. 242 (1890); *Rogers* v. *Raynor*, 102 Mich. 473, 60 N. W. 980 (1894); *Hawley* v. *Hampton*, 160 Pa. St. 18, 28 Atl. 471 (1894); *Monroe* v. *Button*, 20 N. Y. Misc. 494, 46 N. Y. S. 637 (1897); *Grover* v. *Younie*, 110 Iowa 446, 81 N. W. 684 (1900). But only as to the holder of this lien. *McComb* v. *Watt*, 39 Okla. 412, 135 Pac. 361 (1913).

necessity of considering the question whether the "necessary gearing" could be held exempt from execution, when the debtor had parted with the oxen, by the fact that it does not appear in this case, that the plaintiff had laid any foundation, by proof, for his right to the benefit of the exemption, as to this article, which, by the terms of the law, depended on his selection of it, as necessary for carrying on his business of agriculture. There are certain enumerated articles, which are absolutely exempted from execution, and which the officer is bound, at his peril, to notice, and not take on execution, unless turned out to him, by the debtor waiving his right to the exemption. But there are other articles, including that now in question, the exemption of which from execution, by the terms of the law, depends on the selection to be made by the debtor. This selection should be made by the debtor at the time of the levy, if he be present; but if not present, he should make the selection and notify the officer of the same, within a reasonable time thereafter, and before the sale. Without such selection, the right to the benefit of the exemption does not exist as to those articles, which the statute authorized the debtor to select, and when no such selection has been made, it is the duty of the officer to proceed to levy on, and sell the property. The plaintiff, therefore, having failed to show that he had selected this article to be held as necessary to his business, failed to establish his right to the exemption, and, consequently, his right to maintain an action for the taking and sale of the article on execution.[8]

Judgment affirmed.

---

[8]Where articles are specifically exempt by statute, or where the debtor's property amounts to no more than the exemption allowed, the following cases hold that the officer must assume that an exemption is claimed although there may have been no affirmative act on the debtor's part. *State* v. *Haggard*, 1 Humph. (Tenn.) 390 (1839); *Elliott* v. *Whitemore*, 5 Mich. 532 (1858); *Gilman* v. *Williams*, 7 Wis. 329, 76 Am. Dec. 219 (1859); *Cole* v. *Green*, 21 Ill. 104 (1859); *Wyckoff* v. *Wyllis*, 8 Mich. 48 (1860); *Lynd* v. *Pickett*, 7 Minn. (Gil. 128) 184, 82 Am. Dec. 79 (1862); *Mannan* v. *Merritt*, 93 Mass. (11 Allen) 582 (1866); *Frost* v. *Mott*, 34 N. Y. 253 (1866); *Woods v. Keyes*, 96 Mass. 236, 92 Am. Dec. 765 (1867); *Perry* v. *Lewis*, 49 Miss. 443 (1873); *Wallace* v. *Lawyer*, 54 Ind. 501, 23 Am. Rep. 661 (1876); *Shear* v. *Reynolds*, 90 Ill. 238 (1878); *Murphy* v. *Sherman*, 25 Minn. 196 (1878); *Seip* v. *Tilghman*, 23 Kans. 289 (1880); *Parsons* v. *Thomas*, 62 Iowa 319, 17 N. W. 526 (1883); *Harrington* v. *Smith*, 14 Colo. 376, 23 Pac. 331, 20 Am. St. 272 (1890); *Grieb* v. *Northrup*, 66 App. Div. 86, 72 N. Y. S. 481 (1901); *Skinner* v. *Jennings*, 137 Ala. 295, 34 So. 622 (1902); *Sanderberg* v. *Borstadt*, 48 Colo. 96, 109 Pac. 419 (1910). Contra: *Twinam* v. *Swart*, 4 Lans. (N. Y.) 263 (1871); *Gilewicz* v. *Goldberg*, 69 App. Div. 438, 74 N. Y. S. 984, 10 N. Y. Ann. Cas. 393 (1902); *Thompson* v. *Peterson*, 122 Minn. 228, 142 N. W. 307 (1913). But, generally, the exemption is regarded as a personal privilege to which the debtor must lay claim within the time and in the manner provided by law or established by practice. *Gresham* v. *Walker*, 10 Ala. 370 (1846); *Weaver's Appeal*, 18 Pa. St. 307 (1852); *Hammer* v. *Freese*, 19 Pa. St. 255 (1852); *Diehl* v. *Holben*, 39 Pa. St. 213 (1861); *Borland* v. *O'Neal*, 22 Cal. 504 (1863); *Bair* v. *Steinman*, 52 Pa. St. 423 (1866); *Osborne* v. *Schutt*, 67 Mo. 712 (1878); *State* v. *Boulden*, 57 Md. 314 (1881); *Green* v. *Blunt*, 59 Iowa 79, 12 N. W. 762 (1882); *Barton* v. *Brown*, 68 Cal. 11 (1885); *Settles* v. *Bond*, 49 Ark. 114, 4 S. W. 286 (1886); *Stewart's Appeal*, 20 W. N. Cas. (Pa.) 111 (1887); *Williamson* v. *Krumbhaar*, 132 Pa. St. 455, 19 Atl. 281 (1890); *Stanton* v. *French*, 83 Cal. 194, 23 Pac. 355 (1890); *Pirie* v. *Harkness*, 3

MEGEHE *v.* DRAPER

SUPREME COURT OF MISSOURI, 1855

21 *Mo.* 510

RYLAND, J.: The defendant, Draper, caused the plaintiff's property to be levied upon under and by virtue of an execution. The plaintiff claimed the property, to the value of $150, as exempt from execution, under the act of the legislature of February 6, 1847, and the property was duly appraised. The defendant afterwards caused the property to be sold under the execution, and this suit is brought for that wrong. The defense relied upon is, that the plaintiff, at the time, had other property not specifically exempt from execution, more than sufficient in value to pay the debt, which he concealed from the officer, so as to keep it out of the reach of the execution. Upon the plaintiff's motion, this part of the defendant's answer was stricken out, and the defendant excepted. Upon the trial, the defendant offered to prove the same matters before the jury; which proof was rejected, and the defendant excepted. There was a verdict for the plaintiff, and judgment thereon. The defendant moved for a new trial, which was refused, and he brings the case here by appeal.

The only matter for our consideration involves the act of the court below in rejecting the evidence on the trial, and in striking out the answer, or that part of the answer setting up the above matters in defense. If the court properly struck out that part of the answer, then it was proper also to reject the evidence in relation to the same subject matter.

This court is of opinion that the matter set up in the defendant's answer was well stricken out. It affords no defense to the plaintiff's action. The statutes reserving and exempting certain specific property from execution, and property real, personal and mixed from execution, to a certain amount in value, were not made alone for the benefit of the debtor. He must be the head of a family. The legislature had an eye to the family of the debtor, to his household, and determined to prevent as much suffering and misery from entering

---

S. Dak. 178, 52 N. W. 581 (1892); *Wagner* v. *Barden*, 13 Ind. App. 571, 41 N. E. 1067 (1895); *Scanlan* v. *Guiling*, 63 Ark. 540, 39 S. W. 713 (1897); *Hartman* v. *Wood*, 57 App. Div. 23, 67 N. Y. S. 1046 (1901); *Johnson* v. *Larcade*, 110 Ill. App. 611 (1903); *In re Moss* v. *Lightfine*, 60 Misc. (N. Y.) 62 (1908); *United States Fidelity Co.* v. *Hollenshead*, 51 Wash. 326, 98 Pac. 749 (1909). And this rule is especially applicable where the debtor must select from a number of articles those that he claims as exempt. In *Bussell* v. *Hardy*, 58 N. H. 331 (1878), trespass was brought against an officer for taking a pair of oxen and a cow claimed under the exemption law. At the time of attachment the plaintiff had two cows, a pair of oxen and a horse. Said the court: "Either the oxen or the horse were exempt but not both. One of the two cows was exempt but not both. If he had made such a claim, the officer might have attached the horse and the other cow." Accord: *Sumner* v. *Brown*, 34 Vt. 194 (1861); *Butt* v. *Green*, 29 Ohio St. 667 (1876); *Nash v. Farrington*, 86 Mass. (4 Allen) 157 (1862); *Savage* v. *Davis*, 134 Mass. 401 (1883). Cf. *Copp* v. *Williams*, 135 Mass. 401 (1883).

into such abodes as they could, by saving to them the small allowance mentioned in the statutes. These statutes, so productive of good to the classes which generally so much need protection, deserve and meet with liberal interpretation from the courts.

It would at once destroy all the intended benefit of these statutes, to suffer such a defense to be set up against those claiming the protection under them. If the defendant in the execution, who claims the property to be exempt, has concealed and hid, or placed beyond the immediate reach of the officers of justice, his property, and this fact be known to the plaintiffs in the execution, let them ferret out the hidden property and take steps to reach it, and subject it to the process of the law. The burden should be on their shoulders. If the plaintiff here in the execution asserts that the defendant has concealed his property, let him search out the property with his writ of execution. He can garnishee under execution the person in whose possession the property is supposed to be. Let him take this course. He has no right by act to destroy the obvious intention of the statute in favor of the helpless and needy, when he can so easily, by garnisheeing, reach the hidden or concealed property. It will not do to say that he can not find it, or does not know where it is. He charges that the defendant has concealed it; then the law gives him means to pursue it. Let it once be understood that such an allegation in a defendant's answer, in cases like the present, will be availing, and you might as well strike the whole provision exempting property from execution from the statute book.[4]

Judgment affirmed.

---

[4]Accord: *Calloway* v. *Carpenter,* 10 Ala. 500 (1846); *Wilcox* v. *Hawley,* 31 N. Y. 648 (1864); *Mannan* v. *Merritt,* 93 Mass. 582 (1866); *Moseley* v. *Anderson,* 40 Miss. 49 (1866); *Crummen* v. *Bennet,* 68 N. Car. 494 (1873); *Duvall* v. *Rollins,* 71 N. Car. 218 (1874); *Gaster* v. *Hardie,* 75 N. Car. 460 (1876); *Ketchum* v. *Allen,* 46 Conn. 414 (1878); *Bell* v. *Devore,* 96 Ill. 217 (1880); *Baldwin* v. *Talbot,* 43 Mich. 11, 4 N. W. 547 (1880); *Elder* v. *Williams,* 16 Nev. 416 (1882); *Bates* v. *Callender,* 3 Dak. 256, 16 N. W. 506 (1883); *Admondson* v. *Ryan,* 111 Ill. 506 (1885); *Comstock* v. *Bechtel,* 63 Wis. 656, 24 N. W. 465 (1885); *Over* v. *Shannon,* 91 Ind. 99 (1883); *Sannoner* v. *King,* 49 Ark. 299, 5 S. W. 327, 4 Am. St. 49 (1887); *Freehling* v. *Bresnahan,* 61 Mich. 540, 1 Am. St. 617 (1886); *King* v. *Harter,* 70 Tex. 579, 8 S. W. 308 (1888); *State* v. *Carson,* 27 Nebr. 501, 43 N. W. 361, 9 L. R. A. 523, 20 Am. St. 681 (1889); *Doherty* v. *Ramsey,* 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. 223 (1891); *Pinkus* v. *Bamberger,* 99 Ala. 266, 13 So. 578 (1892); *Noyes* v. *Belding,* 5 S. Dak. 603, 59 N. W. 1069 (1894); *Wagner* v. *J. H. North Furniture & Carpet Co.,* 63 Mo. App. 206 (1895); *Boylston* v. *Rankin,* 114 Ala. 408, 21 So. 995, 62 Am. St. 111 (1896). Compare *State* v. *Freeman,* 173 Mo. App. 294, 158 S. W. 726 (1913). The debtor may by his conduct estop himself from claiming particular property. *Cassell* v. *Williams,* 12 Ill. 387 (1851); *Stevenson* v. *White,* 5 Allen (Mass.) 148 (1862); *Currier* v. *Sutherland,* 54 N. H. 475, 20 Am. Rep. 143 (1874); *Rose* v. *Sharpless,* 33 Grat. (Va.) 153 (1880); *State* v. *Koch,* 40 Mo. App. 635 (1890); *Bohn* v. *Weeks,* 50 Ill. App. 236 (1893).

A doctrine contrary to the principal case prevails elsewhere which is stated as follows in *Strouse* v. *Becker,* 38 Pa. St. 190, 80 Am. Dec. 474 (1861), by Woodward, J.: "When an officer comes with an execution, it is the duty of the debtor, as a good citizen, if he can not pay the debt, to facilitate the making a levy. He should exhibit his property honestly, and claim only the exemption which the law allows him. It is a hard thing, doubtless, to be strictly honest in such an emergency, but it is best, after all, even for the

SECTION 6. CLAIMS BY STRANGERS TO THE WRIT

MILLER *v.* THE COMMONWEALTH

SUPREME COURT OF PENNSYLVANIA, 1847

5 *Pa.* 294

In error from the Common Pleas of Clinton. This was an action of debt against the sheriff and his sureties on an official bond. The plaintiff proved a judgment against Harvey and Fleming; a fieri facias and return of "levied on a horse, wagon, sleigh and clock." He then proved that prior to the delivery of the writ, he had called on the sheriff to make a levy on some lumber of the defendants, and informed him that it was claimed by a stranger, but that he might go on and plaintiff would give a bond of indemnity at any time before the day of sale. The sheriff was satisfied, and did not require a bond at that time. He then gave evidence that the lumber in their possession belonged to defendants in the execution. The defendants then offered in evidence the venditioni and al. vend. at the terms succeeding the fieri facias, to the first of which there was a return—that the property mentioned in the writ being claimed by third persons, and plaintiff having promised to indemnify, and having neglected so to do, he had refused to sell. To

---

debtor himself. If his property be taken, his self-respect and conscious integrity are left, and he has gained a moral discipline which will go far toward repairing his fortunes. But if he equivocate and dissemble—denies his ownership of that which he can not hide, and embarrasses the officer of the law in the execution of legal duties, he forfeits not only his self-respect, but his hold upon the exemption provided for honest debtors. And it is reasonable that he should; for what right has he to expose the officer to the peril of a suit for levying on the goods of a pretended owner, or, on the other hand, of incurring liabilities to the plaintiff for neglect of duty? If, to escape from the dilemma in which the sheriff or constable finds himself placed, he obtains indemnity from the plaintiff, this is an inconvenience and a delay such as a debtor has no right to cause, and then turn around and show by his admission of title and claim of exemption, that it was needless and vexatious. In a word, the law would have all men honest and sincere. To debtors who are so, it leaves $300 worth of property—to those who are not it offers no reward." Accord: *In re Huey's Appeal,* 29 Pa. 219 (1857); *Emerson* v. *Smith,* 51 Pa. St. 90, 88 Am. Dec. 566 (1865); *Carl* v. *Smith,* 8 Phila. Rep. (Pa.) 569 (1871); *In re Imhoff's Appeal,* 119 Pa. St. 350, 13 Atl. 279 (1888); *Moore* v. *Baker,* 2 Pa. *Dist.* R. 142 (1892); *Frank* v. *Kurtz,* 4 Pa. Super. Ct. 233 (1897); *Riley* v. *Ogden,* 185 Pa. St. 506, 40 Atl. 76 (1898); *Brackett* v. *Watkins,* 21 Wend. (N. Y.) 68 (1839); *Sanborn* v. *Hamilton,* 18 Vt. 590 (1846); *Mandlove* v. *Burton,* 1 Ind. 39 (1848); *McNally* v. *Mulherin,* 79 Ga. 614, 4 S. E. 332 (1887); *McWilliams* v. *Bones,* 84 Ga. 199, 10 S. E. 723 (1889); *Hoover* v. *Haslage,* 5 Ohio N. P. 90 (1897); *Farwell Co.* v. *Patterson,* 76 Ill. App. 601 (1898); *In re Yost,* 117 Fed. 792 (1902); *Wunderly* v. *Leopold,* 53 Pa. Super. Ct. 31 (1913).

In a number of states the debtor in special cases may have a stay of execution for a prescribed period upon giving security. The statutes differ widely in the various jurisdictions. See Herman on Executions, § 392; 17 Cyc. 1139; 7 A. & E. Encyc. of Law (1st ed.) 146.

the alias the return was—that he had made diligent search for the property mentioned in the writ, and could find no part of it in his bailiwick; all of which were rejected by the court. The defendants then gave evidence that the lumber was not the property of the defendants in the execution; and they further offered evidence of the same character as to the property levied on, which was rejected.

The court (Woodward, P. J.) after leaving it to the jury to decide whether this was a case for requiring indemnity, said: The conversation respecting indemnity seems to have regarded the lumber, as that alone was in dispute. If the sheriff waived indemnity on an agreement by plaintiff to furnish it when required, it was his duty to go and make a levy, and he might have required indemnity before the sale. If they parted on that understanding, the plaintiff's failure to tender it did not excuse the sheriff. This, however, would not give a right of action to the plaintiff if the property did not belong to the defendants in the execution, and the question whether the lumber was liable to the execution was left to the jury. But as to the property actually levied on, the question of ownership was immaterial, for that was in the custody of the law, and the sheriff was bound to make some disposition of it unless the plaintiff refused to indemnify him, and then he should have refurned that fact, as an excuse for not selling.

The rejection of the evidence, and the charge "as to the indemnity, and that the ownership was immaterial," were the errors assigned.[5]

COULTER, J.: The rule is, that a sheriff must execute a writ of fieri facias at his peril. And in England it seems to be well settled that he can not contradict his return for the purpose of relieving himself from the liability which the return imposes. Thus, where he returns—goods levied, with a schedule—he assumes the responsibility that they belong to the defendant, and he will afterwards, as a general rule, be estopped from denying that they were such. It may in some cases be hard, but considerations of public policy outweigh and countervail all tenderness of that kind. The danger of collusion between the officers and the defendant for the purpose of defeating an honest creditor, marks the wisdom of the rule. Otherwise, a sheriff could return—levied on the goods of the defendant—and thus satisfy the judgment pro tanto, and upon a suit on his bond, call the defendant as a witness to establish that the goods were not his, under some colorable and fraudulent transfer, made for the purpose of defeating the creditor, and thereby hinder and delay creditors and involve them in embarrassing lawsuits.

The sheriff has the remedy in his own hands. If a claim is set up to the property ostensibly belonging to the defendant and in his possession, which would make a reasonable man pause and doubt, he may in England summon a jury to try the right, and this

---

[5]The arguments of counsel and part of the opinion are omitted. The case is at common law, prior to the Interpleader Act of 1848, see note, post page 734.

would protect him, as is said in 3 Bac. Abr. Sheriff, N. 6, sed quere?[6] or he may apply to the court to enlarge the time of making his return until an indemnity has been given to him; 1 Taunton, 120. Although that proceeding has not been adopted here, a remedy equally efficacious is at hand. He is authorized in such circumstances of reasonable doubt, when the property is claimed by a stranger, to demand indemnity from the plaintiff, and if he refuse to give it, the officer may refuse to levy and sell, and make a special return to the court. 16 Serg. & R. (Pa.) 68. But when, regardless of these safeguards, the sheriff chooses to return a levy, it is at his own peril, because the judgment creditor is thereby estopped and hindered, and may be deprived of his right, unless the sheriff be responsible for his own official act. In the whole range of English decisions, there is perhaps but one exception; and that is where a levy is returned on the goods of a person who is afterwards declared a bankrupt, but the act of bankruptcy was committed before levy. In such a case the assignee in bankruptcy is entitled to the goods, and the sheriff being ignorant of the act of bankruptcy at the time of the levy and return, is relieved from its force and the liability it creates. 6 Maule & Selw. 42. But this exception to the general rule seems to be founded on the peculiar policy of the bankrupt system; a cherished policy in England, and which overrides other rules for the purpose of giving efficacy to its peculiar feature—an equilibrium among creditors at the date of the act of bankruptcy. If the goods are eloigned or rescued, the sheriff is liable. 2 Saund. 343. And the English courts will only interfere to relieve a sheriff from the dilemma of an adverse claim by extending the time for making his return, at their discretion, and upon such terms as they think right. 4 Taunt. 585; 1 Taunt. 120.[7] In New York it has been ruled that it is the duty of the sheriff to sell the goods seized, and which are claimed by a stranger, unless they are proved before an inquest which the sheriff has authority to impanel, not to be the goods of the defendant. In that case he may return nulla bona; but even on inquest found, if the plaintiff gives him indemnity, he is

[6] The sheriff could summon a jury to inquire as to the fact of ownership, *Farr* v. *Newman*, 4 T. R. 621 (1792), at p. 633; *Roberts* v. *Thomas*, 6 T. R. 88 (1794); *Bayley* v. *Bates*, 8 Johns. (N. Y.) 185 (1811); *Philips* v. *Harriss*, 3 J. J. Mar. (Ky.) 122 (1829), but the findings of the jury were not conclusive, *Latkow* v. *Eamer*, 2 H. Bl. 437 (1795); *Glossop* v. *Pole*, 3 M. & S. 175 (1814); *Chinn* v. *Russell*, 2 Blackf. (Ind.) 172 (1828); *Cassell* v. *Williams*, 12 Ill. 387 (1851); *Rowe* v. *Bowen*, 28 Ill. 116 (1862); *Cohen* v. *Climax Cycle Co.*, 19 App. Div. 158, 46 N. Y. S. 4, 4 Ann. Cas. 332 (1897).

[7] While the sheriff could apply to the court for further time to make his return, so that during the interval the question of property might be settled or one or the other of the parties interested might indemnify him against either proceeding with the levy or making a return of nulla bona, Watson on Sheriffs, 195; Murfree on Sheriffs, § 581, it was wholly discretionary with the court whether it would interfere at all or upon what terms it would do so. See *Wells* v. *Pickman*, 7 T. R. 174 (1797); *King* v. *Bridges*, 7 Taunt. 294 (1817); *Venables* v. *Wilks*, 4 Moore 339 (1820); *Etchells* v. *Lovatt*, 9 Price 54 (1821); *Ledbury* v. *Smith*, 1 Chitty 294 (1819); *Burr* v. *Freethy*, 1 Bingh. 71 (1822); *Robey* v. *State*, 94 Md. 61, 50 Atl. 411, 89 Am. St. 405 (1901).

bound to proceed. 8 Johns. (N. Y.) 185.[8] The rights of judgment creditors can not be disregarded. A judgment would be of little value if it could be hindered in execution by frivolous pretenses, and sham and fraudulent transfers of property. The sheriff is bound to execute his writ, saving only when he adopts the means furnished for his security, and which do not injure or defeat the creditor. But if he goes on to execution without resort to these, seizes goods, and makes return of record so as to render the judgment extinct pro tanto, and defeat and delay its further execution, to the manifest injury of the plaintiff, he does so at his own peril, and every consideration of public policy requires that he should be held accountable. In *Hall* v. *Galbraith*, 8 Watts (Pa.) 220, it was ruled by this court that a constable who has reason to doubt the ownership of goods, may require the plaintiff to indemnify him, and if he refuses to sell, not having done so, he becomes liable. The discriminating and accurate judge who delivered the opinion in that case, assimilates the proceeding to like transaction on the part of the sheriff, and fully sustains the case in 16 Serg. & R., already referred to. It would seem, therefore, that in cases where a sheriff returns that he has levied the goods of the defendant, he is to be bound by it.[9] He ought to sell on his fieri facias, but if he return the levy, the venditioni exponas may be issued to compel him to sell, and bring him into contempt if he does not.

The plaintiff stated that a brother of one of the defendants claimed part of the lumber, but he should go on and make the levy,

[8]Accord: *Townsend* v. *Phillips*, 10 Johns. (N. Y.) 98 (1813); *Van Cleef* v. *Fleet*, 15 Johns. (N. Y.) 147 (1818); *Platt* v. *Sherry*, 7 Wend. (N. Y.) 236 (1831); *Curtis* v. *Patterson*, 8 Cow. (N. Y.) 65 (1827); *Ball* v. *Pratt*, 36 Barb. (N. Y.) 402 (1862); *Cohen* v. *Climax Cycle Co.*, 19 App. Div. 158, 46 N. Y. S. 4, 4 N. Y. Ann. Cas. 332 (1897); N. Y. Code Civ. Pro., §§ 1418-20. If the undertaking is given the officer must detain the property as belonging to the judgment debtor.

[9]In *Dorin* v. *McCandless*, 146 Pa. St. 344, 23 Atl. 245, 28 Am. St. 798 (1891), the sheriff took possession of goods pointed out to him by the plaintiff as the property of the debtor, and, upon a claim by a third person, relinquished possession and returned the writ nulla bona without demanding indemnity. In an action against him for failing to sell it was held error to refuse to permit him to show that the goods belonged to the claimant. *Miller* v. *Commonwealth* was distinguished on the ground that in that case the sheriff had returned a levy and that he should not be allowed to contradict his own return. The court says, per Paxson, C. J.: "The true rule to be deduced from the authorities is this: that when the sheriff returns an execution nulla bona, he does so at his own risk, and if it is shown that there is property of the defendant which he might and ought to have levied upon, he will be responsible. It is competent, however, for him to show that the property pointed out to him was the property of a stranger. In other words, he may show his return to be true, for if true, the plaintiff in the execution has sustained no injury." See further *Commonwealth* v. *Vandyke*, 57 Pa. St. 34 (1868); *Smith* v. *Cicotte*, 11 Mich. 383 (1863); *Sage* v. *Dickinson*, 33 Grat. (Va.) 361 (1880); *State* v. *Langdon*, 57 Mo. 353 (1874); *Hamblet* v. *Herndon*, 3 Humph. (Tenn.) 34 (1842); *Adams* v. *Disston*, 44 N. J. L. 662 (1882). As to the constitutionality of a statute restricting a claimant to an action on the bond see *Foule* v. *Mann*, 53 Iowa 42, 3 N. W. 814 (1879); *Cheadle* v. *Guitlar*, 68 Iowa 680, 28 N. W. 14 (1886), and compare *Harris* v. *Krause*, 60 N. J. L. 72, 37 Atl. 439 (1897).

and they would then see who owned the property; that he would give a bond of indemnity before the sale, if required. The sheriff was satisfied with this arrangement, but never did levy on the lumber, and never called upon or notified the plaintiff, but made the levy on the other property, and returned that levy. Evidence on both sides was given as to the ownership of this lumber, and the transaction bears strong impress of a fraudulent arrangement between the brother and one of the defendants to cheat his creditors. The facts, however, were fully submitted to the jury. But the court said that the testimony given in relation to the indemnity related to the lumber, as it was only with regard to that, there was understood to be any dispute. The learned judge then states the law correctly; that if the sheriff had agreed to levy on the lumber, upon the condition that Allison would indemnify him at any time afterwards before sale, if required, and the sheriff neglected to make the levy, and never informed the plaintiff, or called on him for indemnity, that the officer was liable. In the case of the *Commonwealth* v. *Watmough,* 6 Whart. (Pa.) 117, it was decided that the sheriff was not bound knowingly and wilfully to levy on the property of a stranger even before indemnity offered, but that where the plaintiff showed the property and there was tolerable evidence of title, such as possession in defendant, the sheriff was bound to levy upon it, being indemnified, or answer in damages, and that in such case a stranger could not maintain trespass without showing clearly and satisfactorily that the property belonged to him. In the case at bar the jury determined the property to be in defendant, and assessed damages accordingly.

Judgment affirmed.[10]

---

[10]On a fieri facias at common law the sheriff was bound at his peril to take only the goods of the defendant; and therefore, if he took the goods of a stranger, although the plaintiff declared they were the property of the defendant, he was a trespasser, for he was "obliged at his peril to take notice whose the goods are." Bacon's Abridgement, Execution (c); *Sanderson* v. *Baker,* 2 Wm. Bl. 832 (1772); *Ackworth* v. *Kempe,* 4 Dougl. 40 (1778); *Glasspoole* v. *Young,* 9 B. & C. 696 (1829). The following courses were open to him: (1) To levy, sell and run the risk of a suit by the claimant. (2) To return the writ nulla bona and run the risk of a suit by the plaintiff. (3) To apply to the court for further time to make his return so that during the interval one of the parties might indemnify him for either proceeding with the levy or making a return nulla bona. (4) To summon a jury to satisfy himself as to the fact of ownership, but such action was of little value, since the verdict was not conclusive against the claimant, nor against the plaintiff in execution, although in his case perhaps admissible in mitigation of damages. See cases in note 6 *supra.* Tidd's Practice (1828) 1008.

In many of the American states there is a statutory proceeding, modelled on the sheriff's inquest, for determining before sale the right of property in chattels taken in execution. The state laws differ widely in their provisions. In some the claimant is free to pursue his common-law remedies, in others the judgment is conclusive, at least as to the sheriff's responsibility. Text writers regard them as cumbersome and inadequate. Freeman on Executions (3d ed.), § 277; Murfree on Sheriffs, § 584. Compare N. Y. Code Civ. Pro., § 1418 *et seq.,* and cases in note 8 *supra* with Comp. Stat. N. J. (1910), Executions, § 34, and *Harris* v. *Krause,* 60 N. J. L. 72, 37 Atl. 439 (1897).

In Massachusetts it is provided: "If there is reasonable doubt as to the ownership of the property, or as to its liability to be taken on execution, the officer may require sufficient security of the creditor to indemnify him for taking it." Rev. L. Mass. (1902), ch. 177, § 35. If the officer neither

SLINGSBY *v.* BOULTON

IN CHANCERY BEFORE LORD ELDON, 1813

1 Ves. & B. 334

In 1812, the plaintiff, being sheriff of Yorkshire, received a writ of fieri facias upon a judgment obtained by the defendant, Boulton, against the other defendant, indorsed for £446. The plaintiff levied; but receiving notice, and a copy of a settlement of part of the goods, he made no return; but afterwards paid in £329 2s., being the residue of the levy after deducting the sum paid to the trustees of the settlement; who brought an action of trover against the plaintiff for the goods in settlement; and, the defendant, Boulton, also claiming, the plaintiff filed a bill of interpleader; offering to bring the money into court, if the court should be of opinion, that under the circumstances he ought to do so; and moved for an injunction.

Mr. Barber, for the motion, admitted that this was a bill of interpleader without bringing the money into court; but insisted that under the circumstances of the case it was not necessary.

Mr. Johnson, for the defendant, resisted the motion, on the ground that the interposition of this court to compel defendants to interplead could not be obtained, when the fund was not deposited.

THE LORD CHANCELLOR: Is there any instance of a bill of interpleader by the sheriff? He acts at his peril in selling the goods; and is concluded from stating a case of interpleader; in which the plaintiff always admits a title against himself in all defendants. A person can not file a bill of interpleader, who is obliged to put his case upon this, that as to some of the defendants he is a wrongdoer.[11]

---

demands this nor asks specific directions, but assumes the responsibility of executing his process in his own way, he can not require indemnity when subsequently to his action controversy arises. *Russell* v. *Walker,* 150 Mass. 531 (1890). The laws of Illinois, Maine, Michigan and Kansas are substantially the same as of Massachusetts. Murfree on Sheriffs, §§ 592, 593.

[11]Accord: *Shaw* v. *Chester,* 8 Paige Ch. 339 (1840), affirming 2 Edw. Ch. 405 (1834); *Quinn* v. *Green,* 1 Ired. Eq. (N. Car.) 229 (1840); *Quinn* v. *Patton,* 2 Ired. Eq. (N. Car.) 48 (1841); *Parker* v. *Barker,* 42 N. H. 78, 77 Am. Dec. 789 (1860); *Rogers* v. *Weir,* 34 N. Y. 463 (1866) semble; *Dewey* v. *White,* 65 N. Car. 225 (1871); *First Nat. Bank* v. *Bininger,* 26 N. J. Eq. 345 (1875); *Third Nat. Bank* v. *Skillings Lumber Co.,* 132 Mass. 410 (1882). Cf. *Storrs* v. *Payne,* 4 Hen. & Munf. (Va.) 506 (1810); *Nash* v. *Smith,* 6 Conn. 421 (1827); *Lawson* v. *Jordan,* 19 Ark. 297, 70 Am. Dec. 596 (1858).

In England substantial relief was afforded to sheriffs by the Interpleader Act of 1831 (1 & 2 Will. IV 4, ch. 58, § 6), which provided that where claims were made by persons, not parties, against whom the process issued, to any goods or chattels taken or intended to be taken in execution, upon application of the sheriff, or other officer, it should be lawful for the court from which the process issued to call before them the party issuing the process and the party making the claim and thereupon to exercise for the relief of the sheriff the powers contained in the act, that is to compel the claimant to appear and maintain or relinquish his claim, to order the trial of a feigned issue, or, with the consent of the parties, to dispose of the merits of their claims in a summary manner. The judgment in an interpleader proceeding is conclusive. Act of 23 & 24 Vict. (1860), ch. 126, § 17. The subject is now

DE COPPETT *v.* BARNETT

COURT OF APPEAL, 1901

17 Times L. Rep. 273

This was an appeal from an order made by Mr. Justice Darling at Chambers. The plaintiff, de Coppett, carried on business as a lodging-house keeper in Clarges street, Piccadilly, and he had on his premises thirty-three cases of wine, which had been deposited with him by one Captain Bell as security for an advance of money, and which he had subsequently been authorized by Captain Bell to sell in order to repay the debt. The defendant, Barnett, who was

---

governed by the Rules of the Supreme Court of Judicature. Act of 46 & 47 Vict. (1883), ch. 49; Order LVII, rule 1, which provides: "Relief by way of interpleader may be granted * * * where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and any claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued." The sheriff, however, may proceed with the execution if he thinks proper. *Harrison* v. *Foster*, 4 Dowl. P. C. 588 (1836). See further *Allen* v. *Gibbon*, 2 Dowl. P. C. 292 (1833); *Holton* v. *Guntrip*, 6 Dowl. P. C. 130 (1837); *Claridge* v. *Collins*, 7 Dowl. 698 (1839); *Winter* v. *Bartholomew*, 11 Exch. 704 (1856); *Richards* v. *Jenkins*, L. R. 18 Q. B. Div. 451 (1886); *Goodman* v. *Blake*, L. R. 19 Q. B. 77 (1887); *Van Laun* v. *Baring*, L. R. (1903) 2 K. B. 277; *Cox* v. *Bowen*, L. R. (1911) 2 K. B. 611. Generally, where the claimant does not enter security the court orders the sale of the goods. *Paquin* v. *Robinson*, 85 L. T. 5 (1901); *Discount Banking Co.* v. *Lambarde*, L. R. (1893) 2 Q. B. 329.

In Pennsylvania the English procedure was adopted, the Interpleader Act of April 10, 1848, P. L. 448, § 9, being almost a verbatim copy of the Act of 1 & 2 Will. IV; Troubat and Haly's Practice (Wharton's ed.) 721. The practice has been further defined by the Act of May 26, 1897, P. L. 95, P. & L. Dig. (2d ed.) 3439, which is a consolidation of the existing statutory law and in addition puts into statutory form the principal parts of the practice already established by the decisions. When goods levied on are claimed by a third person, the sheriff applies for a rule to show cause why an issue should not be framed to determine the ownership. *Berger & Wirth* v. *H. W. Juergen & Co.*, 7 Pa. Super. Ct. 388 (1898); *Barton* v. *Reynolds*, 17 Pa. Super. Ct. 504 (1901). If the rule is made absolute, the claimant gives bond to maintain his title and receives the goods, otherwise the court may direct a sale. *Blackstaff* v. *Du Pont De Nemours Powder Co.*, 48 Pa. Super. Ct. 470 (1912). In the issue the claimant is the plaintiff and the other parties defendants. *Provost* v. *Algeo*, 8 Pa. D. R. 517 (1899).

Under the Act of 1848 the discharge of a rule for an interpleader did not affect the claimant's rights, *Bain* v. *Funk*, 61 Pa. St. 185 (1869). But section 15 of the Act of 1897 provides that if the sheriff complies with the provisions of the act, "he shall be freed from all liability to the claimant, the plaintiff and defendant in the execution, the person found in possession of the goods and chattels levied on or seized, and every other person who had knowledge of such levy or seizure prior to the sale of said goods and chattels, or who shall take any step under the provisions of this act." As this deprives the claimant of his right of action against the sheriff, he is a party aggrieved by the discharge of a rule for an issue and may question the order. *Book* v. *Day*, 189 Pa. St. 44, 41 Atl. 998 (1899). If the sheriff does not proceed under the act he remains liable as formerly to plaintiff or the claimant. *Necker* v. *Sedgwick*, 36 Pa. Super. Ct. 593 (1908). Where the sheriff in making a levy is subjected to no risk, as in the case of a chattel real, he is not entitled to an interpleader. *Maurer* v. *Sheafer*, 116 Pa. 339, 9 Atl. 869 (1887).

a judgment creditor of Captain Bell and had obtained a writ of fieri facias against him, went to the plaintiff's premises with an officer of the sheriff of Middlesex named Mountjoy, and some other men, and forcibly removed the wine. For this trespass the plaintiff brought an action against Barnett, Mountjoy and Sir George Herbert, the sheriff. The question as to the right to the wine having been brought before Mr. Justice Channell on interpleader proceedings, that learned judge directed that an interpleader issue should be tried, and that no action should be brought or continued against the sheriff pending the interpleader proceedings. The issue was tried before Mr. Justice Darling, who decided the matter in favor of the plaintiff, de Coppett, and directed that the action against the sheriff should not be barred. The action thereupon continued, and after various proceedings had been taken, the case again came before Mr. Justice Darling on an appeal by the plaintiff from an order giving the defendants further time for delivering their defense. The learned judge dismissed the plaintiff's appeal, and added to the order an expression of his opinion that there ought not to be an action against the sheriff. From this order the plaintiff appealed.

Mr. Carrington appeared for the plaintiff, Mr. P. Rose-Innes for the sheriff.

The Master of the Rolls[12] said there had clearly been a trespass in this case, and the question was whether the plaintiff's action against the sheriff ought to be barred. Mr. Rose-Innes had referred to the case of *Smith* v. *Critchfield,* 14 Q. B. Div. 873. That only showed that a sheriff might be protected against an action for trespass if no substantial grievance had been done to the person whose premises were wrongfully entered.[13] The evidence here showed that the plaintiff had been disturbed in the enjoyment of the premises, and had suffered damage. In his opinion the order appealed against was a remarkable order, and he thought that the clause expressing the learned judge's opinion that there ought to be no action against the sheriff should be struck out. The plaintiff would, therefore, be at liberty to continue his action.

Lord Justice Romer concurred.

Appeal allowed.

---

[12] Sir A. L. Smith.

[13] Accord: *Winter* v. *Bartholomew,* 11 Exch. 704 (1856), distinguishing if not overruling *Hollier* v. *Laurie,* 3 C. B. 334 (1846); *Smith* v. *Critchfield,* L. R. 14 Q. B. Div. 873 (1885); *London, Chatham &c. R. Co.* v. *Cable,* 80 L. T. 119 (1899). See also *Holt* v. *Frost,* 3 H. & N. 821 (1858); *Hooke* v. *Ind, Coope & Co.,* 36 L. T. 467 (1877).

In *Zacharias* v. *Totton,* 90 Pa. St. 286 (1879), the sheriff, by direction of the execution creditor and upon being indemnified, levied on goods in possession of the claimant as the property of the execution debtor and afterward applied for and obtained an order for an interpleader. The trial of the issue resulted in favor of the claimant and he took out of court the proceeds of the sale of his goods. Thereafter he brought trespass *de bonis asportatis* against the sheriff and the execution creditor. *Held,* reversing judgment for the defendants that neither of them could justify under the interpleader act for anything done prior to the inception of the proceedings thereunder. But compare Act of 1897, *supra.* See also *Walker* v. *Olding,* 1 H. & C. 621 (1862); *Abbey* v. *Searls,* 4 Ohio St. 598 (1855); *Phillips* v. *Reagan,* 75 Pa. St. 381 (1874); *Hibbard* v *Thrasher,* 65 Ill. 479 (1872).

SECTION 7. THE SALE AND RETURN

THOMSON *v.* CLERK

COURT OF QUEEN'S BENCH, 1596

1 *Cro. Eliz.* 504

Trover and conversion of goods, at D. in comitat. Nott. The defendant saith, that he recovered against the plaintiff a debt of £20 by bill in the Queen's Bench, and thereupon had a fieri facias, directed to the sheriff of York, who, at Wakefield, in comitat. Eborum, seized those goods, and delivered them unto him in satisfaction of this execution; and so justifies the conversion. It was thereupon demurred, and without argument ruled, that the pleading was ill. Because[14] . . . the sheriff upon a writ of fieri facias can not deliver the defendant's goods to the plaintiff, in satisfaction of his debt. Wherefore it was adjudged for the plaintiff.[15]

---

[14]Part of the judgment, on points of pleading, is omitted.

[15]Accord: *Bealy* v. *Sampson*, 2 Vent. 93 (1689); *Holm* v. *Hunter*, 12 Mod. 494 (1699); *Cargle* v. *Knox*, 143 Ga. 597, 85 S. E. 764 (1915). Upon a writ of fieri facias the goods must be sold and, in strictness, the money brought into court. Bacon's Abridgement, Executions (c); *Clerk* v. *Withers*, 1 Salk. 322, 2 Ld. Raym. 1072 (1704); *Leader* v. *Danvers*, 1 Bos. & P. 359 (1798); *Beale's Exrs.* v. *Commonwealth*, 11 Serg. & R. (Pa.) 299 (1824); *Campbell* v. *Cobb*, 2 Sneed (Tenn.) 18 (1854). But at the sale the judgment creditor may become a purchaser. *Petit* v. *Benson*, Comb. 452 (1696); *Stratford* v. *Twynan*, Jac. 418 (1822); *Atty.-Gen.* v. *Fort*, 8 Price 364 note (1804); *Cookson* v. *Fryer*, 1 F. & F. 328 (1858); *Delisle* v. *Dewitt*, 18 U. C. Q. B. 155 (1859); *Villars* v. *Rogers*, L. R. 9 Ch. App. 439 (1874); *Morris' Estate*, Crabbe (U. S.) 70 (1836); *Smull* v. *Jones*, 1 Watts & S. (Pa.) 128 (1841); *Cavender* v. *Smith*, 1 Iowa 306 (1855); *Dickerman* v. *Burgess*, 20 Ill. 266 (1858); *Boos* v. *Morgan*, 130 Ind. 305, 30 N. E. 141, 30 Am. St. 237 (1891); *Bradley* v. *Hefferman*, 156 Mo. 653, 57 S. W. 763 (1900). In Pennsylvania, where there is a sale by the officer to the execution creditor in the absence of any other bidder or bystander, collusion will be presumed. *Ricketts* v. *Unangst*, 15 Pa. 90, 53 Am. Dec. 572 (1850); *McMichael* v. *McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560 (1851); *Conniff* v. *Doyle*, 8 Phila. (Pa.) 630 (1871). Contra: *State* v. *Johnson*, 2 N. Car. (Hayw.) 293 (1796); *Learned* v. *Geer*, 139 Mass. 31, 29 N. E. 215 (1885) semble; *Power* v. *Larabee*, 3 N. Dak. 502, 57 N. W. 789, 44 Am. St. 577 (1894); *Gilbert* v. *Watts-DeGolyer Co.*, 169 Ill. 129, 48 N. E. 430, 61 Am. St. 154 (1897); and see *Swires* v. *Brotherline*, 41 Pa. St. 135, 80 Am. Dec. 601 (1861).

In *Owen* v. *Barksdale*, 30 N Car. 81, 47 Am. Dec. 348 (1847), it is said: "When a sheriff receives an execution, it is his duty to levy it, and make public sale of the property so levied on; he can not deliver it to the plaintiff in the execution in satisfaction of his debt, nor can he sell it at private sale; and until he does sell it as the law directs, his deed can convey no title to the purchaser. It is the judgment, execution, sale and conveyance by him that completes the conversion of the property." *Bingham* v. *Young*, 10 Pa. St. 395 (1849); *Dickerman* v. *Burgess*, 20 Ill. 266 (1858); *Mechanics' Bank* v. *Pitt*, 44 Mo. 364 (1869); *Sheehy* v. *Graves*, 58 Cal. 449 (1881).

WALLER *v.* WEEDALE

COURT OF COMMON BENCH, 1604

Noy 107

In detinue the case was thus: A had recovered in debt against W and execution awarded to the now defendant being then sheriff of Southampton; who takes the goods, etc., and returns a fieri facias et denarios habeo, but none of the goods were sold before the return, but the sheriff kept them in his hands; and judgment now for the plaintiff. For the sheriff can not detain the goods taken upon an execution in his own hands, and satisfy the debt of his proper money. But he ought to sell them upon a venditioni exponas, and may return upon his so doing, quod non invenit emptores; for a grand inconvenience would ensue, if the sheriff himself might retain them.[16]

JOHN J. REYNOLDS *v.* THOMAS T. HOXSIE

SUPREME COURT OF RHODE ISLAND, 1860

6 *R. I.* 463

Ejectment to recover part of a tract of land known as the Reynolds Hoxsie farm. At the trial it appeared that the plaintiff claimed title, under a sheriff's deed, to the interest of Reynolds Hoxsie, Jr., which was sold to the plaintiff on July 28, 1855, as the highest bidder, at a sale under a levy thereon of an execution in favor of the

[16]So also, the general rule is that the officer making the sale, or his deputy, can not directly or indirectly become the purchaser of the property sold. *Ormond* v. *Faircloth*, 1 Murph. (5 N. Car.) 35 (1804); *Mark* v. *Lawrence*, 5 Har. & J. (Md.) 64 (1820); *Mills* v. *Goodsell*, 5 Conn. 475, 13 Am. Dec. 90 (1825); *Perkins* v. *Thompson*, 3 N. H. 144 (1825); *Pierce* v. *Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396 (1833); *Riner* v. *Stacy*, 8 Humph. (Tenn.) 288 (1847); *McCluskey* v. *Webb*, 4 Rob. (La.) 201 (1843); *Daniel* v. *Modawell*, 22 Ala. 365, 58 Am. Dec. 260 (1853); *Crook* v. *Williams*, 20 Pa. St. 342 (1853); *Wickliff* v. *Robinson*, 18 Ill. 145 (1856); *Robinson* v. *Clark*, 7 Jones (52 N. Car.) 562, 78 Am. Dec. 265 (1860); *Terrill* v. *Anchauer*, 14 Ohio St. 80 (1862); *Galbraith* v. *Drought*, 24 Kans. 590 (1880); *Downing* v. *Lyford*, 57 Vt. 507 (1885); *Price* v. *Thompson*, 84 Ky. 219, 1 S. W. 408, 8 Ky. L. 201 (1886); *McKeighan* v. *Hopkins*, 19 Nebr. 33, 26 N. W. 614 (1886); *Shotwell* v. *Munroe*, 42 Mo. App. 669 (1890); *Giles* v. *Bank of Southwestern Georgia*, 102 Ga. 702, 29 S. E. 600 (1897); N. Y. Code Civ. Pro., § 1387. At least, without the knowledge and acquiescence of the parties. *Woodbury* v. *Parker*, 19 Vt. 353, 47 Am. Dec. 695 (1847); *Farnum* v. *Perry*, 43 Vt. 473 (1871). Nor can he bid for another person, *Chambers* v. *State*, 3 Humph. (Tenn.) 237 (1842); *Harrison* v. *McHenry*, 9 Ga. 164, 52 Am. Dec. 435 (1850); *Knight* v. *Herrin*, 48 Maine 533 (1860); *Sparling* v. *Todd*, 27 Ohio St. 521 (1875); *Caswell* v. *Jones*, 65 Vt. 457, 26 Atl. 529, 20 L. R. A. 503, 36 Am. St. 879 (1893); *Coleman* v. *Maclean*, 101 Ga. 303, 28 S. E. 861 (1897). But semble contra *Moore* v. *Pye*, 10 Kans. 246 (1872); *Scott* v. *Mann*, 36 Tex. 157 (1871).

to sell; the whole of which was intrusted by the execution, under the law, to the officer. No other order was ever issued to him than the execution; a venditioni exponas being wholly unknown in the simplicity of our practice.[20] Within the limits of the law the officer exercised his discretion with regard to the time of sale; and as no positive publication of the necessary power of adjournment existed upon the statute book, adjourned the sale, from time to time, as the exigencies of the case required.[21] If he could not, from storms or accidents, reach the place of sale; if reaching it, from want of buyers, he could not sell, or could not sell except at a great sacrifice; in fine, if from any cause, consistently with the performance of his general duty under the execution, the sale could not take place at the time originally appointed, he appointed another time at which it might. Nor was this practice peculiar to ourselves; but in other states this same incidental power was not only possessed, but in proper cases required to be exercised, by sheriffs charged with sales upon execution as a part of their duty. *Warren* v. *Leland,* 9 Mass. 265, 266; *Tinkom* v. *Purdy,* 5 Johns. (N. Y.) 345; *McDonald* v. *Neilson,* 2 Cow. (N. Y.) 159, 170, 185, 190, 191; *Russell* v. *Richards,* 11 Maine 371; *Mants* v. *Worthington,* 4 Pa. 153; *Richards et al.* v. *Holmes et al.,* 18 How. (N. Y.) 147. No doubt, officers were liable to either party to the execution, for the improper, and especially fraudulent exercise of this power, to his detriment; but that they were deemed to possess and actually did exercise it, long before our statutes incidentally recognized it as possessed by them, is perfectly notorious.[22]

---

[20]In England under the rules of the Supreme Court, Order XLIII, rule 2, the judgment creditor is at liberty to sue out a writ of venditioni exponas where it appears upon the return of a fieri facias that the sheriff has seized but not sold the goods of the judgment debtor. In *Hughes* v. *Rees,* 4 M. & W. 468 (1838), it is said by Lord Abinger, C. B.: "The venditioni exponas is not a process distinct from the fieri facias, but a part of it; it is a writ directing the sheriff to execute the fieri facias in a particular manner." Accord: *Farmers' Bank* v. *Massey,* 1 Harr. (Del.) 186 (1833); *Frisch* v. *Miller,* 5 Pa. St. 310 (1847); *Fenno* v. *Coulter,* 14 Ark. 38 (1853); *Holmes* v. *McIndoe,* 20 Wis. 657 (1866); *Bigelow* v. *Renker,* 25 Ohio St. 542 (1874); *Dryer* v. *Graham,* 58 Ala. 623 (1877); *Borden* v. *McRae,* 46 Tex. 396 (1877); *Hicks* v. *Ellis,* 65 Mo. 176 (1877); *Hall* v. *Clagett,* 63 Md. 57 (1884); *Hastings* v. *Bryant,* 115 Ill. 69, 3 N. E. 507 (1885); *Rain* v. *Young,* 61 Kans. 428, 59 Pac. 1068, 78 Am. St. 325 (1900). In Pennsylvania a venditioni exponas is the proper writ under which to sell land levied on by fieri facias and condemned by the sheriff's inquisition. Act of June 16, 1836, P. L. 755, § 61, P. L. Dig. (2d ed.) 3464.

[21]But now the General Laws of Rhode Island (1909), tit. 31, ch. 304, § 13, provide: "The officer may, for good cause, from time to time, adjourn the sale of the estate levied on, giving one week's notice thereof by publication in a newspaper." *McCudden* v. *Wheeler,* 23 R. I. 528, 51 Atl. 48 (1902).

[22]The power of the sheriff to adjourn a sale for good cause is generally recognized. *Tinkom* v. *Purdy,* 5 Johns. (N. Y.) 345 (1810); *McDonald* v. *Neilson,* 2 Cow. (N. Y.) 139, 14 Am. Dec. 431 (1823); *Russell* v. *Richards,* 11 Maine 371, 26 Am. Dec. 532 (1834); *Lantz* v. *Worthington,* 4 Pa. St. 153, 45 Am. Dec. 682 (1846); *Donaldson* v. *Kerr,* 6 Pa. St. 486 (1847); *Jewett* v. *Guyer,* 38 Vt. 209 (1865); *Sanborn* v. *Chamberlin,* 101 Mass. 409 (1869); *Todd* v. *Hoagland,* 36 N. J. L. 352 (1873); *Wade* v. *Saunders,* 70 N. Car. 270 (1874); *Aldrich* v. *Grimes,* 14 R. I. 219 (1883); *Hollister* v. *Vanderlin,* 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. 657 (1895); *Gilbert* v. *Watts-DeGolyer*

We do not by this intend to sanction needless adjournments of such sales merely for the purpose of delay, and especially not adjournments made by an officer in collusion with either party, to serve the particular interest of that party, to the injury of the other. When such cases arise, they will be dealt with according to their circumstances; it being perfectly understood that there can not be a wrong, under our jurisprudence, for which the law in some form does not provide an adequate remedy. In the case at bar, there was not only no collusion of the kind adverted to, but the delay of sale, caused by the adjournment was either absolutely required, or, in proper caution, prudent, in order to its validity. Accidentally—and the evidence does not disclose whether by the carelessness of the officer or of the printer—the newspaper advertisements of the sale, in both instances, embodied a mistake. In the first, the day of the week for the sale, appropriate to the day of the month named, was mistaken; and in the last, the levy was stated to have been made in January, when it was actually made in February. For the purpose of correcting such mistakes, it was, in our judgment, quite proper for the officer, that the sale might be correctly advertised and all question of its validity upon this ground avoided, to adjourn the sale, as he did, for the periods necessary for this purpose; and the defendant, at least, whose time to redeem was thereby enlarged, is the last person who has cause to complain of the delay.

Judgment for the plaintiff.

MOSES A. McNAUGHTON *v.* CHARLES E. McLEAN

SUPREME COURT OF MICHIGAN, 1889

73 Mich. 250

Relator applied for mandamus to compel the respondent, as financial secretary to the Laboring Men's Building and Savings Association, to transfer to relator certain shares of stock in said association bid off by him at an execution sale.[23]

SHERWOOD, C. J.: Respondents make answer to the petition of relator, and among other things say that the sale under which re-

---

Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. 154 (1897); *Weatherby* v. *Slape*, 58 N. J. Eq. 550, 43 Atl. 898, 78 Am. St. 627 (1899); *Frazee* v. *Nelson*, 179 Mass. 456, 61 N. E. 40, 88 Am. St. 391 (1901). Contra: *Fraaman* v. *Fraaman*, 64 Nebr. 472, 90 N. W. 245, 97 Am. St. 650 (1902). But the power is not to be arbitrarily exercised. *Todd* v. *Hoagland*, 36 N. J. L. 352; *Gilbert* v. *Watts-DeGolyer Co.*, 66 Ill. App. 625, aff'd 169 Ill. 129, 48 N. E. 430, 61 Am. St. 154 (1897). And in many jurisdictions a new notice must be given. *Enloe* v. *Miles*, 12 Sm. & M. (Miss.) 147 (1849); *Thornton* v. *Boyden*, 31 Ill. 200 (1863); *Montgomery* v. *Barrow*, 19 La. Ann. 169 (1867); *Frederick* v. *Wheelock*, 3 Th. & C. (N. Y.) 210 (1874); *Avon-by-the-Sea Land &c. Co.* v. *Finn*, 56 N. J. Eq. 808, 41 Atl. 360 (1898). Contra: *Luther* v. *McMichael*, 6 Humph. (Tenn.) 298 (1845), and compare *Dexter* v. *Shepard*, 117 Mass. 480 (1875); *Hollister* v. *Vanderlin*, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. 657 (1895).

[23] Part of the opinion of the court is omitted.

lator claims to be the owner of said stock was made by the officer holding the execution in the hall of the association in the evening, between nine and ten o'clock, after a meeting had been held, and after all the members but three had left and gone away; and they aver that such sale was void, and conferred no rights upon the relator respecting the stock. *Carnick* v. *Myers*, 14 Barb. (N. Y.) 9.

The sale made by an officer under an execution at such an hour, and under such circumstances, was void, at least as to the parties having knowledge of the facts, and in this case they had such knowledge. In New York the statute requires that the sale shall be made between nine o'clock in the forenoon and the setting of the sun,[24] but, independently of any statute, we think that a public sale of property ordered by court, at such an unseasonable hour, ought not to be sustained. It would subject the debtor's property in a large majority of cases to great sacrifice, and must be held against public policy and void.[25]

The writ will be denied.

HEROD *v.* BARTLEY

SUPREME COURT OF ILLINOIS, 1853

15 *Ill.* 58

Replevin by Herod and Colvard against Seaton, to recover possession of a horse. The pleas put in issue the right of the plaintiffs to the property. The cause was heard by the court. The plaintiffs introduced the following evidence, and then closed their case: (1) A transcript from the docket of a justice of the peace, showing a judgment in favor of Hudson against Layton, and an assignment thereof to the plaintiffs; (2) An execution issued on the judgment, which was returned satisfied by the sale of a horse to the plaintiffs; (3) The constable testified, that he levied the execution on the horse in question, and allowed Layton to retain him till the day of sale; the plaintiffs purchased the horse at the sale, but the horse was not then present, nor was he in the possession of the witness. Judgment was rendered for the defendant.[26]

---

[24] N. Y. Code Civ. Pro., § 1384.

[25] Accord: *Greenwood* v. *Lehigh Coal Co.*, 1 Clark (Pa.) 393 (1843); *Carrick* v. *Myers*, 14 Barb. (N. Y.) 9 (1852); *Rigney* v. *Small*, 60 Ill. 416 (1871); *Grace* v. *Garnett*, 38 Tex. 156 (1873); *Cole* v. *Porter*, 4 G. Gr. (Iowa) 510 (1854) semble; *Hancock* v. *Shockman*, 4 Ind. T. 138, 69 S. W. 826 (1902); *Rhodes & Son Furniture Co.* v. *Jenkins*, 2 Ga. App. 475 (1907). Compare *Woodward* v. *Sartwell*, 129 Mass. 210 (1880); *In re Raubenhold's Estate*, 1 Woodw. (Pa.) 478 (1869). A sale prior to the time authorized by statute is invalid. *Mushback* v. *Ryerson*, 11 N. J. L. 346 (1830); *Gibbs* v. *Neely*, 7 Watts (Pa.) 305 (1838); *Williams & Davis* v. *Jones*, 1 Bush. (Ky.) 621 (1866); *Camp* v. *Ganley*, 6 Ill. App. 499 (1880); *Wienskawski* v. *Wisner*, 114 Mich. 271, 72 N. W. 177 (1897).

[26] The statement of facts is from the opinion of the court, a brief portion of which is omitted.

TREAT, C. J.: The plaintiffs were not entitled to recover. They failed to substantiate their claim of title. The sale of the horse by the constable was illegal and void. In the sale of personal property on execution, the property itself must be present. Bidders should have an opportunity of inspecting the goods, and forming an estimate of their value. This is the only way to secure fairness and competition at public sales. It is necessary to protect the rights of both debtor and creditor. It should also be in the power of the officer to deliver the property forthwith to the purchaser.[27]

Judgment affirmed.

LONGWORTHY *v.* FEATHERSTON

SUPREME COURT OF GEORGIA, 1880

65 *Ga.* 165

Ejectment by Longworthy against Featherston to recover a tract of land sold by the sheriff on executions against the plaintiff and purchased by the defendant. The jury found for the defendant and

---

[27]Accord: *Linnendoll* v. *Doe*, 14 Johns. (N. Y.) 22 (1817); *Sheldon* v. *Soper*, 14 Johns. 352 (N. Y.) (1817); *Cresson* v. *Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373 (1819); *Ainsworth* v. *Greenlee*, 3 Murph. (N. Car.) 470, 9 Am. Dec. 615 (1819); *Bostick* v. *Keizer*, 4 J. J. Marsh. (Ky.) 597, 20 Am. Dec. 237 (1830); *Smith* v. *Tritt*, 1 Dev. & B. (N. Car.) 241, 28 Am. Dec. 565 (1835); *Bakewell & Cole* v. *Ellsworth*, 6 Hill (N. Y.) 484 (1844); *Skinner* v. *Skinner*, 4 Ired. L. (N. Car.) 175 (1843); *Blanton* v. *Morrow*, 7 Ired. Eq. (N. Car.) 47, 53 Am. Dec. 391 (1850); *Perkins* v. *Spaulding*, 2 Mich. 157 (1851); *Burns* v. *Ray*, 18 B. Mon. (Ky.) 392 (1857); *Crandall* v. *Blen*, 13 Cal. 15 (1859) semble; *Baker* v. *Casey*, 19 Mich. 220 (1869); *Tibbetts* v. *Jageman*, 58 Ill. 43 (1871); *Gaskill* v. *Aldrich*, 41 Ind. 338 (1872); *Morgan* v. *Holladay*, 48 How. (N. Y.) 86, 38 N. Y. Super. Ct. 53 (1874); *Winfield* v. *Adams*, 34 Mich. 437 (1876); *Rowan* v. *Refeld*, 31 Ark. 648 (1877); *Murphy* v. *Hill*, 77 Ind. 129 (1881); *Boylan* v. *Kelly*, 36 N. J. Eq. 331 (1882); *Wright* v. *Mack*, 95 Ind. 332 (1883); *Yoemans* v. *Bird*, 81 Ga. 340, 6 S. E. 179 (1888); *Gunter* v. *Cobb*, 82 Tex. 598, 17 S. W. 848 (1891); *Horsey* v. *Knowles*, 74 Md. 602, 22 Atl. 1104 (1891); *Alston* v. *Morphew*, 113 N. Car. 460, 18 S. E. 335 (1893); *Lawry* v. *Ellis*, 85 Maine 500, 27 Atl. 518 (1893); *Stonebridge* v. *Perkins*, 141 N. Y. 1, 35 N. E. 980 (1894); *Penney* v. *Earle*, 87 Maine 167, 32 Atl. 879 (1895); *Brock* v. *Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. 896 (1901); *Hartman* v. *Hefflefinger*, 47 Pa. Super. Ct. 1 (1911). In some cases it has been held that the property need not be in immediate view provided the property is open to the inspection of bidders. *Earle* v. *Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. S. 1037, 74 N. Y. St. 333 (1896), where, on a sheriff's sale of the silverware of a hotel, held in the hotel rotunda a large part of the silverware was in an adjoining room opening out of the rotunda. *Tifft* v. *Barton*, 4 Denio (N. Y.) 171 (1847); *Bruce* v. *Westervelt*, 2 E. D. Smith (N. Y.) 440 (1854); *Klopp* v. *Witmoyer*, 43 Pa. St. 219, 82 Am. Dec. 561 (1862); *National Bank of M.* v. *Sprague*, 20 N. J. Eq. 159 (1869); *Henry & Co.* v. *Patterson*, 57 Pa. St. 346 (1868); *Phillips* v. *Brown*, 74 Maine 549 (1883). While the decided weight of authority is that a sale not within view of the bidders is void, there are decisions which hold such a sale voidable only. *Eads* v. *Stephens*, 63 Mo. 90 (1876); *Foster* v. *Mabe*, 4 Ala. 402, 37 Am. Dec. 749 (1842); *Hazzard* v. *Burton*, 4 Harr. (Del.) 62 (1843); *Cook* v. *Timmons*, 67 Ill. 203 (1873).

plaintiff excepted. It was insisted for the plaintiff that the sale was illegal because it was not before the court house door.[28]

JACKSON, J.: The court house was burned down. No new one had been built, and no place rented for a court house. The superior court was held twice a year at an academy, but school was kept there, and the county only engaged it temporarily at the time and for the time the superior court sat, and it remained and was private property. The clerk's office was in a rented room at another place. Where the other county officers kept theirs the record does not tell us.

Under these circumstances the sheriff went to the site of the burnt court house and the weather being hot he made proclamation and took the crowd to a shade some hundred or hundred and fifty yards off in full view of the court house site, and there sold the property to the highest and best bidder, at a fair and full price. The sale was fully attended and it appears that the property brought full price; and under the peculiar facts and circumstances of this case, we think that the purchaser who paid full price, and whose money, paid for this land, was applied to the executions against the plaintiff, should be protected. The court house here was burnt, no other had been built, no other had been rented by the year, or for any term of years, as a court house—the academy had not been so rented, but was merely used by arrangement with the owner made twice a year to hold the superior court there, and the balance of the time he kept school therein, and on the day of this sale the school was kept there. There was then no court house in the county at the time of the sale. Must sheriff sales therefore cease, and no title pass to property at them, and no judgment be enforced, and all the wheels of justice stop running? We think not. The sale ought not to have been at the academy; the sheriff and bidders would have been trespassers on the school and school master and his private property. It ought not to have been at the clerk's office; that was in a private building, and in no sense the court house, for it does not appear that any court ever was held there; the record shows no other place where to sell but the court house site, still the county property and whereon in time the court house would be rebuilt; for convenience and the comfort of shade, and with no hurt to anybody, the sheriff proclaimed to the crowd assembled there within the hours of sale that he would go over to a grove in full view, and there everybody went and the sale took place. These circumstances take this case without the cases cited by the counsel for plaintiff in error, who argued the case with much learning and ability, and we affirm the judgment upholding the validity of the sale.

The sale by the sheriff should be at the court house, if there be one, either owned or rented by the county authorities; but if there be but the ashes of one, and none other substituted, the sheriff may sell there, or in full view of it, after proclaiming within the hours of sale to the assembled bidders that they would go to a shady place hard by to escape the oppressive heat of the sun; and one who buys

[28]Part of the opinion of the court is omitted.

for full value at such a sale will be protected by the sheriff's title against the defendant in execution.[29]

Judgment affirmed.

---

[29]In *Kane* v. *McCown,* 55 Mo. 182 (1874), a sheriff's sale held at the door of a church building located at the county seat and used at the time as the court house, the regular court house being occupied by troops, was held valid. Said the court: "It is plain that a sale at the door of the deserted court house, where no court was in session, would have been utterly against the spirit and meaning of the law."

In *Union Bank* v. *Smith,* 3 La. Ann. 147 (1848), where, after a levy and advertisement of the sale, the court house was by special law removed to another place, it was held that the advertisement posted at the old court house should be removed to the new and the sale be made at the latter. In *Patterson* v. *Reynolds,* 19 Ind. 148 (1862), a sale of land by the sinking fund commissioners was set aside on the ground that it was not made at the court house door. It appeared that the commissioner who cried the sale made proclamation of the terms of sale on the court house steps and then on account of the inclemency of the weather went into the court house and conducted the sale from the judge's stand in full view of the court house door. The judgment was reversed.

The statutes of many states require that sales of real estate on execution shall be made at the court house, or door of the court house, of the county wherein the land is situate. *Sessions* v. *Peay,* 23 Ark. 39 (1861); *Mers* v. *Bell,* 45 Mo. 333 (1870); *Koch & Dryfus* v. *Bridges,* 45 Miss. 247 (1871); *Biggs & Co.* v. *Brickell,* 68 N. Car. 239 (1873); *Holmes* v. *Taylor,* 48 Ind. 169 (1874); *Sinclair* v. *Stanley,* 64 Tex. 67 (1885); *Moody* v. *Moeller,* 72 Tex. 635, 10 S. W. 727, 13 Am. St. 839 (1889); *Kendrick* v. *Latham,* 25 Fla. 819, 6 So. 871 (1889); *Borneman* v. *Norris,* 47 Fed. 438 (1891); *Anniston Pipe-Works* v. *Williams,* 106 Ala. 324, 18 So. 111, 54 Am. St. 51 (1894). Where the place of sale is not designated by law, the officer in choosing the place must act in good faith and with due regard for the rights and interests of the parties. *Howland* v. *Pettey,* 15 R. I. 603, 10 Atl. 650 (1887); *Cowgill* v. *Cahoon,* 3 Harr. (Del.) 23 (1839); *Cummins* v. *Little,* 16 N. J. Eq. 48 (1863); *Woodward* v. *Sartwell,* 129 Mass. 210 (1880). A term of years need not to be sold on the premises. *Sowers* v. *Vie,* 14 Pa. St. 99 (1850). A sale of real estate on execution held out of the county where the land lies is at least irregular and is generally held void. *Cox* v. *Nelson,* 1 T. B. Mon. (Ky.) 94, 15 Am. Dec. 89 (1824); *Trestor* v. *Fleisher,* 7 Watts & S. (Pa.) 137 (1844); *Doe ex dem. Hanby* v. *Tucker,* 23 Ga. 132, 68 Am. Dec. 514 (1857); *Jenners* v. *Doe ex dem. Pomeroy,* 9 Ind. 461 (1857); *Alred* v. *Montague,* 26 Tex. 732, 84 Am. Dec. 603 (1863); *Thacher* v. *Devol,* 50 Ind. 30 (1875); *Morrell* v. *Ingle,* 23 Kans. 32 (1879); *Kentzler* v. *Chicago &c. R. Co.,* 47 Wis. 641, 3 N. W. 369 (1879); *Street* v. *McClerkin,* 77 Ala. 580 (1884); *Wortham* v. *Basket,* 99 N. Car. 70, 5 S. E. 401 (1888); *Needles* v. *Frost,* 2 Okla. 19, 35 Pac. 574 (1894).

Court of King's Bench, 1694, *Palmet* v. *Price,* 2 Salk. 589. An action was laid in Staffordshire, and judgment for the plaintiff; he sued out a fieri facias with a testatum into Worcestershire; and now it was moved that this was irregular, and ought to be set aside, because no fieri facias had ever gone into Staffordshire; and the sheriff of Staffordshire made affidavit that he never returned any fieri facias in the cause: Sed non allocatur; for the fieri facias upon which the testatum is founded, is returned of course by the attorneys themselves, as originals are; if you search the file you may find one, and that is sufficient.

At common law, if it was desired to have execution of the defendant's goods in a county different from that in which the venue of the action was laid the practice was to issue what was called a testatum fieri facias, which, regularly, was preceded by a fieri facias in the county of the venue returned nulla bona, *Brand* v. *Mears,* 3 T. R. 388 (1789); *Cowperthwaite* v. *Owen,* 3 T. R. 657 (1790), although the issuing of the original fieri facias was to a great extent a matter of form. Archbold's Practice (Chitty's ed.) 419. In some American jurisdictions this practice has been followed, *Denn, Lessee of Inskeep* v. *Lecoy,* 1 N. J. L. 46 (1790); *Trenton Delaware Bridge Co.* v.

WODDYE *v.* COLES

COURT OF QUEEN'S BENCH, TEMP. ELIZ.

Noy 59

An action of trespass was brought for taking goods, etc. The defendant said that a recovery was had against the plaintiff in Southw. upon which a fieri facias was directed to him by which he took the goods and sold them. By Popham. If a fieri facias for £20 be awarded to the sheriff, upon which he takes an entire chattel and sells it for £40 and returns the fieri facias with the £20 in court, he may detain the surplusage until the defendant comes to demand it of him; for he is not bound to search the defendant. Agreed. But by Gawdy. If a fieri facias be awarded for 40s. by force of which the sheriff takes five oxen, every one of the value of £5 and sells them all, it is clear that the defendant shall have an action of trespass against the sheriff, which was agreed.[80]

Ward, 4 N. J. L. 320 (1816); *Lesher* v. *Gehr*, 1 Dall. (U. S.) 330, 1 L. ed. 161 (1788); *McCormick* v. *Meason*, 1 Serg. & R. (Pa.) 92 (1814); *Bowman* v. *Tagg*, 12 Phila. (Pa.) 338 (1878); *Wilson* v. *Arnold*, 172 Pa. St. 264, 33 Atl. 552 (1896). Act June 16, 1836, P. L. 755, § 76, P. & L. Dig. (2d ed.) 3477. In many jurisdictions the common-law practice has been superseded by statutes authorizing the issuing of execution into any county in which the judgment has been docketed. N. Y. Code Civ. Pro., § 1365; *Roth* v. *Schloss*, 6 Barb. (N. Y.) 308 (1849); *Dunham* v. *Reilly*, 110 N. Y. 366, 18 N. E. 89 (1888); *Gowan* v. *Fountain*, 50 Minn. 264, 52 N. W. 862 (1892); *Bugbee* v. *Lombard*, 88 Wis. 271, 60 N. W. 414 (1894). Compare *Evans* v. *Aldridge*, 133 N. Car. 378, 45 S. E. 772 (1903). See also U. S. Comp. Stat. (1913), § 1631; *Prevost* v. *Gorrell*, 25 Pitts. L. J. 125 (1877); *Lyman Ventilating Refrigerator Co.* v. *Southard*, Fed. Cas. No. 8633, 12 Blatchf. 405 (1875).

[80] A sale of more property than is necessary to satisfy the execution is void. *Patterson* v. *Carneal*, 3 A. K. Mar. (Ky.) 618, 13 Am. Dec. 508 (1821); *Tiernan* v. *Wilson*, 6 Johns. Ch. (N. Y.) 411 (1822); *Reed* v. *Carter*, 1 Blackf. (Ind.) 410 (1825); *Richards* v. *Brittin*, 3 Pa. (Clark L. J.) 207 (1845); *Dawson* v. *Litsey*, 10 Bush (Ky.) 408 (1874); *Cornelius* v. *Buford*, 28 Tex. 202, 91 Am. Dec. 309 (1866); *Plummer* v. *Whitney*, 33 Minn. 427, 23 N. W. 841 (1885); *Grim* v. *Reinbold*, 148 Pa. 446, 23 Atl. 1129 (1892); *Richards* v. *Edwardy*, 138 Ga. 690, 76 S. E. 64 (1912). Compare where the excess was small, *Morrison* v. *Bruce*, 9 Dana (Ky.) 211 (1839); *Humphry* v. *Beeson*, 1 G. Gr. (Iowa) 199, 48 Am. Dec. 370 (1848).

So, where property real or personal is susceptible of subdivision, the officer ought to divide it into parcels, and discontinue the sale as soon as he has realized enough to satisfy the writ. *Stead* v. *Course*, 4 Cranch. (U. S.) 403, 2 L. ed. 660 (1808); *Hewson* v. *Deygert*, 8 Johns. (N. Y.) 333 (1811); *Groff* v. *Jones*, 6 Wend. (N. Y.) 522, 22 Am. Dec. 545 (1831); *Reed* v. *Carter*, 3 Blackf. (Ind.) 376, 26 Am. Dec. 422 (1834); *Wheeler* v. *Kennedy*, 1 Ala. 292 (1840); *Den ex dem. Davis* v. *Abbott*, 3 Ired. (N. Car.) 137 (1842); *Cowen* v. *Underwood*, 16 Ill. 22 (1854); *Aldrich* v. *Wilcox*, 10 R. I. 405 (1873); *Baker* v. *Chester Gas Co.*, 73 Pa. St. 116, 2 Del. Co. 269 (1873); *Gordon* v. *O'Neil*, 96 Mo. 350, 9 S. W. 920 (1888); *White* v. *Roberts*, 112 Ky. 788, 66 S. W. 758, 23 Ky. L. 2187 (1902). Where an execution commands a sheriff to sell so much of the premises as may be necessary to satisfy a decree, his duty is to sell so much only as may be necessary to meet the requirement of the execution, provided such portion can be conveniently and reasonably detached from the residue of the property. *Vanduyne* v. *Vanduyne*, 16 N. J. Eq. 93 (1863).

WOODS *v.* MONELL

COURT OF CHANCERY OF NEW YORK, 1815

1 Johns. Ch. (N. Y.) 502

The plaintiff's bill averred that one Sakett had conveyed certain land to the plaintiff in trust to sell the same and apply the proceeds in payment of incumbrances thereon and other debts of Sakett. That the property was subject to judgments upon which executions issued and all the premises were sold together by the sheriff on February 23, 1812; that the plaintiff who was present at the sale gave notice of his deed of trust and requested the sheriff to sell in parcels; that the premises were sold to the attorney for the execution creditors who conveyed to Monell and Waller, who had commenced an action of ejectment. The prayer was for an injunction to stay the action of ejectment and that the sale might be set aside. The answer admitted that the property was sold as a whole; that the premises had been laid out into town lots on a map, but no one had informed the sheriff of the division of the lots, nor did it appear that they had been divided except on paper. Witnesses were heard.[31]

KENT, Chancellor: The suit is brought to set aside the sheriff's sale, on the ground of fraud. The plaintiff has not made out a case of actual fraud; and if the sale is invalid, it must be because the premises described in the case were sold contrary to law, by being sold entire, and not in parcels, as the plaintiff requested.

I have no doubt of the value and solidity of the rule, that where a tract of land is in parcels, distinctly marked for separate and distinct enjoyment, it is, in general, the duty of the officer to sell by parcels, and not the whole tract, in one the entire sale. To sell the parcels separately is best for the interest of all the parties concerned. The property will produce more in that way, because it will accommodate a greater number of bidders, and tends to prevent odious speculations upon the distresses of the debtor. Nor does the officer act within the spirit of his authority, if he sells more than is requisite to satisfy the execution. To sell a whole tract, when a small part of it would be sufficient, or, probably sufficient, for the purpose, is a fraud that ought to set the sale aside. The principle which I have suggested has received a judicial sanction. *Rowley v. Webb*, 1 Binn. (Pa.) 61; *Stead* v. *Course*, 4 Cr. (U. S.) 403; *Hewson* v. *Deygert*, 8 Johns. (N. Y.) 333; and whenever a case comes fairly within the reach of it, I shall very willingly adopt and apply it.[32]

---

[31]The statement of facts is abridged and part of the opinion omitted.

[32]Property, whether real or personal susceptible of division into lots, tracts or parcels, should as a rule be offered for sale in parcels. A "lumping sale" is rarely justifiable. *Ryerson* v. *Nicholson*, 2 Yeates (Pa.) 516 (1799); *Rowley* v. *Brown*, 1 Binn. (Pa.) 61 (1803); *Tiernan* v. *Wilson*, 6 Johns. Ch. (N. Y.) 411 (1822); *Fletcher* v. *Stone*, 3 Pick. (Mass.) 250 (1825); *Nesbitt* v. *Dallam*, 7 Gill. & J. (Md.) 494, 28 Am. Dec. 236 (1836); *Merwin* v. *Smith*,

But I do not perceive that the circumstances of this case are sufficient to warrant the application of the rule.

The plaintiff was present at the sale, and became a bidder. He requested the sheriff to sell the premises by lots, and not in one entire parcel; but he produced no map or other description of the ground as laid out in lots. In the deed of trust under which the plaintiff claimed title, and which had been executed to him by the defendant in the execution, about six months before, the ground was not designated by lots, but was described as a "certain lot, piece, or parcel of land, known and distinguished on a map, etc., as lot No. 34, and the easterly end of lot No. 38, containing three and a half acres, and bounded," etc. And when the plaintiff took possession of this "said tract of land," under his deed, he leased the same as one entire parcel to I. Hasbrouck; and so it appears to have been enjoyed at the time of the sale.

The sale is represented as having been made on the land. To bring the sheriff in default, or to charge him with an abuse of trust, the plaintiff, who was then in possession, and claimed the land, ought, at least, to have furnished the sheriff with clear and distinct proof of the division of the three acres into town lots, and of the size and description of these lots, and that the same was the act of the owner.[88] So small a tract, and under the occupation of one

---

2 N. J. Eq. 182 (1839); *Coxe* v. *Halsted*, 2 N. J. Eq. 311 (1840); *Penn* v. *Craig*, 2 N. J. Eq. 495 (1841); *Hicks & Hammond* v. *Perry*, 7 Mo. 346 (1842); *Day* v. *Graham*, 6 Ill. (1 Gilm.) 435 (1844); *Culberson* v. *Morgan*, 29 N. Car. 387, 47 Am. Dec. 329 (1847); *Sherry* v. *Nick*, 1 Ind. (Smith 289) 575 (1849); *Tate* v. *Carberry*, 1 Phila. (Pa.) 133 (1850); *Reed* v. *Diven*, 7 Ind. 189 (1855); *Tillman* v. *Jackson*, 1 Minn. (Gil. 157) 183 (1854); *Cunningham* v. *Cassidy*, 17 N. Y. 276, 7 Abb. Pr. 183 (1858) *Boyd* v. *Ellis*, 11 Iowa 97 (1869); *Klopp* v. *Whitmoyer*, 43 Pa. St. 219 (1862); *San Francisco* v. *Pixley*, 21 Cal. 56 (1862); *Catlett* v. *Gilbert*, 23 Ind. 614 (1864); *Bunker* v. *Rand*, 19 Wis. 253, 88 Am. Dec. 684 (1865); *Gregory* v. *Purdue*, 32 Ind. 453 (1870); *Tugwell* v. *Bussing*, 48 How. Pr. (N. Y.) 89 (1874); *Hay* v. *Baugh*, 77 Ill. 500 (1875); *Bell* v. *Taylor*, 14 Kans. 277 (1875); *Schilling* v. *Lintner*, 43 N. J. Eq. 444, 11 Atl. 153 (1887); *Grim* v. *Reinbold*, 148 Pa. St. 446, 23 Atl. 1129 (1892); *Power* v. *Larabee*, 3 N. Dak. 502, 57 N. W. 789, 44 Am. St. 577 (1894); *Hart* v. *Hines*, 10 App. Cas. (D. C.) 366 (1897); *Forbes* v. *Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. 152 (1897); *Holton* v. *Moody*, 117 Mich. 321, 75 N. W. 762 (1898); *Brock* v. *Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. 896 (1901); *Miller* v. *McAllister*, 197 Ill. 72, 64 N. E. 254 (1902); *Copper* v. *Iowa Trust &c. Bank*, 149 Iowa 336, 128 N. W. 373 (1910); *Sublett* v. *Gardner*, 144 Ky. 190, 137 S. W. 864 (1911); *Vangundy* v. *Hill*, 262 Ill. 162, 104 N. E. 147 (1914); *York* v. *Byars*, 131 Tenn 38, 173 S. W. 435 (1915).

[88] In *Lennon* v. *Heindel*, 56 N. J. Eq. 8, 37 Atl. 147 (1897), on bill by the execution defendant to set aside a sheriff's sale of real estate it was urged that the property should have been sold in parcels. Pitney, V. C., said: "I think this ground fails for two reasons—first, I am not sure that it would have sold for more if it had been sold in parcels, though it is probable that it would; second, no serious request of the sheriff was made, no preparation or surveys or plots were made. The property was described in two parcels, but it was not suggested that it should have been sold in the parcels thus designated. And if the defendants in execution had wished the property sold in parcels they should have got up a scheme, maps and plots, and requested the sheriff to make sale in that way." In Iowa it is provided by the code that the defendant may deliver to the officer a plan of division of the land levied on, and if the officer unreasonably refuses to sell according to the plan the sale will be set aside. *Taylor* v. *Trulock*, 59 Iowa 558, 13 N. W. 661

tenant, will not, without other circumstances, raise the presumption of an abuse of power in the sale. One of the witnesses says that the premises, at the sale, were divided into five lots, by fences; but the other witness, who was also present at the sale, says he does not recollect any cross fences, and if they were then visible, the whole was still in the occupation of one tenant; those fences could not have been intended for the evidence of any division in pursuance of the map to which the witnesses refer, and which is made an exhibit in the cause; for by the map, the ground was divided into a great number of small lots; and it bears date within three months of the sale.

I see no sufficient ground, therefore, upon which this bill can be sustained; and it must, accordingly, be dismissed as to all the defendants, with costs.[84]

Decree accordingly.

(1882). See also *Baker* v. *Chester Gas Co.*, 2 Del. Co. 269 (1873), affd. 73 Pa. St. 116; *Wellshear* v. *Kelley*, 69 Mo. 343 (1879); *Feild* v. *Dortch*, 34 Ark. 399 (1879); *Howland* v. *Pettey*, 15 R. I. 603, 10 Atl. 650 (1887).

[84]As it is the duty of the officer to make an advantageous sale of the property he must necessarily be invested with some discretion in the manner of sale, and if he has honestly done so his judgment will usually be accepted. *Nelson* v. *Bronnenburg*, 81 Ind. 193 (1881); *Stall* v. *Macalester*, 9 Ohio 19 (1839); *Balfour* v. *Burnett*, 28 Ore. 72, 41 Pac. 1 (1895). A division may be clearly impractical, as in *Craig* v. *Stevenson*, 15 Nebr. 362, 18 N. W. 510 (1884), and *Geney* v. *Maynard*, 44 Mich. 578, 7 N. W. 173 (1880), where upon several lots a single building has been erected, *Gleason* v. *Hill*, 65 Cal. 17, 2 Pac. 413 (1884), where four ditches and the water rights connected therewith constituting one system were sold as one parcel. So where the officer receives no bids for the parcels, he may offer the property en masse. *Slater* v. *Maxwell*, 6 Wall. (U. S.) 268, 18 L. ed. 796 (1867); *White* v. *Crow*, 110 U. S. 183, 28 L. ed. 113 (1884); *Nix* v. *Williams*, 110 Ind. 234, 11 N. E. 36 (1886); *Ollis* v. *Kirkpatrick*, 3 Idaho 247 (Hasb.), 28 Pac. 435 (1891); *Henderson* v. *Harness*, 184 Ill. 520, 56 N. E. 786 (1900); *Wilson* v. *Cory*, 114 Iowa 208, 86 N. W. 289 (1901); *Siler* v. *Lawson*, 163 Ky. 6, 173 S. W. 158 (1915). Contra: *Udell* v. *Kahn*, 31 Mich. 195 (1875).

Where property subject to a mortgage is taken on execution, since the equity of redemption can not be subdivided by separate sales of the various articles or tracts, the whole ought to be sold in one parcel. *Tifft* v. *Barton*, 4 Denio (N. Y.) 171 (1847); *Webster* v. *Foster*, 81 Mass. (15 Gray) 31 (1860); *Carpenter* v. *Simmons*, 28 How. Pr. (N. Y.) 12, 24 N. Y. Super. Ct. 360 (1863); *Worthington* v. *Hanna*, 23 Mich. 530 (1871); *Harvey* v. *McAdams*, 32 Mich. 472 (1875); *Plimpton* v. *Goodell*, 143 Mass. 365, 9 N. E. 791 (1887); *Locke* v. *Shreck*, 54 Nebr. 472, 74 N. W. 970 (1898); *Knutson* v. *Rosenberger*, 81 Nebr. 761, 116 N. W. 687, 129 Am. St. 711 (1908); *Howland* v. *Donehoo*, 141 Ga. 687, 82 S. E. 32 (1914). But in *Rowley* v. *Brown*, 1 Bin. (Pa.) 61 (1803), a lumping sale of three properties was disallowed although subject to an unapportioned ground rent. Compare *Sargent* v. *Bedford*, 6 W. N. C. Pa. 575 (1879), and see *Baker* v. *Chester Gas Co.*, 73 Pa. St. 116, 2 Del. Co. 269 (1873); *Excelsior Savings Fund* v. *Cochran*, 10 Del. Co. (Pa.) 10 (1905); *Cochran* v. *Goodell*, 131 Mass. 464 (1881); *North* v. *Dearborn*, 146 Mass. 17, 15 N. E. 129 (1888).

By the weight of authority a sale en masse instead of in parcels is voidable but not void. *Wheeler* v. *Train*, 3 Pick. (Mass.) 255 (1825); *Williams* v. *Allison*, 33 Iowa 278 (1871); *Lamberton* v. *Merchants' Nat. Bank*, 24 Minn. 281 (1877); *Boylan* v. *Kelly*, 36 N. J. Eq. 331 (1882); *Bennett* v. *Bagley*, 22 Hun (N. Y.) 408 (1880); *Reynolds* v. *Tenant*, 51 Ark. 84, 9 S. W. 857 (1888); *Lewis* v. *Whitten*, 112 Mo. 318, 20 S. W. 617 (1892); *Hudepohl* v. *Liberty Hill &c. Water Co.*, 94 Cal. 588, 29 Pac. 1025, 28 Am. St. 149 (1892); *Grim* v. *Reinbold*, 148 Pa. 446, 23 Atl. 1129 (1892); *Hoffman* v.

WORTH *v.* NEWLIN

COURT OF CHANCERY OF NEW JERSEY, 1896

36 Atlantic Reporter 30[85]

GREY, V. C.: This matter is presented upon exceptions filed against the confirmation of a foreclosure sale under section 45, p. 2111, Gen. Stat. 1895. The sale was made by the sheriff of Cape May county, on October 19, 1896, pursuant to the command of a writ of fieri facias issued upon decree made in this foreclosure suit for the sale of an hotel and lot of land, and also its furniture. The execution directed the sale of a lot of land at Cape May having an hotel upon it, and also of a lot of furniture, the equipment of the hotel, described in the proofs as "The Chalfonte." The execution did not specify whether the land should be sold separately from the personal property or not, nor did it direct a sale of either in parcels. It described the real estate and the personal property in the same terms by which they were described by the mortgagor in the complainant's mortgage.

The objection is that the real estate and personal property were sold together, and not separately.[86] The property consisted of an hotel and its furniture and equipment. The exceptant is one of the mortgagors. In the mortgage which she made she described the lands mortgaged, and added this clause as to the personal property: "And also all the furniture, carpets, bedding, household goods, kitchen utensils, crockery, china, glass, wooden, silver, iron, and tin ware, and other household furnishing goods now in or which may hereafter be put in the hotel on the said premises." The mortgage was not executed as a chattel mortgage, as if the parties considered the furniture separately from the hotel, but as a real estate mortgage only, naming the furniture as if it were appurtenant to the hotel. There were no judgments entered or other liens upon the personal property. The complainant's mortgage was the only lien upon this personal property. The furniture and utensils of the hotel were treated by the parties as if they considered them to be part of the hotel equipment. The writ directed a sale of the property mortgaged in the very words which the exceptant had herself used in describing it in the mortgage. The sheriff swears without contradiction "that no request was made to deponent (the sheriff) before or at the sale to sell said hotel and said furniture separately."

Buschman, 95 Mich. 538, 55 N. W. 458 (1893); *Hargin* v. *Wicks*, 92 Hun 155, 36 N. Y. S. 375, 71 N. Y. St. 145 (1895); *Palmer* v. *Riddle*, 180 Ill. 461, 54 N. E. 227 (1899); *Dixon* v. *Dixon*, 38 Misc. Rep. 652, 78 N. Y. S. 255 (1902); *Bechtel* v. *Wier*, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549n (1907). Contra: *Brien* v. *Robinson*, 102 Tenn. 157, 52 S. W. 802 (1898), and see *Forbes* v. *Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. 152 (1897).

[85] Part of the opinion is omitted.

[86] In *Lee* v. *Fellowes & Co.*, 10 B. Mon. (Ky.) 117 (1849), a sale on execution of land and slaves in gross was held irregular. Accord: *Cresson* v. *Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373 (1819).

The property had, at the last two sales made of it, been sold real and personal as an entirety. The weight of the evidence is that it is customary in Cape May to sell hotels with their furniture as an entirety. In view of these facts, and of the sheriff's opinion that the property would bring a better price when sold as a whole than when sold separately, I do not think the sheriff exceeded his power under the writ, nor that he used his discretionary authority harshly or oppressively, in selling the hotel and its equipment as an entirety.

The hotel was located at a public seaside resort, and the persons who could have proved the value of the hotel and of the furniture, if it were desired to do so, were necessarily many. The sheriff testifies that in his opinion the hotel and furniture was "worth more, and would sell for more, if sold together as a whole, than if sold separately." I think it may well be claimed that a furnished hotel, mortgaged as such, would produce at a public sale a higher price if sold as an entirety than would result from a sale of the hotel at one bid, and its furniture separately, either as a whole or in parcels. Upon the whole matter, as submitted to me, I think the exceptant has failed to show sufficient cause to justify a refusal to confirm the sale. I shall therefore advise that an order be made confirming the sale.[37]

THOMPSON *v.* McMANAMA

SUPERIOR COURT OF CINCINNATI, 1858

2 Disn. (Ohio) 213

Special Term.—On motion to set aside a sheriff's sale. At the January term, A. D. 1858, the plaintiff obtained a decree of foreclosure and sale of certain leasehold premises in the city of Cincin-

[37] In *Bergin* v. *Hayward*, 102 Mass. 414 (1869), it is said: "The law does not undertake to point out in what precise manner he (the officer) shall set up the property to be bidden upon. From the necessity of the case, much must be left to his reasonable and fair discretion. There may be cases in which it would be injudicious to sell articles singly, or in any other way than by the case, or the dozen, or perhaps even by the lot. He must act in good faith, so as to make the process as little oppressive to the debtor and as productive to the creditors as circumstances will allow, paying of course, all due regard to general usage and established practice in like cases. We can not say, however, that it would necessarily, and under all circumstances be illegal or improper for the officer to set up in one lot the whole of a stock in trade, or the entire contents of a workshop, or all the machinery, tools and fixtures of a specific manufactory. It is certainly possible to conceive of cases in which subdivision might be injurious to all parties concerned. For instance, it might be more judicious to sell a pair of horses together, at one collective price, than to sell each horse separately." Accord: *Matson* v. *Sweetser*, 50 Ill. App. 518 (1893); *National Bank of the Metropolis* v. *Sprague*, 20 N. J. Eq. 159 (1869). Compare *Yost* v. *Smith*, 105 Pa. St. 628, 51 Am. Rep. 219 (1884); *Smith* v. *Meldren*, 107 Pa. St. 348 (1884); *Furbush* v. *Greene*, 108 Pa. St. 503 (1885), with *Klopp* v. *Witmoyer*, 43 Pa. St. 219, 82 Am. Dec. 561 (1862); *Grim* v. *Reinbold*, 148 Pa. St. 446, 23 Atl. 1129 (1892).

nati. The property was appraisesd at $900, and the sheriff makes his return that the property "was struck off and sold to Joseph Temple for the sum of $860, it being more than two-thirds of the appraised value of said lot or parcel of land, and he being the highest and best bidder for said premises and the purchaser thereof." The sheriff also indorsed upon the order of sale the following statement of facts, viz.:

"1858, March 15. In this case, at the sale of the premises herein described, George B. Whitcomb bid for said property the sum of $875, whereupon the same was knocked down and struck off to him, and he paid me $25, and promised and agreed with me and the other parties interested, that he would pay the balance of said purchase money within a limited time, or that it should be returned sold to the next highest bidder, and that the $25 so paid should be forfeited to the interested parties; and the said George B. Whitcomb having failed to pay said sum, so bid by him, I have returned the sale to the next highest bidder (see return hereto attached), and ask the court, in making their final order in said action, to direct what is to be done with the $25 forfeited as aforesaid.

R. MATHERS, Sheriff."

Edward Morse, for plaintiff.
Joseph McDougal, for McManama.
R. D. Handy, for purchaser, Temple.

STORER, J.: The duty of the sheriff, whenever he is required to sell real estate upon execution is plain.

1. He must demand and receive the purchase money from the purchaser before he makes his return.[88]

[88]A sale on execution is a cash sale. *Negley* v. *Stewart*, 10 Serg. & R. (Pa.) 207 (1823); *Bayley* v. *French*, 2 Pick. (Mass.) 586 (1824); *Robins* v. *Bellas*, 2 Watts (Pa.) 359 (1834); *Swope* v. *Ardery*, 5 Ind. 213 (1854); *Ex parte State*, 15 Ark. 263 (1854); *Isler* v. *Andrews*, 66 N. Car. 552 (1872); *Chandler* v. *Goodrich*, 58 N. H. 525 (1879); *Daset* v. *Landry*, 21 Nev. 291, 30 Pac. 1064 (1892); *Simmons* v. *Cook*, 109 Ga. 553, 34 S. E. 1033 (1899); *Meherin* v. *Saunders*, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272 (1901); *Rowe* v. *Granger*, 118 App. Div. (N. Y.) 459, 103 N. Y. S. 439 (1907). If the officer extends credit to the purchaser he does so at his own risk. *Denton* v. *Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264 (1812); *McCluskey* v. *McNeely*, 8 Ill. (3 Gilm.) 578 (1846); *Harper* v. *Fox*, 7 Watts & S. (Pa.) 142 (1844); *Disston* v. *Strauck*, 42 N. J. L. 546, 2 Ky. Law Rep. 100 (1880); *McLendon* v. *Harrell*, 67 Ga. 440 (1881); *Robinson* v. *Brennan*, 90 N. Y. 208 (1882); *Willbanks* v. *Untriner*, 98 Ga. 801, 25 S. E. 841 (1896); *Commonwealth* v. *Comrey*, 174 Pa. St. 355, 34 Atl. 581 (1896). In a number of jurisdictions, if the execution creditor becomes the purchaser the officer may credit the amount of the execution debt in payment of the bid. *Nichols* v. *Ketcham*, 19 Johns. (N. Y.) 84 (1821); *Russell* v. *Gibbs*, 5 Cow. (N. Y.) 390 (1826); *Mark* v. *Osmer*, 138 Pa. St. 1, 20 Atl. 841 (1890); *Krumbhaar* v. *Yewdall*, 153 Pa. St. 476, 26 Atl. 219 (1893); see Pa. Act of April 20, 1846, P. L. 411, 19 P. & L. Dig. of Dec. 34350; *Wilson* v. *American Photo-Relief Printing Co.*, 4 Wkly. Notes Cas. (Pa.) 13 (1877); *Boots* v. *Ristine*, 146 Ind. 75, 44 N. E. 15 (1896). Compare *Watson* v. *Hoboken Planing Mills Co.*, 156 App. Div. 8, 140 N. Y. S. 822 (1913). If there is a dispute between creditors as to the application of the proceeds of the sale the officer should bring the money into court. *Fowler* v. *Pearce*, 7 Ark. 28, 44 Am. Dec. 526 (1846); *Williams* v. *Smith*, 6 Cal. 91 (1856); *Hotchkiss* v. *Homan*, 11 Pa. Dist. R. 43 (1901); *Atlanta Trust &c. Co.* v. *Nelms*, 115 Ga. 53, 41 S. E. 247 (1902).

2. He must sell to the highest and best bidder.[39]

3. If the purchaser neglects or refuses to pay the purchase money, or if he is not a real bidder, and it is evident that he has made his bid to postpone the sale or delay the creditor in the collection of his debt, it is the duty of the sheriff to disregard his bid and offer the property again for sale, as if no previous bid had been made.

It was held in *Bisbee v. Hall,* 3 Ohio 464, that when the purchaser refuses to complete the contract by paying the money, the sheriff was not bound to make himself liable by returning an actutal sale and trusting to a recovery against the purchaser, and this rule is affirmed in *Russell* v. *Gibbs,* 5 Cow. (N. Y.) 396, where it is said, "the officer may refuse to deliver the property until he receives the purchase money, and if the money is refused, he may re-sell the property." We find the same principle decided in *Wortman v. Conyngham,* 1 Pet. (C. C.) 243, where Judge Washington states, "if the purchasers refused to comply with the terms of sale, it was the same thing as if the land had not been struck off to them; and the marshal might, and it was his duty to offer the property again for sale."[40] When, however, the officer returns that the property has been struck off to a purchaser, and a new agreement is made at the time, by which the payment of the price is postponed to a future time, and upon the nonperformance of which the sale is to be set

[39]At a sheriff's sale A bid three dollars, B bid three dollars and a half, but the sheriff refused to cry B's bid and knocked off the property to A. The sale was set aside. *Duffy* v. *Rutherford,* 21 Ga. 363 (1857). The sale should be to the highest and best bidder. *Parker* v. *Pratt,* 8 N. J. L. 104 (1849); *Lane* v. *White,* 12 Wis. 381 (1860); *United States* v. *Vestal,* 4 Hughes (C. C.) 467 (1882); *Swires* v. *Brotherline,* 41 Pa. St. 135, 80 Am. Dec. 601 (1861) semble. The officer is not obliged to accept the bid of an irresponsible person. *State* v. *Johnson,* 2 N. Car. (Hayw.) 293 (1796); *Den ex dem. Flomerfelt* v. *Zellers,* 7 N. J. L. 153 (1824); *Kinney* v. *Showdy,* 1 Hill (N. Y.) 544 (1841); *Hobbs* v. *Beavers,* 2 Ind. 142, 52 Am. Dec. 500 (1850); *Michel* v. *Kaiser,* 25 La. Ann. 57 (1873); *Hotchkiss* v. *Homan,* 11 Pa. Dist. R. 43 (1901).

[40]The defaulting bidder may be held to his contract in an action by the officer to recover the amount of the bid. *Friedly* v. *Scheetz,* 9 Serg. & R. (Pa.) 156, 11 Am. Dec. 691 (1823); *Chappell* v. *Dann,* 21 Barb. (N. Y.) 17 (1855); *Armstrong* v. *Vroman,* 11 Minn. (Gil. 142) 220, 88 Am. Dec. 81 (1866); *Webb* v. *Perkins,* 60 Ill. App. 91 (1894). Or the officer may resell the property. *Wilson* v. *Loring,* 7 Mass. 392 (1811); *Bisbee's Lessee* v. *Hall,* 3 Ohio 449 (1828); *Den ex dem. Smith* v. *Young,* 12 N. J. L. 300 (1831); *People* v. *Hays,* 5 Cal. 66 (1855); *New Orleans* v. *Pellerin,* 12 La. Ann. 92 (1857); *Croacher* v. *Oesting,* 143 Mass. 195, 9 N. E. 532 (1887); *Bradley* v. *Geo. Challoner's Son's Co.,* 103 Ill. App. 618 (1902). And, generally, the defaulting bidder will be held liable for the difference between his bid and the amount obtained. *Robinson* v. *Garth,* 6 Ala. 204, 41 Am. Dec. 47 (1844); *Gaskell* v. *Morris,* 7 Watts & S. (Pa.) 32 (1844); *Williams* v. *Lines,* 7 Blackf. (Ind.) 46 (1843); *Farster* v. *Hayman,* 26 Pa. 266 (1856); *Herdman* v. *Cooper,* 39 Ill. App. 330 (1890) semble; *Barnes* v. *Bluthenthal,* 101 Ga. 598, 28 S. E. 1017, 65 Am. St. 339 (1897); *Hughes* v. *Miller,* 186 Pa. St. 375, 40 Atl. 492 (1898); *Hartman* v. *Pemberton,* 24 Pa. Super. Ct. 222 (1904). Contra: *Grier* v. *Yontz,* 50 N. Car. 371 (1858); *Roberts* v. *Westbrook,* 1 Coldw. (Tenn.) 115 (1860); *Harvey & Keith* v. *Adams,* 9 Lea (Tenn.) 289 (1882). And the rule does not apply where the terms of sale are altered. *Hare* v. *Bedell,* 98 Pa. St. 485 (1881).

aside, the power of the officer ceases over the process and he can not, upon the same process, offer the property again for sale, much less disregard the sale and return that the next highest bidder is the purchaser.

The sheriff's duty is clearly defined: he must discharge it as the law requires him to do; he can not impose new conditions or make any private agreement connected with the sale.[41] If he presumes thus to act, his proceedings will be set aside or disregarded altogether, as the court, from which execution has issued, may think proper. We have no doubt, nevertheless, in every proper case, that the person to whom the property has been struck down, as the purchaser, may, at any time before the confirmation of the sale, assign his bid to another, and the act will be confirmed by the court. This is the rule in Kentucky; *Jamison* v. *Tudor*, 3 B. Mon. (Ky.) 357; *Frizzle* v. *Veach*, 1 Dana (Ky.) 212; and it has long been regarded as the law in Ohio; *Ewing* v. *Higby*, 7 Ohio pt. I, 204.[42]

But in the case before us the sale appears to have been made to one party, and afterwards, without the property being re-offered, another person is returned as the next highest bidder, and entitled to the purchase; and this, too, by an understanding between the parties to the sale. Such a proceeding we can not judicially sanction. The sale must be set aside and a new order of sale issue to the sheriff.[43]

Motion granted and sale set aside.

---

[41]A conditional bid is unauthorized and should be disregarded by the officer. *Faunce* v. *Sedgwick*, 8 Pa. St. 407 (1848); *Moore* v. *Owsley*, 37 Tex. 603 (1872); *Dewey* v. *Willoughby*, 72 Ill. 250 (1874); *Nebraska Loan & Trust Co.* v. *Hamer*, 40 Nebr. 281, 58 N. W. 695 (1894). Nor can the sheriff impose terms different from those employed by law. *Stevenson* v. *Black*, 1 N. J. Eq. 338 (1831); *Hellman* v. *Hellman*, 4 Rawle (Pa.) 440 (1834); *In re Devine's Appeal*, 30 Pa. St. 348 (1858); *Cable* v. *Byrne*, 38 Minn. 534, 38 N. W. 620, 8 Am. St. 696 (1888).

[42]Accord: *People ex rel. Newell* v. *Muzzy*, 1 Denio (N. Y.) 239 (1845); *Trotter* v. *Nelson*, 1 Swan (Tenn.) 7 (1851); *Carpenter* v. *Sherfy*, 71 Ill. 427 (1874); *Green* v. *Clark*, 31 Cal. 591 (1867); *Wood* v. *Morehouse*, 45 N. Y. 368 (1871); *Conger* v. *Babcock*, 87 Ind. 497 (1882); *Ward* v. *Lowndes*, 96 N. Car. 367, 2 S. E. 591 (1887); *Parler* v. *Johnson*, 81 Ga. 254, 7 S. E. 317 (1888); *Oliver* v. *Dougherty*, 8 Ariz. 65, 68 Pac. 553 (1902).

[43]Accord: *Swortzell* v. *Martin*, 16 Iowa 519 (1864); *Mathews* v. *Clifton*, 13 Sm. & M. (Miss.) 330 (1850); *Dazet* v. *Landry*, 21 Nev. 291, 30 Pac. 1064 (1892); *Kunkel* v. *Eby*, 7 Pa. D. R. 672 (1898); *Hotchkiss* v. *Homan*, 11 Pa. Dist. R. 43 (1901). Contra: *Zantzinger* v. *Pole*, 1 Dall. (Pa.) 419, 1 L. ed. 204 (1789) semble; *Cummings* v. *MacGill*, 6 N. Car. (2 Murph.) 357 (1818); *South* v. *Lavens*, 6 W. N. Cas. (Pa.) 528 (1878); *Houseman* v. *Potts*, 40 W. N. C. (Pa.) 452 (1897).

WILLIAM D. GULICK *v.* MARY WEBB ET AL.

SUPREME COURT OF NEBRASKA, 1894

41 Nebr. 706

Appeal from a decree of the District Court of Lancaster county, confirming a sheriff's sale of certain lots in the city of Lincoln, sold under an order of sale in an action to foreclose certain mechanics' and mortgage liens. W. H. Tyler was the purchaser for $13,000, which was more than two-thirds of the appraised value.[44]

HARRISON, J.: The objection upon which the appellants rely is as follows: "An unlawful combination was entered into by certain of the claimants and lien-holders to prevent competition at the bidding or crying of the sale; that such combination was carried out and rival bidding was prevented, to the injury of the defendant and certain of the creditors." The evidence (which consists of affidavits of various persons) discloses that five of the lienholders, whose liens were of the liens foreclosed in the action, no one of them being of sufficient financial ability to purchase the property, entered into an agreement or combination to the effect that one of their number, William Tyler, was to bid at the sale in behalf of all the five lienholders, and bid until the amount offered for the premises would equal the mortgage liens of one Gulick, which was prior to the liens of the five who entered into the agreement, and eighty per cent. of the aggregate amount of their liens. A careful reading and analysis of all the evidence contained in the affidavits presented and used during the hearing in the district court, as preserved in the bill of exceptions and record filed in this court, satisfies us that the judge who rendered the decision and confirmed the sale was fully warranted in the conclusion which he evidently formed as a basis for the disposition made of the matters in controversy, that the agreement between the five lienholders was one by which they combined to jointly purchase the property for their common benefit, and not an agreement not to bid or to avoid competition or to deter others from bidding or competing at the sale; that in so combining they had no fraudulent or illegal intent or purpose. This being established, then the question arises whether such an agreement is forbidden by or is contrary to law, and sufficient to set aside the sale to the trustees acting or bidding for the parties to such contract. We have no doubt that in the earlier cases in which this question arose and was decided, some courts of high authority have announced a doctrine which would avoid this sale solely upon the grounds of the formation of such an association, regardless of the intent or motives of the parties, assigning as a reason that its necessary and unavoidable effect is to tend to discourage or prevent competition; but the later cases have in effect overruled the above doctrine and established what we consider a better and more practical

[44] The arguments of counsel and part of the opinion are omitted.

one, that where an examination of all the facts and circumstances shows the object of the association was to enable the parties to compete where without combining they could not do so, formed for an honest purpose and with such an intent, and not with any view to preventing competition, or deterring bidders or "chilling bids," the sale will be upheld and completed.[45]

Decree affirmed.

---

[45]At sales on execution the puffing or chilling of the bidding is fraudulent. *Moncrieff* v. *Goldsborough*, 4 H. & M. (Md.) 281, 1 Am. Dec. 407 (1799); *Donaldson* v. *McRoy*, 1 Browne (Pa.) 346 (1811); *Crowder* v. *Austin*, 2 Car. & P. 208 (1825); *Rex* v. *Marsh*, 3 Y. & J. 331 (1829); *Bunts* v. *Cole*, 7 Blackf. (Ind.) 265, 41 Am. Dec. 226 (1844); *Carson* v. *Law*, 2 Rich. Eq. (S. Car.) 296 (1846); *Herndon* v. *Gibson*, 38 S. Car. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. 765 (1892); *Toole* v. *Johnson*, 61 S. Car. 34, 39 S. E. 254 (1901). And, generally, if practices are resorted to by a bidder or combination of bidders the object of which is to stifle fair competition the sale will be set aside. *Jones* v. *Caswell*, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134 (1802); *Thompson* v. *Davies*, 13 Johns. (N. Y.) 112 (1816); *Troup* v. *Wood*, 4 Johns. Ch. (N. Y.) 228 (1820); *Mills* v. *Rogers*, 2 Litt. (Ky.) 217, 13 Am. Dec. 263 (1822); *Hawley* v. *Cramer*, 4 Cow. (N. Y.) 717 (1825); *Froneberger* v. *First Nat. Bank*, 203 Fed. 429 (1913); *Den ex dem. Smith* v. *Greenlee*, 2 Dev. L. (N. Car.) 126, 18 Am. Dec. 564 (1829); *Smull* v. *Jones*, 1 Watts & S. (Pa.) 128 (1841); *Hamburgh Mfg. Co.* v. *Edsall*, 5 N. J. Eq. 249 (1845); *Vantrees* v. *Hyatt*, 5 Ind. 487 (1854); *Slinghuff* v. *Eckel*, 24 Pa. St. 472 (1855); *Wooton* v. *Hinkle*, 20 Mo. 290 (1855); *Cocks* v. *Izard*, 7 Wall. (U. S.) 559, 19 L. ed. 275 (1868); *National Bank of the Metropolis* v. *Sprague*, 20 N. J. Eq. 159 (1869); *Packard* v. *Bird*, 40 Cal. 378 (1870); *Gage* v. *Graham*, 57 Ill. 144 (1870); *Griffith* v. *Judge*, 49 Mo. 536 (1872); *Underwood* v. *McVeigh*, 23 Grat. (Va.) 409 (1873); *Barrett* v. *Bath Paper Co.*, 13 S. Car. 128 (1879); *Lawnin* v. *Bradley*, 13 Mo. App. 361 (1883); *Phelps* v. *Benson*, 161 Pa. St. 418, 29 Atl. 86 (1894); *Lennon* v. *Heindel*, 56 N. J. Eq. 8, 37 Atl. 147 (1897); *Hurst* v. *Fisher*, 64 Ohio St. 530, 60 N. E. 626 (1901); *Fisher* v. *Hampton Transp. Co.*, 136 Mich. 218, 98 N. W. 1012, 112 Am. St. 358 (1904); *Fletcher* v. *Johnson*, 139 Mich. 51, 102 N. W. 278, 111 Am. St. 401 (1905); *Coal & Coke R. Co.* v. *Marple*, 70 W. Va. 136, 73 S. E. 261, 38 L. R. A. (N. S.) 719n, Ann. Cas. 1913 D, 959n (1911). But an agreement by two or more persons to purchase for their joint benefit is not unlawful where the purpose of the combination is honest, as to prevent a sacrifice of the property, or where, on account of the magnitude of the sale, purchasers who would otherwise be excluded are enabled to participate in the bidding. *Phippen* v. *Stickney*, 3 Metc. (Mass.) 384 (1841); *Smull* v. *Jones*, 6 Watts & S. (Pa.) 122 (1843); *Switzer* v. *Skiles*, 8 Ill. (3 Gilm.) 529, 44 Am. Dec. 723 (1846); *James* v. *Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743 (1851); *Bellows* v. *Russell*, 20 N. H. 427, 51 Am. Dec. 238 (1845); *Kearney* v. *Taylor*, 15 How. (U. S.) 494, 14 L. ed. 787 (1853); *Buckner* v. *Chamblis*, 30 Ga. 652 (1860); *Young* v. *Snyder*, 3 Grant Cas. (Pa.) 151 (1852); *Jenkins* v. *Frink*, 30 Cal. 586, 89 Am. Dec. 134 (1866); *Wicker* v. *Hoppock*, 6 Wall. (U. S.) 94, 18 L. ed. 752 (1867); *Marie* v. *Garrison*, 83 N. Y. 14 (1880); *Hunt* v. *Elliott*, 80 Ind. 245, 41 Am. Rep. 794 (1881); *Oram* v. *Rothermel*, 98 Pa. St. 300 (1881); *Pennsylvania Transp. Co.* v. *Pittsburgh &c. R. Co.*, 11 W. N. Cas. (Pa.) 35 (1881); *Smith* v. *Ullman*, 58 Md. 183, 42 Am. Rep. 329 (1881); *Maffet* v. *Ijams*, 103 Pa. St. 266 (1883); *Hopkins* v. *Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731 (1890); *Fidelity Trust Co.* v. *Mobile St. R. Co.*, 54 Fed. 26 (1893); *Woodruff* v. *Warner*, 175 Pa. St. 302, 34 Atl. 667, 52 Am. St. 845 (1896), question of actual fraud is for the jury; *De Baun* v. *Brand*, 61 N. J. L. 624, 41 Atl. 958 (1898); *Munson* v. *Magee*, 22 N. Y. App. Div. 333, 47 N. Y. S. 942 (1897), affd. 161 N. Y. 182; *Braden* v. *O'Neil*, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. 761 (1898); *Satterfield* v. *Kindley*, 144 N. Car. 455, 57 S. E. 145, 15 L. R. A. (N. S.) 399n, 12 Ann. Cas. 1098 (1907); *Snouffer* v. *Heisig* (Tex.), 130 S. W. 912 (1910).

LEVI *v.* GREER

SUPREME COURT OF PENNSYLVANIA, 1912

236 Pa. 475

Appeal, No. 166, Jan. T., 1912, by W. N. Seibert, from order of C. P. Erie Co., Feb. T., 1912, No. 60, setting aside sheriff's sale in case of *Isaac Levi* and *J. P. Trivitt* v. *R. M. Greer,* administrator of the estate of Elsie A. Greer, deceased, and R. M. Greer, et al.

PER CURIAM: The setting aside, or the refusal to set aside a sheriff's sale is in the sound discretion of the court and its order will not be disturbed unless it appears that there was manifest error. While inadequacy of price is not by itself sufficient to justify the court in setting aside a sheriff's sale, yet where there is great inadequacy, the court may seize upon other circumstances in order to give relief; *Stroup* v. *Raymond,* 183 Pa. 279; *Light* v. *Zeller,* 195 Pa. 315. In this case there was great inadequacy in price and a misdescription of the property by including seven and a half acres not owned by the defendant and not subject to the lien of the judgment, which left some uncertainty as to what a purchaser would take by the sale and clouded the title of a third party who joined in the application to set aside the sale. There was, in addition to this, conduct on the part of the purchaser, who refused shortly before the sale to carry out his agreement to buy a part of the premises at private sale and who thus prevented the defendant from paying the judgment, which indicted unfairness by him and a purpose of mislead.

The order is affirmed at the cost of the appellant.[46]

[46]Mere inadequacy of price is not sufficient in itself to justify the setting aside of a judicial sale of property. *Livingston* v. *Byrne,* 11 Johns. (N. Y.) 555 (1864); *Mercereau* v. *Prest,* 3 N. J. Eq. 460 (1836); *Draine* v. *Smelser & Henderson,* 15 Ala. 423 (1849); *Brittin* v. *Handy,* 20 Ark. 381, 73 Am. Dec. 497 (1859); *Smith* v. *Duncan,* 16 N. J. Eq. 240 (1863); *Kerr* v. *Haverstick,* 94 Ind. 178 (1883); *Coolbaugh* v. *Roemer,* 32 Minn. 445, 21 N. W. 472 (1884); *Central Pac. R. Co.* v. *Creed,* 70 Cal. 497, 11 Pac. 772 (1886); *Smith* v. *Perkins,* 81 Tex. 152, 16 S. W. 805, 26 Am. St. 794 (1891); *Barling* v. *Peters,* 134 Ill. 606, 25 N. E. 765 (1890); *Morrisse* v. *Inglis,* 46 N. J. Eq. 306, 19 Atl. 16 (1889); *Ceburre* v. *Pearson,* 27 App. Div. 621, 50 N. Y. S. 112 (1898); *Clark* v. *Glos,* 180 Ill. 556, 54 N. E. 631, 72 Am. St. 223 (1899); *Ackerman* v. *Hendricks,* 117 Iowa 106, 90 N. W. 522 (1902); *Westmoreland Building Assn.* v. *Nesbit,* 21 Pa. Super. Ct. 150 (1902); *Lyle* v. *Armstrong,* 235 Pa. 224, 83 Atl. 577 (1912). But courts are not slow to seize upon other circumstances impeaching the fairness of the transaction, as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. *Reed* v. *Carter,* 3 Blackf. (Ind.) 376, 26 Am. Dec. 422 (1834); *Graffam* v. *Burgess,* 117 U. S. 180, 6 S. Ct. 686, 29 L. ed. 839 (1885); *Fletcher* v. *McGill,* 110 Ind. 395, 10 N. E. 651, 11 N. E. 779 (1886); *Phillips* v. *Wilson,* 164 Pa. St. 350, 30 Atl. 264 (1894); *Davis* v. *McCann,* 143 Mo. 172, 44 S. W. 795 (1897); *Simmons* v. *Sharpe,* 138 Ala. 451, 35 So. 415 (1903); *Kinkaid* v. *Rossa,* 31 S. Dak. 559, 141 N. W. 969, Ann. Cas. 1915D, 1098n (1913). So also, if the sale has been attended by an irregularity. *Booth* v. *Webster,* 5 Harr. (Del.) 129 (1848); *Byers* v. *Surget,* 19 How. (U. S.) 303, 15 L. ed. 670 (1856); *Schroeder* v. *Young,* 161 U. S. 334, 40 L. ed. 721 (1895); *Lennon* v. *Heindel,* 56 N. J. Eq. 8, 37 Atl. 147 (1897); *Haspel* v. *Lyons,* 41 Pa. Super. Ct. 285 (1909); *Kissinger* v. *Zieger,* 138 Wis. 368, 120 N. W. 249 (1909); *Shipley* v. *Shamwell,* 41 App. D. C. 267 (1914).

JONES *v.* GOODBAR

SUPREME COURT OF ARKANSAS, 1895

60 *Ark.* 182

C. B. Goodbar issued an execution on a judgment confessed on a promissory note for $150 before a justice of the peace and placed the same in the hands of J. T. Jones, a constable. On January 26, 1891, the constable returned the execution "not satisfied" and the justice renewed it for a year. On January 26, 1892, the constable again brought the execution to the justice and made oral report that it was still unsatisfied, but made no written return thereof. Afterwards the appellee recovered judgment against the appellants, the constable and his surety, for failure to return the execution. A motion for new trial having been overruled an appeal was taken.[47]

RIDDICK, J.: The question to consider is whether the bringing back of the writ on the return day, and the oral report by the constable to the justice that it was still unsatisfied, constituted a return thereof, within the meaning of the statute.

"A return," says Mr. Herman, "may be considered as the certificate of the officer to whom any process is directed, stating what he has done in obedience to the command therein given, or the reason of his neglect in not fulfilling them, and is a material part of his duty." Herman on Ex., p. 373. Our statute requires this return to be made in writing, and that the name of the officer be signed to his return. Sand. & H. Dig., section 6003. But this would probably be the law, even without the statute. Herman on Executions, p. 236.

It is evident that one object in requiring the officer to make a return of the writ is that the court and parties interested may know, first, whether the writ has been obeyed, and, if so, in what manner, and if not executed, the reason of the officer for failing to execute it. To this end the written certificate concerning these facts is required. The bringing back of the writ by the officer, and filing it in the office of the justice or clerk from which it issued, together with this written certificate of his proceedings under it, indorsed on the writ or upon some paper attached thereto, constitute in law the return of the writ. Making the indorsement without the actual return of the writ is not a return, nor is it a return to bring back and file the writ without the certificate of the officer required to be indorsed, for both together constitute the return, within the meaning of the statute. *State* v. *Melton,* 8 Mo. 417; *Nelson* v. *Brown,* 23 Mo. 13; *Beall* v. *Shattuck,* 53 Miss. 361; Freeman on Ex. (2d ed.), section 353. We therefore conclude that the circuit court, under the facts of this case, properly held that the officer failed to return the writ.[48]

---

[47]The arguments of counsel and part of the opinion of the court are omitted. There was error on another point.

[48]Accord: *Purrington* v. *Loring,* 7 Mass. 388 (1811); *Shover* v. *Funk,* 5 Watts & S. (Pa.) 457 (1843).

"It is the duty of a sheriff or other ministerial officer to return all writs on the return day thereof with a short account in writing endorsed by him

thereon of the manner in which he has executed the same, or why he has done nothing. A return upon an execution, which is sufficient in law; that is, a return which the officer has the right to make, is conclusive between the parties, and they are interested to have the officer perform his full duty, to make his return and file the writ with its proper custodian. Neither of them can be deprived of the return by his neglect or failure to return the writ by the return day, and the court in which the judgment was obtained, upon which the execution issued, may, if the writ be not returned in due time, award a rule against the officer to return it, and if he do not obey the rule, compel him to make his return upon the writ and to return it by attaching and fining him for contempt." Per Riely, J., in *Rowe* v. *Hardy*, 97 Va. 674, 34 S. E. 625, 75 Am. St. 811 (1899); *People* v. *Everest*, 4 Hill (N. Y.) 71 (1843); Tidd's Practice (9th ed.) 307; *Clerk's Case*, *Cro.* Eliz. 873 (1601); *Moreland* v. *Leigh*, 1 Stark N. P. 312 (1816); *Jupp* v. *Cooper*, L. R. 5 C. P. D. 26 (1879). A failure by the officer to make a return will, in most states, render him liable to an action for damages and in some states to a penalty. *White* v. *Wilcox*, 1 Conn. 347 (1815); *Burk* v. *Campbell*, 15 Johns. (N. Y.) 456 (1818); *McGregor* v. *Brown*, 22 Mass. (5 Pick.) 170 (1827); *Runlett* v. *Bell*, 5 N. H. 433 (1831); *Keith* v. *Commonwealth*, 5 J. J. Marsh. (Ky.) 360 (1831); *Commonwealth* v. *McCoy*, 8 Watts (Pa.) 153, 34 Am. Dec. 445 (1839); *Pardee* v. *Robertson*, 6 Hill (N. Y.) 550 (1844); *Lawrence* v. *Rice*, 53 Mass. (12 Metc.) 535 (1847); *Bachman* v. *Fenstermacher*, 112 Pa. St. 331, 4 Atl. 546 (1886); *McGuire* v. *Bausher*, 52 N. Y. App. Div. 276, 65 N. Y. S. 382 (1900); *Bell* v. *Wycoff*, 131 N. Car. 245, 42 S. E. 608 (1902); *Bickham* v. *Kosminsky*, 74 Ark. 413, 86 S. W. 292 (1905). So also for a false return. *Weld* v. *Bartlett*, 10 Mass. 470 (1813); *Clough* v. *Monroe*, 34 N. H. 381 (1857); *Long* v. *Towl*, 41 Mo. 400 (1867); *Wright* v. *Darlington*, 108 Pa. St. 372 (1885); *Remick* v. *Wentworth*, 89 Maine 392, 36 Atl. 622 (1896).

Failure to make return, and delays and defects in the return of the writ do not, in most jurisdictions, affect the purchaser's title. *Smull* v. *Mickley*, 1 Rawle (Pa.) 95 (1828); *Jackson ex dem. Ten Eyck* v. *Walker*, 4 Wend. (N. Y.) 462 (1830); *Doe ex dem. Wolf* v. *Heath*, 7 Blackf. (Ind.) 154 (1844); *Forrest & Lyon* v. *Camp*, 16 Ala. 642 (1849); *Hinds' Heirs* v. *Scott*, 11 Pa. St. 19, 51 Am. Dec. 506 (1849); *Phillips* v. *Coffee*, 17 Ill. 154, 63 Am. Dec. 357 (1855); *Low* v. *Adams*, 6 Cal. 277 (1856); *Phillips* v. *Schiffer*, 64 Barb. (N. Y.) 548, 7 Lans. 347 (1873); *Murray* v. *Chadwick*, 52 Vt. 293 (1880); *Willis* v. *Smith*, 66 Tex. 31, 17 S. W. 247 (1886). But in states where the practice of extending land on execution prevails, it is essential that the return be filed in conformity with the statute. *Bott* v. *Burnell*, 11 Mass. 163 (1814); *Prescott* v. *Pettee*, 3 Pick. (Mass.) 331 (1825); *Mitchell* v. *Kirtland*, 7 Conn. 229 (1828); *Walsh* v. *Anderson*, 135 Mass. 65 (1883). In Massachusetts: "It is well settled that a title to real estate, acquired under a judgment and execution can not be established unless the execution is returned into court, but as the statute does not fix the time within which this must be done, the return will be effectual if it is made at any time before the execution is put in evidence in the case in which it is relied on. It is equally true that an officer can not justify an attachment of goods on mesne process unless he returns his writ into court." *Fletcher* v. *Wrighton*, 184 Mass. 547, 69 N. E. 313 (1904). See also *Firth* v. *Haskell*, 148 Mass. 501, 20 N. E. 164 (1889); *Rand* v. *Cutler*, 155 Mass. 451, 29 N. E. 1085 (1892).

SECTION 8. TITLE OF THE PURCHASER

HARDENBURG *v.* BEECHER

SUPREME COURT OF PENNSYLVANIA, 1883

104 *Pa. St.* 20

Error to the Court of Common Pleas of Warren County, of January term, 1883, No. 382.

Replevin, brought November 6, 1882, by Moses Beecher and W. H. Copeland against G. W. Hardenburg and B. F. McClure, for "one hundred barrels crude petroleum." The property was replevied and a claim property bond given. Plea, non cepit, and property.[49]

The interest of Merrill and Markert in twenty-five acres of land under articles, was taken in execution on three several writs and sold July 26, 1882, to the defendants, G. W. Hardenburg and B. F. McClure, for the sum of $1,100, and the deed therefor was acknowledged on November 27, 1882. The costs of sale only were then paid, but after the acknowledgment of the deed the balance of the bid, on application to court, was applied upon the purchase money judgments of Hardenburg, McClure and M. D. Archibold.

At the date of the sale to said Hardenburg and McClure, July 26, 1882, there were two oil wells on said twenty-five acres, flowing several barrels of oil per day. Soon after said sale defendants took possession of said twenty-five acres, said Merrill and Markert having abondoned the same, repaired the tanks and wells, and saved the flow of oil.

The plaintiffs, Beecher and Copeland, issued an alias fieri facias on their judgment, September 2, 1882, to No. 13, December term, 1882, and levied on the oil in question in tanks on the land, being oil produced on said twenty-five acres from the said wells, after the sale of the said twenty-five acres by the sheriff to the defendants, and before the acknowledgment of the deed for the same land to them. Said oil was levied on October 16, 1882, and sold as the property of Merrill and Markert to plaintiffs October 26, 1882, being one hundred barrels crude petroleum, sold at ninety cents per barrel. Said oil was sold in tanks on the land then in possession of the defendants. The defendants claimed the oil by virtue of the sheriff's sale to them of the land as above stated, and refused to surrender the same to the plaintiffs, whereupon plaintiffs brought this action of replevin for said one hundred barrels of crude petroleum.

Judgment, on case stated, was entered for the plaintiff for ninety dollars and defendants took this writ of error.

CLARK, J.: A purchaser at a sheriff's sale, before his deed has been acknowledged, has an inceptive interest in the land; *Morrison* v. *Wurtz*, 7 Watts. (Pa.) 437; such an interest as will be bound by a

[49]Part of the reporter's statement of facts is omitted.

judgment; *Robb* v. *Mann*, 1 Jones (Pa.) 300. The subsequent acknowledgment and delivery of the sheriff's conveyance inures to the benefit of lien creditors, and, as in the case of a private individual sale, the incumbrancer by relation has the benefit of his security to the extent of the whole estate; such an estate is attended with the ordinary consequences of sale by an individual; *Hawk* v. *Stouch*, 5 Serg. & R. (Pa.) 161; *Stephen's App.*, 8 W. & S. (Pa.) 188; *Slater's App.*, 4 Cas. (Pa.) 170. The title acquired under the sheriff's deed relates back to the time of the sale, not merely to the date of the deed;[50] *Hoyt* v. *Koons*, 7 Harr. (Pa.) 277; but not so as to wholly divest the legal ownership of the debtor, who, until the acknowledgment of the deed, is entitled to the possession, with all its attendant advantages; *Garrett* v. *Dewart*, 7 Wr. (Pa.) 342. A judgment entered against the debtor after the day of the sale is not a lien upon the land, although the deed to the purchaser was not acknowledged until a subsequent time;[51] *Hahn v. Rhoads*, 1 P. & W. (Pa.) 484. It follows as the result of all these cases, that if the deed be subsequently acknowledged, the vendee has such inceptive title by his mere purchase as will be bound by the lien of a judgment, whilst the debtor has no such title remaining as will support a lien; if, however, the acknowledgment be refused, the vendee's contract is rescinded, and the debtor's title remains as if no sale had been made.

The debtor is, however, entitled to the possession until the acknowledgment; the purchaser has by his mere purchase acquired no title to the present enjoyment.[52] This right to possession carries

---

[50]Accord: *Smith* v. *Allen*, 1 Blackf. (Ind.) 22 (1818); *Robinson* v. *Robinson*, 3 Harr. (Del.) 391 (1841); *Boyd's Lessee* v. *Longworth*, 11 Ohio 235 (1842); *Thomas* v. *Crofut*, 14 N. Y. 474 (1856); *Barrett* v. *Western*, 66 Barb. (N. Y.) 205 (1870); *Edwardsville R. Co.* v. *Sawyer*, 92 Ill. 377 (1879); *Farlin* v. *Sook*, 30 Kans. 401, 1 Pac. 123, 46 Am. Rep. 100 (1883); *Hackensack Sav. Bank* v. *Morse*, 46 N. J. Eq. 161, 18 Atl. 367 (1889); *Pennsylvania Schuyl. V. R. Co.* v. *Cleary*, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. 913 (1889). Contra: *Leger* v. *Doyle*, 11 Rich. L. (S. Car.) 109, 70 Am. Dec. 240 (1857); *Den ex dem. Green* v. *Steelman*, 10 N. J. L. 193 (1828). Cf. *Leach* v. *Koenig*, 55 Mo. 451 (1874).

[51]Accord: *Fell* v. *Price*, 8 Ill. (3 Gilm.) 186 (1846); *Marshall* v. *McLean*, 3 G. Greene (Iowa) 363 (1852); *Miller* v. *Wilson*, 32 Md. 297 (1869); *Greer* v. *Wintersmith*, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. 96, 7 Am. St. 613 (1887); *Robinson* v. *Thornton*, 102 Cal. 675, 34 Pac. 120 (1893); *Dumond* v. *Church*, 4 App. Div. 194, 38 N. Y. S. 557, 74 N. Y. St. 176 (1896); Cf. *Van Rensselaer* v. *Sheriff of Albany*, 1 Cow. (N. Y.) 501 (1823).

[52]A conveyance is necessary to complete the title of the purchaser of real estate sold on execution, and the right to possession follows. *Hall* v. *Benner*, 1 Pen. & W. (Pa.) 402 (1830); *Kelly* v. *Governor*, 14 Ala. 541 (1848); *Storch* v. *Carr*, 28 Pa. St. 135 (1857); *Dunnica* v. *Coy*, 24 Mo. 167, 69 Am. Dec. 420 (1857); *Garrett* v. *Dewart*, 43 Pa. St. 342, 82 Am. Dec. 570 (1862); *Rogers* v. *Cawood*, 1 Swan (Tenn.) 142, 55 Am. Dec. 729 (1851); *Edwards* v. *Miller*, 4 Heisk. (Tenn.) 314 (1871); *Robinson* v. *Hall*, 33 Kans. 139, 5 Pac. 763 (1885). But a deed is unnecessary where a leasehold interest is sold. *Williams* v. *Downing*, 18 Pa. St. 60 (1851). In jurisdictions allowing a statutory period for the redemption of the property by the debtor, the purchaser is not entitled to a deed from the sheriff until the expiration of such period. *Evertson* v. *Sawyer*, 2 Wend. (N. Y.) 507 (1829); N. Y. Code Civ. Pro., §§ 1438-41; Cal. Code Civ. Pro., §§ 700-1; *Schermerhorn* v. *Merrill*, 1 Barb. (N. Y.) 511 (1847); *McMillan* v. *Richards*, 9 Cal. 365, 70 Am. Dec. 655 (1858); *Cummings* v. *Coe*, 10 Cal. 529 (1858); *Curtis* v. *Bush*, 39 Barb.

with it its attendant advantages, the right to the growing crops as they may mature; the right to an ordinary use of a mine or quarry, or to the flow from an oil well. The debtor will not be allowed to commit waste or destruction of the premises.[53] The sheriff's vendee is, therefore, only entitled to the growing grain, to the use of mine or quarry, and the oil upon the lands embraced within his purchase, subject to the right accruing to the debtor under his possession. The grain, the coal, or the oil, so far as they are of the realty, belong to the vendee; the debtor may, however, pending the sale, and until the acknowledgment of the deed, cut the ripened grain, mine the coal, or receive the flow of oil, and apply the product to his own use. Whilst these products are attached to the realty they belong to the vendee, and it is by ordinary severance only that they become the property of the debtor.[54]

The grain as a growing crop, the coal in the mine, or the oil in the well, could not, after the sale of the land, be seized and sold upon execution as the property of the debtor, nor would the debtor be allowed to sell or waste them. But if, before the acknowledgment, the grain ripen and the debtor sever it from the land, if he continue

---

(N. Y.) 661 (1863); *Page* v. *Rogers*, 31 Cal. 293 (1866); *Cook* v. *Knowles*, 38 Mich. 316 (1878); *Foorman* v. *Wallace*, 75 Cal. 552, 17 Pac. 680 (1888); *Shirk* v. *Thomas*, 121 Ind. 147, 22 N. E. 976, 16 Am. St. 381 (1889); *Dray* v. *Dray*, 21 Ore. 59, 27 Pac. 223 (1891); *Hill* v. *Swihart*, 148 Ind. 319, 47 N. E. 705 (1897); *Wood* v. *Conrad*, 2 S. Dak. 405, 50 N. W. 903 (1891). In some states a sheriff's deed must be acknowledged. *Roads* v. *Symmes*, 1 Ohio 281, 13 Am. Dec. 621 (1824); *Boal* v. *King*, Wright (Ohio) 223 (1833); *Bellas* v. *McCarty*, 10 Watts (Pa.) 13 (1840); *Storch* v. *Carr*, 28 Pa. St. 135 (1857); *Ryan* v. *Carr*, 46 Mo. 483 (1870); *Hammond* v. *Gordon*, 93 Mo. 223, 6 S. W. 93 (1887). Contra: *Doe ex dem. Wayman* v. *Naylor*, 2 Blackf. (Ind.) 32 (1826); *Greer* v. *Howard*, 4 Ky. L. 350 (1882); *Stephenson* v. *Thompson*, 13 Ill. 186 (1851); *White* v. *Farley*, 81 Ala. 563, 8 So. 215 (1886); *Paxton* v. *Heron*, 41 Colo. 147, 92 Pac. 15 (1907); *McNamara* v. *McNamara*, 135 N. Y. Supp. 215 (1911).

[53] The debtor in possession is answerable to the sheriff's vendee for waste committed after the sale. *Rich* v. *Baker*, 3 Denio (N. Y.) 79 (1846); *McKeen* v. *Gammon*, 33 Maine 187 (1851); *Thomas* v. *Crofut*, 14 N. Y. 474 (1856); *Sands* v. *Pfeiffer*, 10 Cal. 258 (1858); *Marquette H. & O. R. Co.* v. *Atkinson*, 44 Mich. 166, 6 N. W. 230 (1880); *Whitney* v. *Huntington*, 34 Minn. 458, 26 N. W. 631, 57 Am. Rep. 68 (1886); *Gourley* v. *Lukens*, 4 Montg. Co. (Pa.) 15 (1888). Otherwise where a house is accidentally destroyed by fire. *Merritt* v. *Richey*, 127 Ind. 400, 27 N. E. 131 (1890).

[54] Where there is no severance, actual or constructive, growing crops pass to the purchaser of land at execution sale. *Bear* v. *Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 490 (1851); *Bloom* v. *Welsh*, 27 N. J. L. 177 (1858); *Nichols* v. *Dewey*, 86 Mass. (4 Allen) 386 (1862); *Scriven* v. *Moote*, 36 Mich. 64 (1877); *Frost* v. *Render*, 65 Ga. 15 (1880); *Thweat* v. *Stamps*, 67 Ala. 96 (1880); *Thomas* v. *Noel*, 81 Ind. 382 (1882); *Heavilon* v. *Farmers' Bank*, 81 Ind. 249 (1881); *Smith* v. *Hague*, 25 Kans. 246 (1881); *Long* v. *Seavers*, 103 Pa. St. 517 (1883). Contra: *Cassilly* v. *Rhodes*, 12 Ohio 88 (1843); *Albin* v. *Riegel*, 40 Ohio St. 339 (1883); contra, as to matured crops, *Hecht* v. *Dittman*, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131 (1881); *First Nat. Bank* v. *Beegle*, 52 Kans. 709, 35 Pac. 814, 39 Am. St. 365 (1894). In *Potter* v. *Lambie*, 142 Pa. 535, 21 Atl. 888 (1891), the purchaser who had not dispossessed the debtor by legal proceedings or otherwise, was held a trespasser for removing part of the crops. See N. Y. Code Civ. Pro., § 1441. *Richardson* v. *Dinkgrave*, 26 La. Ann. 632 (1874); *Frank* v. *Magee*, 50 La. Ann. 1066, 23 So. 939 (1898).

the ordinary work of the mine, or operate the oil well, the grain, the coal, and the oil, the ordinary products of the land, during the lawful possession of the debtor, are his; these are some of the attendant advantages of his possession. After severance and possession taken by the debtor, these products are of course liable to execution for his debts.

But if he voluntarily abandon the possession of the land, and surrender to the sheriff's vendee, he loses all these attendant advantages.[55]

If the vendee enter under these circumstances, he is lawfully in possession; the subsequent acknowledgment of the deed gives him title by relation from the date of the sale. The debtor's right to remain until the sale is fully completed, and to enjoy its incidental advantages as such, are not the subject of execution, nor is he obliged to remain for the benefit of his creditors; the privilege is a personal one, and he may exercise it or not, as he chooses.

Hardenburg and McClure bought the lands and the oil, and if Merrill and Markert, the debtors, without any fraud, abandoned their possession and suffered the vendees to enter, if they did not stand upon their rights or claim the advantages incident to possession, but voluntarily relinquished all, we think the vendees were justified in making an entry for the purpose of securing the oil which flowed from the lands they had already purchased, and which were subsequently conveyed to them. If, whilst lawfully in possession, they erected tanks and received the flow of oil from the well, which otherwise would have gone to waste, the subsequent acknowledgment of the deed would as certainly have confirmed their title to the oil, part and parcel of the land when they bought, as to the land itself. Merrill and Markert might have remained pending the acknowledgment of the sheriff's deed and received and claimed this oil as their own, but they were not obliged to do so.

---

[55] A purchaser at sheriff's sale upon obtaining title may, if he can do so peaceably, take possession of the land. *Taylor* v. *Cole*, 3 T. R. 292 (1789); *McDougall* v. *Sticher*, 1 Johns. (N. Y.) 42 (1806); *Orser* v. *Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543 (1826); *Leidy* v. *Proctor*, 97 Pa. St. 486 (1881), but he can not take forcible possession, the defendant is only bound to surrender when statutory proceedings or a judgment in ejectment require it. *People ex rel. Brinkerhoff* v. *Nelson*, 13 Johns. (N. Y.) 340 (1816); *Evertson* v. *Sawyer*, 2 Wend. (N. Y.) 507 (1829); *Coleman* v. *Hair*, 22 Ala. 596 (1853); *Frick* v. *Fiscus*, 164 Pa. St. 623, 30 Atl. 515 (1894). The common-law remedy of the purchaser to obtain possession is ejectment. *Morton* v. *Sanders*, 2 J. J. Marsh. (Ky.) 192 (1829); *Den ex dem. Davis* v. *Evans*, 27 N. Car. 525 (1845); *Odonnell* v. *McMurdie*, 6 Humph. (Tenn.) 134 (1845); *Downing* v. *Sullivan*, 64 Conn. 1, 29 Atl. 130 (1894); *Gunn* v. *Hardy*, 130 Ala. 642, 31 So. 443 (1900). In a number of jurisdictions a summary proceeding to obtain possession is provided by statute. *Ferguson* v. *Blakeny*, 6 Ark. 296 (1845); *Spraker* v. *Cook*, 16 N. Y. 567 (1858); N. Y. Code Civ. Pro., § 2232; *Walbridge's Appeal*, 95 Pa. St. 466 (1880); *Moore* v. *Moore*, 23 Super. Ct. Pa. 73 (1903); Pa. Act of April 20, 1905, P. L. 239, 2 P. & L. Dig. (2d ed.) 3491. As to writs of assistance see *Lundstrum* v. *Branson*, 92 Kans. 78, 139 Pac. 1172 (1914). As to the New England practice see note to *Chenery* v. *Stevens*, 97 Mass. 77, *supra*.

They can not complain, as the claim of these creditors to the oil can occupy no higher place than that of Merrill and Markert.

The judgment is therefore reversed.[56]

CHAMPNEY *v.* SMITH

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1860

81 *Mass.* 512

Action of tort for the conversion of forty-eight and one-half cords of wood. At the trial in the Superior Court it was agreed that the defendants purchased wood of a deputy sheriff, who sold it on execution against S. L. Arnold & Co. as their property, when it was in fact the property of the plaintiff. The defendants contended that the plaintiff's remedy was against the officer, and not against them. But Putman, J., ruled otherwise. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

METCALF, J.: A purchaser at an officer's sale of A's goods, on an execution against B, acquires no property in them, and can justify no intermeddling with them. For any acts of assumed ownership or control thereof he is liable to A in any action to which he would have been liable if there had been no sale. Cases cited in *Buffum* v. *Deane*, 8 Cush. (Mass.) 41; *Shaw* v. *Tunbridge*, 2 W. Bl. 1064; *Stone* v. *Ebberly*, 1 Bay (S. Car.) 317.

We understand that the defendants took and carried away the wood, under Smith's claim thereto, by virtue of the officer's sale. The plaintiff has therefore adopted a proper form of action, though he might have maintained replevin.

Exceptions overruled.[57]

---

[56]So it has been frequently held that the purchaser is entitled only to rent which accrues after the sheriff's deed is acknowledged. *Scheerer* v. *Stanley*, 2 Rawle (Pa.) 276 (1830); *Bank of Pennsylvania* v. *Wise*, 3 Watts (Pa.) 394 (1834); *Smith* v. *Colvin*, 17 Barb. (N. Y.) 157 (1853); *Swift* v. *Agnes*, 33 Wis. 228 (1873); *Millard* v. *McMullin*, 68 N. Y. 345 (1877); *Kirkpatrick* v. *Boyd*, 90 Ala. 449, 7 So. 913 (1889); *Israel* v. *Clough*, 5 Pa. Dist. R. 325 (1896); *King* v. *Bosserman*, 13 Pa. Super. Ct. 480 (1900); *Tate* v. *Saunders*, 245 Mo. 186, 149 S. W. 485 (1912). Contra: *Stayton* v. *Morris*, 4 Harr. (Del.) 224 (1845); *Dailey* v. *Grimes*, 27 Md. 440 (1867); *Kane* v. *Mink*, 64 Iowa 84, 19 N. W. 852 (1884). As to the respective rights of the purchaser and the debtor in jurisdictions where the debtor is allowed a period to redeem, compare *Reynolds* v. *Lathrop*, 7 Cal. 43 (1857); *Walker* v. *McCusker*, 71 Cal. 594, 12 Pac. 723 (1887); *Sadler* v. *Kearney*, 143 Cal. 506 (1904), with *Wright* v. *Williams*, 7 Lea (Tenn.) 700 (1881); *Merritt* v. *Gibson*, 129 Ind. 155, 27 N. E. 136, 15 L. R. A. 277 (1891), and with *Sowles* v. *Hauley*, 64 Vt. 412, 23 Atl. 725 (1892); *Pringle* v. *James*, 109 Ill. App. 100 (1902); *Kennedy* v. *Trumble*, 32 Wash. 614, 73 Pac. 698 (1903).

[57]A sale on execution passes only the right, title and interest of the judgment debtor. If the debtor has no interest, none passes by the sale to the purchaser. There is no warranty in judicial sales, and if the sheriff sells in good faith, he is not responsible to the purchaser for any defects in title. The purchaser takes what he gets and no more. *Caveat Emptor* is the rule. *The Monte Allegre*, 9 Wheat. (U. S.) 616, 6 L. ed. 174 (1824); *Duncan* v.

Garratt, 1 Car. & P. 169, 2 L. J. (O. S.) K. B. 142, 26 R. R. 629 (1824); *Friedly* v. *Scheetz*, 9 Serg. & R. (Pa.) 156, 11 Am. Dec. 691 (1822); *Weidler* v. *Farmers Bank*, 11 Serg. & R. (Pa.) 134 (1824); *Freeman* v. *Caldwell*, 10 Watts (Pa.) 9 (1840); *Williams* v. *Miller*, 16 Conn. 144 (1844); *Austin* v. *Tilden*, 14 Vt. 325 (1842); *Wood* v. *Colvin*, 2 Hill (N. Y.) 566, 38 Am. Dec. 598 (1842); *Mervine* v. *Vanlier*, 7 N. J. Eq. 34 (1848); *Vannoy* v. *Martin*, 41 N. Car. 169, 51 Am. Dec. 418 (1849); *Chapman* v. *Speller*, 14 Ad. & El. (N. S.) 621 (1850); *Vansyckle* v. *Richardson*, 13 Ill. 171 (1851); *McCartney* v. *King*, 25 Ala. 681 (1854); *Creps* v. *Baird*, 3 Ohio St. 277 (1854); *Carpenter* v. *Stilwell*, 11 N. Y. 61 (1854); *Phillips* v. *Zerbe Run & Shamokin Improvement Co.*, 25 Pa. St. 56 (1855) *Hamsmith* v. *Espy*, 19 Iowa 444 (1865); *Coombs* v. *Gorden*, 59 Maine 111 (1871); *Bassett* v. *Lockard*, 60 Ill. 164 (1871); *Vanscoyoc* v. *Kimler*, 77 Ill. 151 (1875); *Frost* v. *Yonkers Sav. Bank*, 70 N. Y. 553, (8 Hun) 26 Am. Rep. 627 (1877); *Carbine* v. *Morris*, 92 Ill. 555 (1879); *Wells* v. *Van Dyke*, 106 Pa. St. 111 (1884); *Wright* v. *Tichenor*, 104 Ind. 185, 3 N. E. 853 (1885); *Smith* v. *Wortham*, 82 Va. 937, 1 S. E. 331 (1887); *Hexter* v. *Schneider*, 14 Ore. 184, 12 Pac. 668 (1886); *Greer* v. *Wintersmith*, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. 96, 7 Am. St. 613 (1887); *Lewark* v. *Carter*, 117 Ind. 206, 20 N. E. 119, 3 L. R. A. 440, 10 Am. St. 40 (1888); *Goodbar* v. *Daniel*, 88 Ala. 583, 7 So. 254, 16 Am. St. 76 (1889); *Stearns* v. *Edson*, 63 Vt. 259, 22 Atl. 420, 25 Am. St. 758 (1891); *Ronan* v. *King*, L. R. (1894) 2 Ir. R. 648; *Stonebridge* v. *Perkins*, 141 N. Y. 1, 35 N. E. 980 (1894); *Long* v. *McKissick*, 50 S. Car. 218, 27 S. E. 636 (1897); *Brady* v. *Cartcret Realty Co.*, 67 N. J. Eq. 641, 60 Atl. 938, 110 Am. St. 502 (1904); *Smith* v. *Kemether*, 24 Del. 572, 76 Atl. 482 (1910); *Kochs Co.* v. *Jackson*, 156 N. Car. 326, 72 S. E. 326 (1911); *Large* v. *Wabash R. Co.*, 168 Ill. App. 310 (1912); *Spears* v. *Weddington*, 146 Ky. 434, 142 S. W. 679 (1912); *Irwin* v. *Beggs*, 24 Colo. App. 158, 132 Pac. 385 (1913); *Nelson* v. *Bock*, 84 N. J. L. 123, 85 Atl. 1009 (1913); *Groves* v. *Lewis*, 53 Pa. Super. Ct. 511 (1913); *Hammer* v. *Westphal*, 120 Md. 15, 87 Atl. 488 (1913).

As to whether equitable relief may be given to the purchaser and, if so, under what circumstances, the cases are conflicting. Compare *Smith* v. *Harrison*, 26 L. J. Ch. 412 (1857); *Kearney* v. *Ryan*, L. R. 2 Ir. R. 61 (1878); *Thompson* v. *Harlan*, 1 Dana (Ky.) 190 (1833); *Rhode* v. *Neff*, 1 Woodw. (Pa.) 477 (1869); *Shakspeare* v. *Delany*, 86 Pa. St. 108 (1878); *Henderson* v. *Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492 (1830); *Boykin* v. *Cook*, 61 Ala. 472 (1878); *First Nat. Bank* v. *Rogers*, 22 Minn. 224 (1875); *Kerr* v. *Kerr*, 81 Ill. App. 35 (1898), with *Weidler* v. *Farmers Bank*, 11 Serg. & R. (Pa.) 134 (1824); *Hand* v. *Grant*, 18 Miss. (10 Sm. & M.) 514 (1848); *Jones* v. *Burr*, 5 Strob. (S. Car.) 147, 53 Am. Dec. 699 (1850); *Bickley* v. *Biddle*, 33 Pa. St. 276 (1859); *Holmes* v. *Shaver*, 78 Ill. 578 (1875); *Goodbar* v. *Daniel*, 88 Ala. 583, 7 So. 254, 16 Am. St. 76 (1889); *Pinkston* v. *Harrell*, 106 Ga. 102, 31 S. E. 808, 71 Am. St. 242 (1898); *Dickson* v. *McCartney*, 226 Pa. 552, 75 Atl. 735 (1910); *Copper Bell Min. Co. of W. Va.* v. *Gleeson*, 14 Ariz. 548, 134 Pac. 285 (1913). A doctrine widely recognized is that an innocent purchaser at a void sale whose money has been expended in discharging the judgment debt or paying liens may be subrogated to the right of the creditors paid as against the execution debtor. *M'Ghee* v. *Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124 (1823); *Payne* v. *Hathaway*, 3 Vt. 212 (1831); *Lambeth* v. *Elder*, 44 Miss. 80 (1870); *Davis* v. *Gaines*, 104 U. S. 386, 26 L. ed. 757 (1881); *Swain* v. *Stockton Savings Soc.*, 78 Cal. 600, 21 Pac. 365, 12 Am. St. 118 (1889); *Paxton* v. *Sterne*, 127 Ind. 289, 26 N. E. 557 (1890); *Junior Order Building & Loan Assn.* v. *Sharpe*, 63 N. J. Eq. 500, 52 Atl. 832 (1902); *Hutson* v. *Wood*, 263 Ill. 376, 105 N. E. 343, Ann. Cas. 1915C, 587 (1914).

PINCKNEY *v.* PINCKNEY

SUPREME COURT OF IOWA, 1901

114 *Iowa* 441

This is an action between the widow and the heirs at law of J. W. Pinckney, deceased, for the partition of certain real estate belonging to the estate of said Pinckney. The issues here arise upon the claim of Sarah A. Collie as a purchaser at execution sale of the interest of one of the heirs.

WATERMAN, J.: J. W. Pinckney died intestate on the twenty-fifth day of April, 1898, seised of the real estate in question, leaving surviving him his widow and a number of children, including John W. Pinckney, whose interest gives rise to this controversy. Some years prior to his death, J. W. Pinckney had made an advancement to this son of $1,000, taking his receipt and acknowledgment therefor. After the death of the father, Sarah A. Collie brought suit by attachment against John W. Pinckney, and caused the writ to be levied upon his interest in the real estate involved herein. Later she obtained judgment, and upon a sale under special execution she bought in said property. At the time of such levy and sale Sarah A. Collie had no knowledge that an advancement had been made to John W. Pinckney, and she now denies the right of the others interested to have the amount of the advancement considered as a part of his interest in the estate; in other words, she claims to have taken under her purchase at execution sale the share which would have gone to John W. Pinckney if no advancement had been made. The trial court awarded her such interest in the property as "John W. Pinckney would have been entitled to in excess of the said advancement." The general rule is that a purchaser of an heir's interest takes subject to all advancements made to him. *Steele* v. *Frierson,* 85 Tenn. 430. The proposition stated also has some support in what is said in the case of *Liginger* v. *Field,* 78 Wis. 367. Ordinarily, the doctrine of caveat emptor applies to a purchaser at judicial sale. *Burns* v. *Hamilton's Admr.,* 70 Am. Dec. 572, note; *Jones* v. *Blumenstein,* 77 Iowa 361. Appellant claims, however, that her rights are saved by section 2925 of the code, which is as follows: "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice unless recorded in the office of the recorder of the county in which the same lies, as hereinafter provided." A judgment creditor purchasing at execution sale is entitled to protection under this section, at least in the absence of controlling equities; *Weaver* v. *Carpenter,* 42 Iowa 343; *Gower* v. *Doheny,* 33 Iowa 36; *Walker* v. *Elston,* 21 Iowa 529. But it is pertinent to ask, against what is this protection assured? The code provision says, in effect, it is against unrecorded instruments affecting real estate. Clearly, this receipt is not such an instrument. The right of the estate to charge the advancement against the heir would have been

the same had no receipt or acknowledgment been given. It seems clear that the instruments referred to in this section are those which are entitled to be recorded, and a receipt is not of that class. When the instrument is of a kind that recording is unnecessary, as a certificate of purchase from the United States, or a transfer thereof, this section does not apply. *Klein's Heirs* v. *Argenbright*, 26 Iowa 493; *David* v. *Rickabaugh*, 32 Iowa 540; *Harmon* v. *Clayton*, 51 Iowa 36. Neither is such a claim as a widow's right to dower affected by the provisions of this section. *Cruzie* v. *Bellmire*, 69 Iowa 397; *Kendall* v. *Kendall*, 42 Iowa 464; *Butler* v. *Fitzgerald*, 43 Nebr. 192. In principle the claim to a credit for the advancement is much like the right of dower. Appellant relies upon the cases of *Ettenheimer* v. *Northbraves*, 75 Iowa 28, and *Finch* v. *Garrett*, 102 Iowa 381; but, in our opinion, neither of these decisions gives any support to her claim. In the first one the equity against which the execution purchaser was given protection was founded upon an unrecorded mortgage, and in the other it was found as a fact that the purchaser had notice of the advancement, but nothing is said to indicate that the holding of the court would have been different had there been no such notice. Our conclusion is that the receipt we have here is not an instrument affecting real estate, within the meaning of section 2925, and that the general rule to which we have above referred applies. Under this rule Sarah A. Collie, by her purchase at execution sale, acquired only the debtor's actual interest in the estate, which was his share as heir, less the advancement. As this was awarded her by the trial court, its judgment will be affirmed.[58]

---

[58]Where the interest sold is subject to equities not within the recording acts, the purchaser takes only such interest. *Richardson* v. *Wicker*, 74 N. Car. 278 (1876); *Morrison* v. *Funk*, 23 Pa. St. 421 (1854); *Burgin* v. *Burgin*, 82 N. Car. 196 (1880); *Chumasero* v. *Vial*, 3 Mont. 376 (1879); *Nugent* v. *Priebatsch*, 61 Miss. 402 (1883); *Parker* v. *Coop*, 60 Tex. 111 (1883); *McKamey* v. *Thorp*, 61 Tex. 648 (1884); *Tennant* v. *Watson*, 58 Ark. 252, 24 S. W. 495 (1893); *Clemmons* v. *Cox*, 114 Ala. 350, 21 So. 426 (1896); *Colyar* v. *Capital City Bank*, 103 Tenn. 723, 54 S. W. 977 (1899); *Cote* v. *Langston*, 226 Pa. 340, 75 Atl. 662 (1910). Compare *Lance* v. *Gorman*, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. 914 (1890); *Logan* v. *Eva*, 144 Pa. St. 312, 22 Atl. 757 (1891); *Creegan* v. *Robertson*, 74 Hun (N. Y.) 22, 26 N. Y. S. 326, 56 N. Y. St. 161 (1893); *Maroney* v. *Boyle*, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. 821 (1894). A fortiori as to equities of which the purchaser has actual or constructive notice. *Parks* v. *Jackson*, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656 (1833); *Hoffman* v. *Strohecker*, 7 Watts (Pa.) 86, 32 Am. Dec. 740 (1838); *Houghton* v. *Bartholomew*, 51 Mass. (10 Metc.) 138 (1845); *Reed's Appeal*, 13 Pa. St. 476 (1850); *Moyer* v. *Hinman*, 13 N. Y. 180 (1855); *Fash* v. *Ravesies*, 32 Ala. 451 (1858); *Gibson* v. *Winslow*, 46 Pa. St. 380, 84 Am. Dec. 552 (1863); *Blue* v. *Blue*, 38 Ill. 9, 87 Am. Dec. 267 (1865); *Byers* v. *Wackmam*, 16 Ohio St. 441 (1866); *Myers* v. *Leas*, 101 Pa. St. 172 (1882); *Sill* v. *Swackhammer*, 103 Pa. St. 7 (1883); *Anglescy* v. *Colgan*, 44 N. J. Eq. 203, 9 Atl. 105, 14 Atl. 627 (1888); *Miller* v. *Baker*, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. 680 (1895); *Geishaker* v. *Pancoast*, 57 N. J. Eq. 60, 40 Atl. 200 (1898); *May* v. *Cleland*, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163 (1898); *Morgan* v. *Turner*, 35 Misc. 399, 71 N. Y. S. 996 (1901); *Luke* v. *Smith*, 13 Ariz. 155, 108 Pac. 494 (1910); *Tate* v. *Sanders*, 245 Mo. 186, 149 S. W. 485 (1912).

FOORMAN *v.* WALLACE

SUPREME COURT OF CALIFORNIA, 1885

75 *Cal.* 552[59]

SEARLS, C. J.: The question involved in this appeal may be stated thus: A brings an action against B, sues out and levies an attachment upon the land of the latter, obtains a judgment upon which an execution issues, and the land in question is sold. A, the judgment creditor, becomes the purchaser, receives a sheriff's certificate of sale, which is filed and recorded, and in due time receives a sheriffs deed of the premises. B, the judgment debtor, had conveyed the land before suit brought by a deed which was not recorded, and of which A had no notice until after his receipt and record of the certificate of sale, but which was duly recorded before the sheriff's deed issued. If, upon these facts, the title of A under his sheriff's deed is paramount to that of B, under his deed recorded after the sale and recordation of the certificate, and before the sheriff's deed was recorded, then the judgment and order appealed from should be affirmed; otherwise a reversal should be had.

In other words, is the interest acquired by a purchaser of real estate at a sheriff's sale, whose certificate of sale is properly recorded, destroyed by the production of a deed from the judgment debtor, executed anterior to the sale, but not recorded until after the record of the certificate of sale, and just prior to the expiration of the time for redemption?

Appellant answers this question in the affirmative, and further contends that respondent, having purchased the land at a sale under his own judgment, and having merely credited the net proceeds of the sale upon such judgment, is not a bona fide purchaser for a valuable consideration.

It has often been held in this state that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of section 1214 of the Civil Code. *Gassen* v. *Hendrick,* 74 Cal. 444; *Frey* v. *Clifford,* 44 Cal. 335; *Schluter* v. *Harvey,* 65 Cal. 158. A like doctrine prevailed under the recording act in force prior to the code. *Hunter* v. *Watson,* 12 Cal. 377, 73 Am. Dec. 543, where it was said: "A judgment creditor, purchasing at his own sale without notice, is a bona fide purchaser within the act."

It follows from these decisions and the findings, that respondent stands in the position of an innocent purchaser for a valuable consideration, without notice at the date of his purchase, in the same manner and to the same extent as an innocent third party would do, who had purchased and paid his money.[60]

Judgment affirmed.

---

[59] The statement of facts and part of the opinion of the court are omitted.

[60] A bona fide purchaser at a sale on execution without notice is within the protection of the recording acts. *Irvine* v. *Campbell,* 6 Binn. (Pa.) 118 (1813); *Pendleton* v. *Button,* 3 Conn. 406 (1820); *Den ex dem. Sam'l J. Read*

BIGHAM *v.* DOVER

SUPREME COURT OF ARKANSAS, 1908

86 *Ark.* 323

Appellee bought a saddle for $12 at a sale under the following execution:

"County of Pope, Township of White.

"The State of Arkansas to any constable of Polk county: You are hereby commanded that of the goods and chattels of E. T. Bigham you cause to be made the sum of nine dollars ($9) which W. W. Cranford late before me, a justice of the peace for said county, recovered against him for his costs in a replevin suit, and also costs in a suit wherein S. S. Crockett was plaintiff and W. W. Cranford and E. T. Bigham were defendants, and that you have said sum of money within thirty days to render to said W. W. Cranford for his costs aforesaid.

"Witness my hand as such justice this the 16th day of September, 1906.

"B. F. MCMILLAN, J. P."

The sale was regular.

The execution was based on two judgments against appellant in the justice court, aggregating the sum of $9 with costs. The judgments were in favor of different parties. The judgments were valid. Appellants, claiming that the execution was void, and that the sale thereunder was void, brought replevin against appellee for the sad-

---

v. *Richman*, 13 N. J. L. 43 (1832); *Jackson ex dem. Merrick* v. *Post*, 15 Wend. (N. Y.) 588 (1836); *Scribner* v. *Lockwood*, 9 Ohio 184 (1839); *Stewart* v. *Freeman*, 22 Pa. St. 120 (1853); *Blankenship* v. *Douglas*, 26 Tex. 225 (1862); *Hetzel* v. *Barber*, 69 N. Y. 1 (1877); *Mansfield* v. *Gregory*, 8 Nebr. 432, 1 N. W. 382 (1879); *Lee* v. *Bermingham*, 30 Kans. 312, 1 Pac. 73 (1883); *McCandless* v. *Inland Acid Co.*, 108 Ga. 618, 34 S. E. 142 (1899); *Johnson* v. *Equitable Securities Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933 (1901). See *Hughes* v. *Williams*, 218 Mass. 448, 105 N. E. 1056 (1914). As in the principal case, some courts have held that the execution creditor purchasing at the sale is protected by the recording acts in the same manner as a stranger. *Wood* v. *Chapin*, 13 N. Y. 509, 67 Am. Dec. 62 (1856); *Hunter* v. *Watson*, 12 Cal. 363, 73 Am. Dec. 543 (1859); *Evans* v. *McGlasson*, 18 Iowa 150 (1864); *Butterfield* v. *Walsh*, 21 Iowa 97, 89 Am. Dec. 557 (1866); *Woodward* v. *Sartwell*, 129 Mass. 210 (1880); *Vance* v. *Corrigan*, 78 Mo. 94 (1883); *Columbus B. Co.* v. *Graves*, 108 Ill. 459 (1884); *Riley* v. *Martinelli*, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. 209 (1893); *Sternberger & Willard* v. *Ragland*, 57 Ohio St. 148, 48 N. E. 811 (1897); *Pugh* v. *Highley*, 152 Ind. 252, 53 N. E. 171, 44 L. R. A. 392, 71 Am. St. 327 (1898); *Rouse* v. *Caton*, 168 Mo. 288, 67 S. W. 578, 90 Am. St. 456 (1901). Contra: *Ayres* v. *Duprey*, 27 Tex. 593, 86 Am. Dec. 657 (1864); *Tennant* v. *Watson*, 58 Ark. 252, 24 S. W. 495 (1893); *Murphy* v. *Plankington*, 13 S. Dak. 501, 83 N. W. 575 (1900); *Hacker* v. *White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945 (1900); *Morris* v. *Ziegler*, 71 Pa. St. 450 (1872) semble; *American S. Bank* v. *Helgesen*, 67 Wash. 572, 122 Pac. 26 (1912); *Luke* v. *Smith*, 227 U. S. 379, 57 L. ed. 558 (1913). See 24 A. & E. Encyc. of Law (2d ed.) 129; 17 Cyc. 1304.

dle. The cause was tried by the court sitting as a jury, and the above appear as the undisputed facts.

The court found that the sale was valid, and that the title to the saddle was in appellee, but that appellant was entitled to the difference between $12, the amount for which the saddle was sold, and $5.50, the amount of the Cranford judgment, and rendered judgment accordingly. The appellant duly prosecutes this appeal.

WOOD, J.: There is no law or rule of practice that authorizes a single execution for the amounts of two separate and distinct judgments. 17 Cyc. 932. A joint execution upon two separate judgments is not voidable merely, but void. *Merchie* v. *Gaines*, 5 B. Monroe (Ky.) 126; *Doe* v. *Rue*, 4 Blackf. (Ind.) 263. Such an execution is defective, not in form merely, but also in substance, and is therefore not susceptible of amendment. See *Blanks* v. *Rector*, 24 Ark. 496; *Hightower* v. *Handlin*, 27 Ark. 20; *Hall* v. *Doyle*, 35 Ark. 445; *Jett* v. *Shinn*, 47 Ark. 373; and *Downs* v. *Dennis*, 83 Ark. 71, as to executions that may or may not be amended. An execution based on a valid judgment, but which contains an excessive amount only, may, according to some decisions, be amended. *Hunt* v. *Loucks*, 38 Cal. 372; *Bogle* v. *Bloom*, 36 Kan. 512; *Otis* v. *Nash*, 26 Wash. 39. But this is not that case. The ruling of the court eliminating the amount of one of the judgments did not cure the error of taking and selling appellant's property under process that was absolutely void. Such error was prejudicial, and could not be cured by amendment. Appellee acquired no title by his purchase at a sale under the void execution.[61]

The judgment is therefore reversed, and the cause is remanded for new trial.

HILL, C. J., and MCCULLOCH, J., dissent.

---

[61]A sale upon a void judgment or execution confers no title. *Armstrong* v. *Jackson, ex dem. Elliott*, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225 (1822); *Bybee* v. *Ashby*, 7 Ill. (2 Gilm.) 151, 43 Am. Dec. 47 (1845); *Kennedy* v. *Duncklee*, 67 Mass. (1 Gray) 65 (1854); *Den ex dem. Todd* v. *Philhower*, 24 N. J. L. 796 (1854); *Gray* v. *Hawes*, 8 Cal. 562 (1857); *Silvan* v. *Coffee*, 20 Tex. 4, 70 Am. Dec. 371 (1857); *Marsh* v. *Sherman*, 12 Ind. 358 (1859); *Farnham* v. *Hildreth*, 32 Barb. (N. Y.) 277 (1860); *French* v. *Edwards*, 80 U. S. 506, 20 L. ed. 702 (1871); *Sheetz* v. *Wynkoop*, 74 Pa. St. 198 (1873); *Cauly* v. *Blue*, 62 Ala. 77 (1878); *Stotsenburg* v. *Stotsenburg*, 75 Ind. 538 (1881); *Sidwell* v. *Schumacher*, 99 Ill. 426 (1881); *McCracken* v. *Flanagan*, 141 N. Y. 174, 36 N. E. 10 (1894); *Tenan* v. *Cain*, 188 Pa. St. 242, 41 Atl. 594 (1898); *McCauley* v. *Williams*, 122 N. Car. 293, 30 S. E. 345 (1898); *First Nat. Bank* v. *Gibson*, 60 Nebr. 767, 84 N. W. 259 (1900); *Kountz* v. *National Transit Co.*, 197 Pa. 398, 47 Atl. 350 (1900); *Schott* v. *Linscott*, 80 Kans. 536, 103 Pac. 997 (1909); *Hartman* v. *Hefflefinger*, 47 Pa. Super. Ct. 1 (1911). But mere irregularities in the proceedings before sale will not impair the title of a bona fide purchaser. Such errors must be corrected by direct proceedings and can not be made the basis of a collateral attack on the title of the purchaser. 3 Freeman on Executions (3d ed.), § 339; *Jackson* v. *Bartlett*, 8 Johns. (N. Y.) 361 (1811); *Jackson ex dem. Carman* v. *Rosevelt*, 13 Johns. (N. Y.) 97 (1816); *Jackson ex dem. Randall* v. *Davis*, 18 Johns. (N. Y.) 7 (1820); *Den ex dem. Flomerfelt* v. *Zellers*, 7 N. J. L. 153 (1824); *Smull* v. *Mickley*, 1 Rawle (Pa.) 95 (1828); *Richardson* v. *Kimball*, 28 Maine 463 (1848); *Park* v. *Darling*, 4 Cush. (Mass.) 197 (1894); *Schaffer* v. *Bolander*, 4 Greene (Iowa) 201 (1853); *Osgood* v. *Blackmore*, 59 Ill. 261 (1871); *Lenox* v. *Clarke*, 52 Mo. 115 (1873); *Olmstead* v. *Kellogg*, 47 Iowa 460 (1877); *Elliott*

WILLIAMS *v.* GALLIEN

SUPREME COURT OF LOUISIANA, 1841

1 *Rob.* (*La.*) 94

The plaintiff filed a petition in the District Court for the Parish of Natchitoches, praying that a monition might be issued, and his title be confirmed to a tract of land purchased by him at a sheriff's sale under execution against the defendant; the homologation of the sale was opposed by the latter. The sale was confirmed, and the defendant ordered to pay the costs of his opposition, Carr, J., presiding.

MARTIN, J.: The defendant is appellant from a judgment homologating the sale of a tract of land of his, adjudicated by the sheriff to the plaintiff. The homologation, on the monition, was resisted on the ground of gross misconduct in the sheriff, who proceeded to the sale of the property levied on, after the defendant had paid the amount of the judgment to the plaintiff in the executiton, notwithstanding the repeated directions of the attorney of said plaintiff to forbear to sell the property, and ordering the execution to be returned. The defendant supported his allegation by the testimony of Sherburne, the attorney of the plaintiff in the execution. This gentleman deposed that he received from the present defendant, then also the defendant in the execution, a draft, and agreed that all proceedings on the fieri facias should be suspended until it could be known whether the draft would be accepted; and that afterwards on learning that the draft had been accepted, he directed the sheriff to return the execution; that the draft was a satisfaction of principal and interest of judgment, and that he considered it as settled; that the sale was made without his knowledge, and that he ordered the sheriff several times before the sale, and once upon seeing the advertisement of sale, to return the execution, and not sell the land. The draft was given him by Gallien, then and now defendant, one month before the sale, which was postponed several times. The costs of suit were not included in the draft. On the part of the

---

v. *Hart*, 45 Mich. 234, 7 N. W. 812 (1881); *Hudepohl* v. *Liberty Hill Water Co.*, 94 Cal. 588, 29 Pac. 1025, 28 Am. St. 149 (1892); *Hoffman* v. *Buschman*, 95 Mich. 538, 55 N. W. 458 (1893); *Conley* v. *Redwine*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. 398 (1899); *Berry* v. *Gates*, 175 Mass. 373, 56 N. E. 581 (1900); *Clough* v. *Welsh*, 229 Pa. 386, 78 Atl. 1000 (1911). A judgment creditor, if the purchaser, is, according to some authorities, chargeable with notice of irregularities. *Piel* v. *Brayer*, 30 Ind. 332, 95 Am. Dec. 699 (1868); *Smith* v. *Huntoon*, 134 Ill. 24, 24 N. E. 971, 23 Am. St. 646 (1890). Hence where after a sale to him the judgment is reversed, he may be compelled to restore the property. *Goodyere* v. *Ince*, Cro. Jac. 246 (1610); *Reynolds* v. *Harris*, 14 Cal. 667, 76 Am. Dec. 459 (1860); *Galpin* v. *Page*, 85 U. S. 350, 21 L. ed. 959 (1873); *Stroud* v. *Casey*, 25 Tex. 740, 78 Am. Dec. 556 (1860); *Stoeckel* v. *Russell*, 6 Houst. (Del.) 32 (1880); *Purser* v. *Cady*, 120 Cal. 214, 52 Pac. 489 (1898); *Winterson* v. *Hitchings*, 10 Misc. 396, 31 N. Y. S. 127, 63 N. Y. St. 411 (1894). Contra: *Yocum* v. *Foreman*, 14 Bush. (Ky.) 494 (1879). Cf. *Cavanaugh* v. *Wilson*, 108 Ky. 759, 57 S. W. 620, 22 Ky. L. 474 (1900).

plaintiff and appellee, it is urged that the sheriff correctly proceeded to the sale under the execution, because the judgment was not entirely satisfied, the draft not being sufficient to cover the whole judgment, as after its payment the costs remained unsatisfied; that the purchaser at the sheriff's sale can not be affected by the neglect of the sheriff to attend to the direction of the plaintiff's attorney, whose instructions to the sheriff were not known to the defendant; and that plaintiff had no right to prevent the sale of property seized, so as to deprive the officers of the court of the means of collecting their fees. It appears to us the district court erred. It is true, that if a defendant against whom judgment be obtained does not procure a suspensive appeal, and the judgment is afterwards reversed, the purchaser of his property on a sale under execution, before the reversal of the judgment, will be maintained in his purchase; but it does not follow from thence, that the sale of a defendant's property, after he has satisfied the judgment, would avail the purchaser. The whole judgment, including the costs, is the property of the plaintiff, who we suppose to have advanced them or who is chargeable therewith; the judgment being that he recover his debt and costs.[62] Code of Pr., Art. 548, et seq. The testimony of Sherburne is uncontradicted, and leaves no doubt of his having given repeated instructions to the sheriff to forbear selling the defendant's property, even after he had seen the sheriff's advertisement for the sale. The plaintiff purchased for seventy dollars six hundred and forty acres of land, which are alleged to be worth several thousand dollars, and were appraised at fifteen thousand, giving a twelve months' bond.

It is, therefore, ordered that the judgment of the District Court be reversed, and that the sale of the defendant's property by the sheriff to the plaintiff be set aside and annulled, and that the latter pay costs in both courts.[63]

---

[62]In *Jackson ex dem. Anderson* v. *Anderson*, 4 Wend. (N. Y.) 474 (1830), it is said per Sutherland, J.: "The sheriff had no right to sell, for the purpose of collecting his fees, after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment, which will authorize him to interfere with or control any settlement or arrangement which the parties may think proper to make. His fees are no part of the judgment. They are but an incident to it; and if the judgment itself is satisfied or discharged, he must look to the plaintiff and his attorney for his fees. He can not collect them from the defendant by a sale of the property." Accord: *Craft* v. *Merrill*, 14 N. Y. 456 (1856). Compare *Slater* v. *Alston*, 103 Ala. 605, 15 So. 944, 49 Am. St. 55 (1893).

[63]In a majority of jurisdictions a sale under a judgment that has been paid or satisfied prior to the execution is void and passes no title even to a bona fide purchaser without notice of the payment. *Wood* v. *Colvin*, 2 Hill (N. Y.) 566, 38 Am. Dec. 598 (1842); *Kennedy* v. *Duncklee*, 67 Mass. (1 Gray) 65 (1854). In the latter case it is said per Metcalf, J.: "We have seen a few cases, in which it was held that though the judgment creditor, or a third person having notice, can not hold property set off or purchased on a satisfied execution, or on an execution issued on a satisfied judgment, yet that it is otherwise in the case of a purchaser without notice. But, in our judgment, there is no legal ground for this distinction. A purchaser of stolen goods, whether he had notice of the theft or not, must surrender them to the owner; because the seller had no title and could convey none. And as we hold such

SECTION 9. AUDITA QUERELA

3 Blackstone's Commentaries 406

An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit, or *puis darrein continuance*, which, as was shown in a former chapter, must always be before judgment), an *audita querela* lies, in the nature of a bill in equity,

---

an execution as above mentioned to be void, we must also hold, with Mr. Justice Butler (1 Rich. (S. Car.) 21) that 'no conveyance can be good, which rests upon that which is null and void.'" Accord: *Hammat* v. *Wyman*, 9 Mass. 138 (1812); *King* v. *Goodwin*, 16 Mass. 63 (1819); *Jackson ex dem. Clark* v. *Morse*, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225 (1821); *Bates* v. *Pilling*, 6 B. & C. 38 (1826); 9 Dis. R. 44; 5 L. J. (O. S.) K. B. 40; *Jackson ex dem. Anderson* v. *Anderson*, 4 Wend. (N. Y.) 474 (1830); *Swan* v. *Saddlemire*, 8 Wend. (N. Y.) 676 (1832); *Hunter* v. *Stevenson*, 1 Hill (S. Car.) 415 (1833); *Cameron* v. *Irwin*, 5 Hill (N. Y.) 272 (1843); *Thrower* v. *Vaughan*, 1 Rich. L. (S. Car.) 18 (1844); *Mouchat* v. *Brown*, 3 Rich. L. (S. Car.) 117 (1846); *Neilson* v. *Neilson*, 5 Barb. (N. Y.) 565 (1849); *Den ex dem. Murrell* v. *Roberts*, 11 Ired. (N. Car.) 33, 424, 53 Am. Dec. 419 (1850); *Craft* v. *Merrill*, 14 N. Y. 456 (1856); *State* v. *Salyers*, 19 Ind. 432 (1862); *Weston* v. *Clark*, 37 Mo. 568 (1866); *Lee* v. *Rogers*, 2 Sawyer 549, Fed. Cas. No. 8201 (1874); *Splahn* v. *Gillespie*, 48 Ind. 397 (1874); *Finley* v. *Gant*, 8 Baxt. (Tenn.) 148 (1874); *State* v. *Prime*, 54 Ind. 450 (1876); *Frost* v. *Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627 (1877); *Huff* v. *Morton*, 83 Mo. 399 (1884); *Chapin* v. *McLaren*, 105 Ind. 563, 5 N. E. 688 (1885); *Shaffer* v. *McCrakin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. 465 (1894); *O'Brien* v. *Allen*, 42 Wash. 393, 85 Pac. 8 (1906). Contra: *Legard* v. *Daly*, 1 Ves. Sr. 192 (1748) semble; *Samms* v. *Alexander*, 3 Yeates (Pa.) 268 (1801); *Boren* v. *McGehee*, 6 Port. (Ala.) 432, 31 Am. Dec. 695 (1837); *Gibbs* v. *Neely*, 7 Watts (Pa.) 305 (1838); *Doe ex dem. Van Campen* v. *Snyder*, 3 How. (Miss.) 66, 32 Am. Dec. 311 (1838); *Bishop* v. *Gregory*, 5 B. Mon. (Ky.) 359, 27 Ky. L. 478, 85 S. W. 1197 (1845); *Dean v. Connelly*, 6 Pa. St. 239 (1847); *Morton* v. *Grenada Male & Female Academies*, 8 Sm. & M. (Miss.) 773 (1847) semble; *Warner* v. *Blakeman*, 36 Barb. (N. Y.) 501 (1862); *Nichols* v. *Dissler*, 31 N. J. L. 461, 86 Am. Dec. 219 (1863); *Woltien* v. *O'Malley*, 12 Lanc. Bar (Pa.) 6 (1880); *Saunders* v. *Gould*, 124 Pa. St. 237, 16 Atl. 807 (1889); *Slater* v. *Alston*, 103 Ala. 605, 15 So. 944, 49 Am. St. 55 (1893).

In *Hoffman* v. *Strohecker*, 7 Watts (Pa.) 86, 32 Am. Dec. 740 (1838), it is said per Rogers, J.: "In *Swan* v. *Saddlemire*, 8 Wend. (N. Y.) 676, it is ruled that an execution upon a judgment, which has been paid and satisfied, is absolutely void, and not merely voidable, and a purchaser under such execution acquires no title. If it is intended to say that a purchaser without notice acquires no title, I should adopt the principle with great hesitation, and should be much inclined to doubt the policy of establishing such a rule. It would not be for the plaintiff and defendant, under such circumstances, to complain, as the injury would result from their own fraud or negligence, in not causing satisfaction to be entered on the judgment. It would be imposing upon a purchaser at sheriff's sale the necessity of ascertaining whether the debt had been paid. He has a right to purchase on the faith of the records of the court which import verity." See also *Gibson* v. *Winslow*, 38 Pa. St. 49 (1860); *Capital Bank of Topeka* v. *Huntoon*, 35 Kans. 577, 11 Pac. 369 (1886); *Kezar* v. *Elkins*, 52 Vt. 119 (1879).

to be relieved against the oppression of the plaintiff. It is a writ directed to the court stating that the complaint of the defendant hath been heard, *audita querela defendentis,* and then, setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed; for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela;* which is a writ of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon a motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela,* and has driven it quite out of practice.[63a]

[63a] *Turner* v. *Davies,* 2 William's Saunders, 137 (1670), and notes. In *Sutton* v. *Bishop,* 4 Burr. 2283 (1769), *audita querela* is referred to by the court as an old legal remedy long disused and expensive, but in *Baker* v. *Ridgway,* 2 Bing. 41 (1824), it is said by Best, C. J., that *audita querela* is neither a difficult nor an obsolete proceeding, and in *Simons* v. *Blake,* 4 Dowl. 263 (1835), it was held that the court would relieve on summary motion if the case was clear but not otherwise. In England, the rules of the Supreme Court now provide, Order XLII, rule 27: "No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the court or judge may give such relief and upon such terms as may be just."

In Pennsylvania the writ is not obsolete, as was at one time supposed, and it has been occasionally resorted to. *Schott* v. *McFarland,* 1 Phila. (Pa.) 53 (1850); *Daly* v. *Derringer,* 1 Phila. (Pa.) 324 (1852); *Kecn* v. *Vaughn,* 48 Pa. 477 (1865); *Emery* v. *Patton,* 9 Phila. (Pa.) 125 (1873); *Gordonier* v. *Billings,* 77 Pa. St. 498 (1875) *semble; Williams* v. *Butcher,* 1 W. N. C. 304, 7 Leg. Gaz. 129 (1874); *McLean* v. *Bindley,* 114 Pa. St. 559, 8 Atl. 1 (1886) *semble.* In *Commonwealth* v. *Berger,* 8 Phila. (Pa.) 237 (1871), it is said per Paxson, J.: "It is too late to question the right to issue such writ in a case where the defendant has a defense which he has had no day in court to plead. But every relief that could be obtained by *audita querela* is now grantable on motion. The latter more simple and speedy form of proceeding has driven this ancient and cumbrous remedy out of general practice."

The writ issues out of the court in which the judgment was entered, only upon petition and special allowance by the court. *Waddington* v. *Vredenbergh,* 2 Johns. Cas. 227 (1801); *Dearie* v. *Ker,* 7 D. & L. 231, 18 L. J. Ex. 448 (1849); *Troup* v. *Ricardo,* 33 Beav. 122 (1863); *Newhart* v. *Wolfe,* 102 Pa. 561 (1883).

In New York it is said that the remedy by *audita querela* is not abolished by the code but is preserved and may be resorted to where something has occurred since the rendition of judgment making its enforcement unjust or inequitable or when some fact exists which could not have been pleaded in the former suit. *Mallory* v. *Norton,* 21 Barb. (N. Y.) 424 (1856); *Smith* v. *McCluskey,* 45 Barb. (N. Y.) 610 (1866); *Phillips* v. *Dusenberry,* 8 Hun (N. Y.) 348 (1876).

MARK H. FOSS *v.* GEORGE P. WITHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1865

91 *Mass.* 572

Audita querela, brought to reverse a judgment erroneously rendered in favor of the defendant in an action brought by him against the plaintiff, who lived out of the state and had no sufficient notice of the action; and to supersede an execution issued on such judgment. Judgment was entered in the Superior Court by Ames, J., reversing the judgment and superseding the execution, as prayed for; and an order was passed that the original action should be brought forward on the docket, and the entry of judgment and default be stricken off, and the action remain upon the docket for further directions; and to this order the plaintiff alleged exceptions.

HOAR, J.: We are of opinion that the exceptions in this case must be sustained. The writ of *audita querela* is the commencement of a suit at common law, recognized also by statute in this commonwealth, in which the plaintiff asks to be relieved from a judgment or execution, or both, by reason of some matter affecting their validity which he has not had an opportunity to plead. If the execution has been satisfied in whole or in part, or he has been imprisoned upon it, he may recover compensation in damages in the *audita querela.* The writ in this case is properly framed for these objects. The plaintiff prays for the relief adapted to his case. But the defendant is not an actor in the suit; and no proceedings are to be had in it for his benefit. Either the plaintiff prevails in whole or in part, and recovers judgment to the extent to which he is entitled to it, or there is a judgment for the defendant, and this is the whole scope and effect of the *audita querela.* 3 Bl. Comm. 405, 406; Fitzh. Nat. Brev. 102, 105; Gen. Stats. ch. 145, sections 1-7; *Lovejoy* v. *Webber,* 10 Mass. 101; *Dingman* v. *Myers,* 13 Gray. 1.[63b]

The plaintiff is entitled to a reversal of the judgment erroneously entered against him, to a *supersedeas* of the execution which improvidently issued, and to his costs. So far the judgment of the superior court was right, and should be supported. But we find no authority for making an order as to any further proceedings in the former suit, under this process. It has sometimes been the practice of courts to give the relief which an *audita querela* affords, in

[63b] Accord: *Hyde* v. *Morley,* Cro. Eliz. 40 (1584); *Child* v. *Durrant,* Cro. Jac. 337 (1615); *Flower* v. *Elgar,* Cro. Car. 214 (1631); *Dingman* v. *Myers,* 79 Mass. 1 (1859); *Marshall* v. *Merritt,* 95 Mass. 274 (1866). See also, *Anonymous,* 1 Vent. 264 (1674); *Anonymous,* 12 Mod. 598 (1700); *White* v. *Harris,* 5 Humph. (Tenn.) 421 (1844); *Alexander* v. *Abbott,* 21 Vt. 476 (1849); *Merritt* v. *Marshall,* 100 Mass. 244 (1868); *Folan* v. *Folan,* 59 Maine 566 (1871); *Radclyffe* v. *Barton,* 161 Mass. 327, 37 N. E. 373 (1894), and cases there cited; *Walter* v. *Foss,* 67 Vt. 591, 32 Atl. 643 (1895); *Russell Lumber Co.* v. *Smith,* 82 Conn. 517, 74 Atl. 949 (1909); 4 Cyc. 1058; 3 Enc. Pl. & Pr. 113. Where the proceedings in an action are wholly void for want of jurisdiction there is no necessity for an *audita querela. French* v. *White,* 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804 (1905).

a summary way, upon motion, when the facts are not in dispute and recent. Ld. Raym. 1295; 1 M. & S. 199; 4 Johns. 191; 17 Johns. 487; *Lovejoy* v. *Webber, ubi supra.* If the proceedings here had been upon motion, we do not mean to decide that they would have been erroneous. But the order to bring forward the former action, if it is competent to the court to make it, is an entirely separate matter, and is not to be entered as a part of the judgment in the present suit.

Exceptions sustained.

SECTION 10. SATISFACTION OF EXECUTIONS

JINKS *v.* AMERICAN MTG. CO. OF SCOTLAND

SUPREME COURT OF GEORGIA, 1897

102 *Ga.* 69

COBB, J.: The American Mortgage Company of Scotland, Limited, obtained a judgment against Jinks on the twenty-sixth day of February, 1890, for $1,200 principal, $226.28 interest, $142.62 attorney's fees, and $11.75 costs. On October 2, 1890, an execution issued on this judgment was levied upon certain land as the property of the defendant in execution. On the fifth day of December, 1893, the sheriff made the following entry upon the execution: "After duly advertising the within-described levied lands according to law in the 'Butler Herald' newspaper, the official gazette of the county, I this day exposed the same to sale before the court house door in the town of Butler, Taylor County, Georgia, within the legal hours of sale, and knocked the same off to Austin Corbin for the sum of nineteen hundred dollars, he being the highest and best bidder. This fifth day of December, 1893. C. A. J. Pope, Sheriff."

On March 5, 1894, the sheriff levied the execution again upon a part of the property described in the former levy, as well as other property of the defendant. To this levy the defendant interposed an affidavit of illegality, setting up that prior to December 5, 1893, he had paid in cash upon the execution the sum of five hundred dollars and that this sum, together with the amount named in the entry of the sheriff relating to the former levy, was more than sufficient to discharge the execution. Upon the trial of the issue formed upon this affidavit of illegality, the judge directed a verdict in favor of the plaintiff in execution. In this we think that he erred. The entry of a sheriff on process in his hands is generally not traversable. *Higgs* v. *Huson,* 8 Ga. 317, 321. Such an entry may be traversed, however, for fraud or collusion. *Tillman* v. *Davis,* 28 Ga. 494; *Sprinz* v. *Frank,* 81 Ga. 162. The code "widened the laws of traverse as to returns of service." Civil Code, section 4988; *Dozier* v. *Lamb,* 59 Ga. 461. But the returns of sheriffs and other levying officers upon final process in their hands are still governed by the law as it stood before the code was adopted.

It being admitted upon the trial that the payment of five hundred dollars had been made,[64] and the execution when introduced in evidence showing an entry of a sale at which an amount more than sufficient to pay the balance due on the execution was realized, the execution appears on its face to have been paid off, and therefore a levy subsequent to such entry was prima facie void. As long as the entry of the sheriff reciting a sale at an amount more than that due on the execution stands upon the records unimpeached and unchallenged, such entry is conclusive upon the plaintiff in execution. If the entry is false, the officer making it is liable in damages to any one injured thereby. If it was made fraudulently or collusively, it may be attacked and set aside at the instance of any one who is the victim of such fraud or collusion. As the amount of the purchase money stated in the sheriff's return of the sale is sufficient to pay off the entire amount then due on the execution, the process is satisfied, so far as the defendant is concerned. If the purchaser has not paid the bid, suit may be brought against him for the purchase money, or the property can be resold at his risk; and if an amount equal to the final bid at the first sale is not realized, the purchaser at such sale is liable for such deficiency. Civil Code, section 5466.

Judgment reversed.[65]

---

[64]Payment of the debt in full to the proper officer discharges the execution, although the creditor does not receive the money. *Rook* v. *Wilmot*, Cro. Eliz. 209 (1590); *O'Neall* v. *Lusk*, 1 Bailey (S. Car.) 220 (1829); *Beard* v. *Millikan*, 68 Ind. 231 (1879), and payment of part will be a satisfaction pro tanto, *Sandburg* v. *Papineau*, 81 Ill. 446 (1876).

[65]A sale of the debtor's property discharges the execution to the extent of the proceeds of the sale. *Hoyt* v. *Peterson*, 4 Johns. (N. Y.) 188 (1809); *Hamlin* v. *Boughton*, 4 Cow. (N. Y.) 65 (1825); *Freeman* v. *Caldwell*, 10 Watts (Pa.) 9 (1840); *Planters' Bank* v. *Spencer*, 11 Miss. (3 Sm. & M.) 305 (1844); *McCluskey* v. *McNeeley*, 8 Ill. (3 Gilm.) 578 (1846); *Doe ex dem. Reynolds* v. *Ingersoll*, 19 Miss. (11 Sm. & M.) 249, 49 Am. Dec. 57 (1848); *Murrell* v. *Roberts*, 33 N. Car. 424, 53 Am. Dec. 419 (1850); *Gray* v. *Griswold*, 7 How. Pr. (N. Y.) 44 (1852); *Niolin* v. *Hamner*, 22 Ala. 578 (1853); *Halcombe* v. *Loudermilk*, 48 N. Car. (3 Jones) 491 (1856); *Ettlinger* v. *Tansey*, 17 B. Mon. (Ky.) 364 (1856); *Rutledge* v. *Townsend*, 38 Ala. 706 (1863); *Douglass' Appeal*, 48 Pa. St. 223 (1864); *McDevitt's Appeal*, 70 Pa. St. 373 (1872); *Kleinhenz* v. *Phelps*, 6 Hun (N. Y.) 568 (1876); *Elliott* v. *Higgins*, 83 N. Car. 459 (1880); *Hoobaugh's Appeal*, 122 Pa. St. 88, 15 Atl. 669 (1888); *Cake* v. *Bird*, 1 Monag. (Pa.) 466, 470, 15 Atl. 774 (1888); *Boos* v. *Morgan*, 130 Ind. 305, 30 N. E. 141 (1891); *Tonopah Banking Co.* v. *McKane Mining Co.*, 31 Nev. 295, 103 Pac. 230 (1909); *Herr* v. *Lancaster Trust Co.*, 47 Pa. Super. Ct. 63 (1911).

Taking the defendant on a capias ad satisfaciendum, at common law, discharges the debt, at least to the extent that other writs can not issue while he is in custody, and, if he is released by the act of the creditor no further execution can issue. *Burnaby's Case*, 1 Str. 653 (1725); *Vigers* v. *Aldrich*, 4 Burr. 2482 (1769); *Tanner* v. *Hague*, 7 Term Rep. 416 (1797); *Jacques* v. *Withey*, 1 D. & E. 557, 1 H. Bl. 65 (1787); *Clark* v. *Clement*, 6 D. & E. 525 (1796); *Blackburn* v. *Stupart*, 2 East 243 (1802); *Lambert* v. *Parnell*, 15 L. J. Q. B. 55 (1845); *Sharpe* v. *Speckenagle*, 3 Serg. & R. (Pa.) 463 (1817); *Miller* v. *Miller*, 5 N. J. L. 508 (1819); *Loomis* v. *Stoors*, 4 Conn. 440 (1822); *Cooper* v. *Bigalow*, 1 Cow. (N. Y.) 56 (1823); *Sunderland* v. *Loder*, 5 Wend. (N. Y.) 58 (1830); *Tappan* v. *Evans*, 11 N. H. 311 (1840); *McCrillis* v. *Sisson*, 1 R. I. 143 (1840); *Dodge* v. *Doane*, 57 Mass. (3 Cush.) 460 (1849); *Kennedy* v. *Duncklee*, 67 Mass. (1 Gray) 65 (1854); *State* v. *Dodge*, 24 N. J.

UNITED STATES *v.* DASHIEL

SUPREME COURT OF THE UNITED STATES, 1865

70 U. S. 688

Debt by the United States for $20,085.74 against Major Dashiel, a paymaster in the army, and his sureties. The defendant claimed that he had been robbed of part of the funds in his care. On the trial there was a verdict for the United States for $10,318.22 and judgment. Not satisfied with the judgment the United States took a writ of error to this court on September 1, 1860. On the fifteenth of April, 1860, however, before taking its writ of error, the government sued out execution against Dashiel and levied on a large amount of real estate and on eight slaves sufficient in all to satisfy the judgment. On the fifth of June, 1860, the deputy marshal sold a portion of the real estate for $5,275, and then adjourned the sale to enable the defendant to find purchasers for his property.[66]

Mr. Paschall, for the defendant in error, moved to dismiss the writ of error on the ground that there was an execution sued out by the plaintiff, a levy, sale and satisfaction.

Mr. Speed, attorney-general, contra.

CLIFFORD, J.: Execution was issued on the judgment on the fifteenth day of April, and the return of the marshal shows that on the twenty-eighth day of the same month he seized certain real property and slaves sufficient in all to satisfy the judgment. Formality of an advertisement, prior to sale, was omitted by the marshal at the request of the principal defendant, and on the fifth day of June following, the marshal sold certain parcels of the real property at public auction, amounting in the whole to the sum of five thousand two hundred and seventy-five dollars, as appears by his return. Nearly half the amount of the judgment was in that manner satisfied, but the clear inference from the return of the marshal, and the accompanying exhibit, is that the sale was suspended and discontinued at the request of the principal defendant and for his benefit. Request for the postponement of the sale came from him, and it was granted by the marshal, as stated in the record, the better to enable the defendant to find purchasers for his property. Writ of error was sued out by plaintiffs on the first day of September, 1860, and was duly entered here at the term next succeeding, and since that time the case has been pending in this court.

Motion to dismiss is grounded solely upon the alleged fact that the judgment was satisfied before the writ of error was sued out

---

L. 671 (1855); *Nowell* v. *Waitt*, 121 Mass. 554 (1877). But if the debtor escape or is discharged without the assent of the creditor it is not a satisfaction. *Richborough* v. *West*, 1 Hill (S. Car.) 309 (1833); *Bowrell* v. *Zigler*, 19 Ohio 362 (1852).

[66] The statement of facts is abridged, and the arguments of counsel and part of the opinion of the court omitted.

and prosecuted. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court. Actual satisfaction beyond the amount specified in the return of the marshal can not be pretended, but the theory is, that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred to appear to give some countenance to that view of the law; that is, they assert the general doctrine that the levy of an execution on personal property sufficient to satisfy the execution operates per se as an extinguishment of the judgment.[67] None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution, and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already has by the lien of his judgment.[68] Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. Many qualifications also exist to the general rule as applied to the

[67] *Mountney* v. *Andrews*, Cro. Eliz. 237 (1591); *Clerk* v. *Withers*, 1 Salk. 322, 2 Ld. Raym. 1072 (1705); *Ladd* v. *Blunt*, 4 Mass. 402 (1808); *Cutler* v. *Colyer*, 3 Cow. (N. Y.) 30 (1824); *Ex parte Lawrence*, 4 Cow. (N. Y.) 417, 15 Am. Dec. 386 (1825). In *Peck* v. *Tiffany*, 2 N. Y. 451 (1849), it is said: "There are some old cases in which dicta are found, that a levy upon sufficient property to satisfy the execution is a satisfaction, but that doctrine has long since been exploded. Where a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed or otherwise disposed of, so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution and the plaintiff must in such case seek his remedy against the sheriff. But where the debtor has neither paid the debt, nor been deprived of his property, the simple act of levying upon it is not a satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct, or by his request, or the voluntary act of the officer, because neither works any wrong to him." See also, the opinion of Cowen, J., in *Green* v. *Burke*, 23 Wend. (N. Y.) 490 (1840), and *Giles* v. *Grover*, 6 Bligh. (N. S.) 277 (1832).

[68] *Shepard* v. *Rowe*, 14 Wend. (N. Y.) 260 (1835); *Taylor* v. *Ranney*, 4 Hill (N. Y.) 619 (1843). An elegit executed by extent returned and filed, is a full satisfaction of the judgment debt. Co. Litt. 290; 2 Wms. Saund. 68 n; Bac. Abr., execution, D; *Crawley* v. *Lidyeat*, Cro. Jac. 338 (1614); *Hele* v. *Bexley*, 17 Beav. 14 (1853). And so where land is set off to the creditor. *Barnet* v. *Washebaugh*, 16 Serg. & R. (Pa.) 410 (1827); *Wareham Savings Bank* v. *Vaughan*, 133 Mass. 534 (1882). But otherwise if the extent is void. *Pullen* v. *Purbeck*, 12 Mod. 355 (1700). Or ineffective. *Leahy* v. *Dancer*, 1 Mol. 313 (1828); *Cowles* v. *Bacon*, 21 Conn. 451, 56 Am. Dec. 371 (1852). And, generally, a levy on land is not prima facie a satisfaction of the debt. *Ladd* v. *Blunt*, 4 Mass. 402 (1808); *Gro* v. *Huntington Bank*, 1 P. & W. (Pa.) 425 (1830); *Reynolds* v. *Rogers*, 5 Ohio 169 (1831); *Hogshead* v. *Carruth*, 5 Yerg. (Tenn.) 227 (1833); *Trapnall* v. *Richardson*, 13 Ark. 543, 58 Am. Dec. 338 (1853); *Taylor's Appeal*, 1 Pa. St. 390 (1845); *White* v. *Graves*, 15 Tex. 183 (1855); *Robinson* v. *Brown*, 82 Ill. 279 (1876); *Bellows* v. *Sowles*, 71 Vt. 214, 44 Atl. 68 (1898). In Indiana a levy on real estate is a satisfaction to the same extent as on personalty. *Lindley* v. *Kelley*, 42 Ind. 294 (1873); *Touhey* v. *Touhey*, 151 Ind. 460, 51 N. E. 919, 68 Am. St. 233 (1898).

levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost, or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Rightly understood, the presumption is only a prima facie one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, says Bronson, C. J.,[69] is gone, although the creditor may not have been paid. Under those circumstances the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss.

Tested by these rules, and in the light of these authorities, it is very clear that the theory of fact assumed in the motion can not be sustained. Satisfaction of the judgment beyond the amount specified in the return of the marshal is not only not proved, but the allegation is disproved by the amended record.

Motion denied.[70]

Grier, Nelson and Swayne, JJ., dissent.

---

[69] *People* v. *Hopson*, 1 Denio (N. Y.) 574 (1845).

[70] A levy on personal property to the amount of the debt is prima facie a satisfaction of the execution, but the presumption may be rebutted. *Hoyt* v. *Hudson*, 12 Johns. (N. Y.) 207 (1815); *McIntosh* v. *Chew*, 1 Blackf. (Ind.) 289 (1823); *Hunt* v. *Breading*, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665 (1824); *Ontario Bank* v. *Hallett*, 8 Cow. (N. Y.) 192 (1828); *Duncan* v. *Harris*, 17 Serg. & R. (Pa.) 436 (1828); *Carroll* v. *Fields*, 6 Yerg. (Tenn.) 305 (1834); *Ford* v. *Commrs. of Geauga County*, 7 Ohio 492 (1836); *Peck* v. *Barney*, 12 Vt. 72 (1840); *Green* v. *Burke*, 23 Wend. (N. Y.) 490 (1840); *Ostrander* v. *Walter*, 2 Hill (N. Y.) 329 (1842); *Taylor's Appeal*, 1 Pa. St. 390 (1845); *Waddell* v. *Elmendorf*, 5 Denio (N. Y.) 447 (1848); *Campbell* v. *Carey*, 5 Harr. (Del.) 427 (1854); *Davids* v. *Harris*, 9 Pa. St. 501 (1848); *Lucas* v. *Cassaday*, 2 Greene (Iowa) 208 (1849); *Montgomery* v. *Wayne*, 14 Ill. 373 (1853); *Lyon* v. *Hampton*, 20 Pa. St. 46 (1852); *Brown* v. *Kidd*, 34 Miss. 291 (1857); *Campbell, Bredlin & Co.'s Appeal*, 32 Pa. St. 88 (1858); *Garner* v. *Cutler*, 28 Tex. 175 (1866); *Walker* v. *Comm.*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631 (1867); *Carr* v. *Weld*, 19 N. J. Eq. 319 (1868); *Hunn* v. *Hough*, 5 Heisk. (Tenn.) 708 (1871); *Wilson* v. *Hatfield*, 121 Mass. 551 (1877); *Bookstaver* v. *Glenny*, 3 T. & C. (N. Y.) 248 (1874); *Smith* v. *Reed*, 52 Cal. 345 (1877); *Chandler* v. *Goodrich*, 58 N. H. 525 (1879); *McCabe* v. *Goodwine*, 65 Ind. 288 (1879); *Oliver* v. *Georgia*, 64 Ga. 480 (1880); *McIver* v. *Ballard*, 96 Ind. 76 (1884); *Chandler* v. *Higgins*, 109 Ill. 602 (1884); *McKenzie* v. *Wiley*, 27 W. Va. 658 (1886); *Conway* v. *Wilson*, 44 N. J. Eq. 457, 11 Atl. 734 (1888); *Smith* v. *Condon*, 174 Mass. 550, 55 N. E. 324, 75 Am. St. 372 (1899).

SECTION 11. SUPPLEMENTARY PROCEEDINGS

PEOPLE EX REL. FITCH *v.* MEAD

SUPREME COURT OF NEW YORK, SPECIAL TERM, 1865

29 How. Pr. (N. Y.) 360[73]

E. DARWIN SMITH, J.: The return to this writ of habeas corpus shows that the relator is imprisoned by the sheriff of Cayuga County upon a process for a contempt, specially and plainly charged in the commitment, issued by the county judge of Cayuga county, an officer clearly having authority to commit for the contempt so charged. By the forty-first section of the habeas corpus act, it is provided that when it appears by the return that the prisoner is in custody in such case, he can only be discharged from such imprisonment in one of five cases therein specified, none of which is applicable to this case except the first, which is, "when the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person."

The county judge clearly had jurisdiction in proceedings supplemental to execution. The proper order for the appearance before him of the relator was duly made under section 292 of the code, upon due proof of recovery of a judgment in this court, and that an execution therein had been duly returned unsatisfied, and such order had been duly served upon the relator, and he in pursuance of the requirements thereof had duly appeared before said judge to submit to the examination thereby directed. The county judge had thus also duly acquired jurisdiction of the person of the relator, according to the statute.

The examination of the relator had been commenced, but as the proof clearly shows, had not been completed and the proceedings had been duly continued for that purpose by adjournment at the instance, and for the benefit of the relator, and in consequence chiefly of his sickness, up to the time when the alleged contempt was committed, by the refusal of the relator to answer such further proper questions as he was required to do by the county judge. The refusal of the relator to make answer before the county judge, which is the contempt for which he was convicted and stands imprisoned, was put upon the ground at the time, under the advice of his counsel, that the county judge had lost jurisdiction of his person and of the proceedings, by the appointment of a receiver of the property and effects of the relator, and the filing of the order for such appointment and the testimony then taken, in the county clerk's office. And this was the point relied upon by the counsel for the relator, in his argument here for the discharge of the relator, upon the return of the writ of habeas corpus. If it be sound, it would follow that the county judge exceeded his jurisdiction in

[73]The statement of facts and parts of the opinion are omitted.

requiring the relator to answer the questions put to him; that he had then lost jurisdiction of his person and of the proceedings, and the relator would be entitled to a discharge from his imprisonment for the alleged contempt.

The argument of the learned counsel for the relator is, that the appointment of a receiver of the property of the judgment debtor, is the chief object and end of these proceedings, supplemental to execution, and that upon such appointment the proceeding is terminated; that such appointment is the final step in the proceedings, like final judgment, and that the jurisdiction of the officer is thereupon at an end. This view of the proceedings, I think, is a mistaken one. They were designed to be a substitute in part for the creditor's bill of the court of chancery, under the old system. For the proceedings by suit, subpœna and injunction, calling for a discovery upon oath, and involving the appointment of a receiver, an order from a judge requiring an oral examination and discovery before the judge or a referee out of court, is substituted. It is a summary proceeding, accomplishing the same end with a creditor's bill, and at small expense to the parties. I think it was to some extent borrowed from the one hundred and ninety-first rule of the court of chancery, in force when that court expired. This rule provided that the debtor against whom a creditor's bill was filed, should not be subjected to the expense of putting in an answer thereto in the usual manner, if he should cause his appearance to be entered, and should within twenty days after service of a copy of the bill and notice of an order to answer, deliver to his complainant a written consent that an order might be entered taking the bill as confessed, and for the appointment of a receiver, and for a reference to take the examination of the defendant in conformity with the rule. Upon presenting such stipulation to the court, the complainant was entitled to an order directing the bill to be taken as confessed against a debtor, and referring it to a master to appoint a receiver and take the examination of the debtor. The order also directed the debtor to transfer to such receiver under oath, all his property and equitable interests, and things in action, and that he appear from time to time before the master for that purpose, and to submit to such examination as the master should direct; and what was accomplished under this system by the filing of the creditor's bill, the injunction thereupon, the stipulation of the defendant under said rule, and the order taking the bill as confessed, and for a reference to appoint a receiver and take the examination of the defendant, is now accomplished by a simple order of a judge, under section 292 of the code, and with the proper proceeding under chapter two of the code, entitled, "proceedings supplemental to the execution."

The appointment of the receiver was under said rule 191, or might have been, the first step in the master's office under the order of reference, and I think in practice was ordinarily the first step taken on the appearance of the defendant before the master. After the receiver was appointed, the defendant was then examined, and

required by the master to deliver to the receiver the property discovered on such examination. I do not see why this is not the proper practice now, upon the return of this order for the examination of the defendant before the judge, under section 292. If the receiver is not generally appointed immediately on the return of the order, I suppose it is omitted to save expense, but I have no doubt that the officer instituting and conducting these proceedings supplemental, may appoint the receiver at any time while the proceedings are pending before him in his discretion, and think the power conferred upon the judge by section 298, may be exercised by him whenever in the progress of the proceedings he thinks it proper to do so. It must be of course while the defendant is before him, and while the proceedings are kept in life by proper adjournments, and it seems to me that there is great propriety in the appointment of the receiver in an early stage of the proceedings, if they are, or are likely to be protracted. In this case they were continued through several months. The order of the judge operates like the filing of a creditor's bill to attach the equitable interests of the judgment debtor, but it does not create any lien upon personal property. Such lien will not be created till the order be made for the appointment of a receiver. Until such order is made, other creditors of the judgment debtor may levy upon any of his personal property subject to execution, and acquire a valid lien thereon. *Van Alstine* v. *Cook,* 24 N. Y. 496. The property of the judgment debtor vests in the receiver from the time the order is made directing such appointment. *Porter* v. *Cook,* 5 Seld. (N. Y.) 148. It follows, therefore, that to give full effect to these proceedings, and to give the creditor instituting them the full benefit thereof, he should promptly procure the appointment of a receiver. This is essential to perfect his lien. It can not be, therefore, that he must be compelled to wait till a protracted examination of the judgment debtor is finished, protracted perhaps, for the very purpose of defeating the object of the proceedings by judgment, by allowing his assets to be scattered and seized by other creditors, before the prosecuting creditor could have the receiver appointed and it can not be that he loses all right to discover from the judgment debtor after the appointment of such receiver. I can see no principle or reason upon which such a claim can be founded, and it is in clear conflict with the object and intent of this whole proceeding.

Relator remanded.[72]

---

[72]In many instances where an ordinary execution is inadequate to obtain satisfaction of the judgment debt, the creditor may resort to equity to obtain discovery of assets or to set aside fraudulent transfers of property. In some jurisdictions additional summary modes of reaching the assets of the debtor are provided by statute, known as "supplementary proceedings" or "proceedings supplemental to execution." The statutes differ materially in the relief afforded, but the more comprehensive laws enable the holder of an unsatisfied judgment to obtain: (1) An order compelling the debtor to attend before a judge or referee and submit to an examination concerning his property. (2) Upon proof that the debtor has property which he unjustly refuses to apply to the satisfaction of the judgment or that there is danger

FELDENHEIMER *v.* TRESSEL

SUPREME COURT OF THE TERRITORY OF DAKOTA, 1889

6 *Dak.* 265

SPENCER, J.: This is a bill filed by the plaintiff, as a judgment creditor, for the purpose of having declared void and set aside a conveyance of the defendant's lands, alleged to have been made fraudulently, and praying that such lands may be subjected to the judgment recovered by said plaintiff against the defendant, John J.

---

that he will leave the state or conceal himself, an order may be made for the arrest of the debtor who may then be required to give security not to dispose of his property pending the proceedings. (3) An order may be made requiring any person or corporation, having property of the debtor or being indebted to him, to attend and be examined concerning the debt or property. Further orders may be made to restrain any transfer or interference with discovered property and subjecting or applying such property to the payment of the debt. (4) An order may be made appointing a receiver of the property of the judgment debtor. New York Code Civ. Pro., §§ 2432-2471. See also, California Code Civ. Pro., §§ 714-721; Iowa Code (1897), §§ 4072-4090; Ohio Gen. Code (1910) §§ 11768-11781 Mass. Rev. Laws (1902), ch. 168, §§ 17-20; N. J. Comp. Stat. (1910) p. 2249; Pennsylvania Act of May 9, 1913, P. L. 197; *Orr's Case*, 2 Abb. Pr. (N. Y.) 457 (1856); *Catlin* v. *Doughty*, 12 How. Pr. (N. Y.) 457 (1856); *Owen* v. *Dupignac*, 9 Abb. Pr. (N. Y.) 180, 17 How. Pr. (N. Y.) 512 (1859); *Field* v. *Sands*, 21 N. Y. Super. Ct. 685 (1861); *Pope* v. *Cole*, 64 Barb. (N. Y.) 406 (1872); *Carter* v. *Clarke*, 30 N. Y. Super. Ct. 43 (1867); *Lynch* v. *Johnson*, 48 N. Y. 27 (1871); *Clark* v. *Bergenthal*, 52 Wis. 103, 8 N. W. 865 (1881); *Munds* v. *Cassidey*, 98 N. Car. 558, 4 S. E. 353, 355 (1887); *Herrlich* v. *Kaufmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St. 50 (1893); *Adler* v. *Turnbull*, 57 N. J. L. 62, 30 Atl. 319 (1894); *Bryan* v. *Grant*, 87 Hun (N. Y.) 68, 33 N. Y. S. 957, 67 N. Y. St. 639 (1895); *Faneuil Hall Nat. Bank* v. *Bussing*, 147 N. Y. 665, 42 N. E. 345 (1895); *Billson* v. *Linderberg*, 66 Minn. 66, 68 N. W. 771 (1896); *Klepsch* v. *Donald*, 18 Wash. 150, 51 Pac. 352 (1897); *Stiefel* v. *Berlin*, 28 App. Div. 103, 51 N. Y. S. 147 (1898); *Consolidated Agency Co.* v. *Townsley*, 72 Misc. 155, 129 N. Y. S. 773 (1911); *Stevens* v. *Maus*, 155 App. Div. 249, 139 N. Y. S. 1059 (1913). As to receivers see *Webb* v. *Overman*, 6 Abb. Pr. (N. Y.) 92 (1867); *De Camp* v. *Dempsey*, 10 N. Y. Civ. Pro. 210 (1886); *Habenicht* v. *Lissick*, 78 Cal. 351, 20 Pac. 874, 5 L. R. A. 713, 12 Am. St. 63 (1889); *Adler* v. *Turnbull*, 57 N. J. L. 62, 30 Atl. 319 (1894); *Teats* v. *Bank of Herington*, 58 Kans. 721, 51 Pac. 219 (1897); *Globe Phosphate Co.* v. *Pinson*, 52 S. Car. 185, 29 S. E. 549 (1897); *Wilkinson* v. *Market*, 65 N. J. L. 518, 47 Atl. 488 (1900); *Dease* v. *Reese*, 39 Misc. 657, 80 N. Y. S. 590 (1903); *Ryan* v. *Wagner*, 143 App. Div. 176, 127 N. Y. S. 973 (1911).

Disobedience of orders made by the court in supplementary proceedings is punished as contempt of court. *Page* v. *Randall*, 6 Cal. 32 (1856); *Parker* v. *Hunt*, 15 Abb. Pr. (N. Y.) 410 n (1863); *Ammidon* v. *Wolcott*, 15 Abb. Pr. (N. Y.) 314 (1860); *Lathrop* v. *Clapp*, 40 N. Y. 328, 100 Am. Dec. 493 (1869); *Shepard* v. *Kent Circuit Judge*, 109 Mich. 606, 68 N. W. 221 (1896); *In re Knaup*, 144 Mo. 653, 46 S. W. 151, 66 Am. St. 435 (1898); *Feinberg* v. *Kutcosky*, 147 App. Div. 393, 132 N. Y. S. 9 (1911); *Shorwitz* v. *Caminez*, 152 App. Div. 758, 137 N. Y. S. 545 (1912); *Goldreyer* v. *Foley*, 139 N. Y. S. 190, 154 App. Div. 584 (1913); *Schwartz* v. *Sill*, 85 Misc. 55, 146 N. Y. S. 1068 (1914); *People ex rel. Roache* v. *Hanbury*, 162 App. Div. 337, 147 N. Y. S. 851 (1914). For England, see Rules of the Supreme Court, Order XLII, rule 32; Order XLIII, rule 6; Order L, rule 15a.

Tressel, previous to the filing of this bill, and that the same may be sold in satisfaction of plaintiff's judgment.

To the complaint the defendants demurred on the ground that the complaint did not state facts sufficient to constitute cause of action, the particular ground of demurrer being that creditor's bills will not lie in this territory, for the reason that the provisions of the Code of Civil Procedure in regard to proceedings supplementary to execution have superseded the remedy by creditor's bills, and now furnish in this jurisdiction the exclusive remedy to judgment creditors to subject property to the satisfaction of their debts.[73]

What were the powers of the court of chancery in reference to creditor's bills?

The court of chancery formerly had cognizance of bills filed by judgment creditors, after they had exhausted their remedies at law, to subject lands fraudulently conveyed to the payment of their judgments. *Edgell* v. *Haywood,* 3 Atk. 357; *Edmeston* v. *Lyde,* 1 Paige (N. Y.) 637; and by the filing of such a bill the creditor acquired a lien upon lands which was superior to any subsequent conveyance. Such bills were sustainable under the ordinary jurisdiction of the court. Its power to hear such cases and set aside fraudulent conveyances which stood as obstructions to executions at law was inherent in the court, and not dependent upon any statute. *Beck* v. *Burdett,* 1 Paige (N. Y.) 305.

From its earliest history the court of chancery has exercised the power of compelling the transfer of the title to real estate by obliging parties holding the legal title to convey it, or by directing it to be sold by some officer of the court appointed for the purpose, or by declaring the title by which it was held fraudulent, and subjecting it to sale under an execution at law. *Mould* v. *Williamson,* 2 Cox Ch. 386; *Edgell* v. *Haywood,* 3 Atk. 357; *Burroughs* v. *Elton,* 11 Ves. 33. These decisions have since been followed, both in England and in this country, particularly upon bills by judgment creditors to set aside fraudulent conveyances. Thus it was held in *Hendricks* v. *Robinson,* 2 Johns. Ch. (N. Y.) 283, that one creditor might maintain a bill on behalf of himself and other creditors, or on behalf of himself alone, to have certain conveyances of his debtor declared fraudulent and void; and in *Cuyler* v. *Moreland,* 6 Paige (N. Y.) 273, that a bill will be sustained filed by a judgment creditor for the double purpose of removing a fraudulent obstruction to an execution at law and of reaching the debtor's equitable assets; and though a fraudulent assignor dies before judgment against him, a creditor's bill will lie to set aside a fraudulent conveyance made by him. *Frazer* v. *Western,* 1 Barb. Ch. (N. Y.) 220. In *Wakeman* v. *Grover,* 4 Paige (N. Y.) 23, the bill of a judgment creditor to obtain satisfaction out of his debtor's equitable assets was sustained, as was also a bill filed by such a creditor for the enforcement of his judgment out of property which the debtor had fraudulently placed out of his reach. *Weed* v. *Pierce,* 9 Cow. (N. Y.) 722.

[73]The arguments of counsel and part of the opinion are omitted.

It is, therefore, settled beyond question that originally the court of chancery, in the exercise of its equitable powers, had jurisdiction of creditors' bills brought for the purpose of setting aside fraudulent conveyances, or reaching equitable assets which the defendant had put in the hands of third parties; and the plaintiff in the suit at bar, having exhausted his remedy at law by the return of his execution, as appears from his bill, was in situation to ask the aid of equity to set aside the alleged fraudulent conveyance, if the facts should demonstrate that it was so, and to reach the equitable assets, if any, which had been put out of his reach by the defendant.

The Supreme and District courts of this territory have, under the organic law, chancery, as well as common law, jurisdiction (Organic Law, Comp. Laws, section 33); and hence this complaint in its present form may be maintained unless some other remedy equally effectual has been provided by law. It is claimed that such remedy has been provided by the Code of Civil Procedure in its provisions in regard to proceedings supplementary to execution, and that this remedy is exclusive. We are unable to assent to this proposition for several reasons. The remedy afforded by proceedings supplementary to execution is not as effective as that furnished by creditors' bills as administered by courts of equity. They are merely proceedings in the original action for the purpose of enforcing the judgment already recovered. *Dresser* v. *Van Pelt*, 15 How. Pr. (N. Y.) 19; *Cold* v. *Torrance*, 19 How. Pr. 560. In the latter case the court, in defining these proceedings, says that they are in the nature of additional or equitable executions. It is not in any sense a new suit. By these proceedings a summary mode is instituted for ascertaining what, if any, property a judgment creditor may have under his control or in his possession subject to execution, and if any persons are owing him, and to what extent. Third persons can not be made parties to the original suit, though they be compelled to appear and be examined as to any property under their control or in their custody belonging to the defendant, or as to whether they owe him. But this is the extent to which the inquiry can go in such proceedings. If property belonging to the defendant is found upon such an examination in the hands of these persons, it may be ordered turned over to apply on the judgment debt; but if the right of the person having it under apparent title comes in question, if he claims to be the owner of the property, the question of title can not be summarily disposed of by the court or judge before whom the proceedings may be pending. Such questions must be adjudicated and determined by an action brought for that purpose. It is thus made apparent that the remedy by proceedings supplementary to execution are much less efficacious, and in many cases would not afford relief to the same extent as a bill in equity, and this even though the proceeding should be prosecuted to a receivership and carried to its utmost extent under the statute.

In *Field* v. *Sands,* 8 Bosw. (N. Y.) 685, it was held that the commencement of supplementary proceedings and the appointment of a receiver therein did not create any lien upon assets previously assigned by the debtor; that such assets could only be reached by a creditor's suit. A similar decision was made in *Conger* v. *Sands,* 19 How. Pr. (N. Y.) 8. See, also, *Gasper* v. *Bennett,* 12 How. Pr. (N. Y.) 307. It is doubtless true that in many jurisdictions adequate remedies have been provided by law to accomplish some of the purposes of creditors' suits—discovery of assets, debts owing by third persons, and the like—and for these purposes proceedings supplementary to execution may be considered a substitute. But for the purpose of reaching equitable assets of the judgment debtor, or to set aside fraudulent transfers of property, supplemental proceedings provide an inadequate remedy; and, though in many respects they may serve as a substitute for a creditor's bill, they are by no means the exclusive remedy to which the creditor may resort. He may still have his creditor's suit. *Pope* v. *Cole,* 64 Barb. (N. Y.) 406; *Bank* v. *White,* 6 N. Y. 236.

The right of a judgment creditor to maintain an action in the nature of a creditor's bill, notwithstanding the remedy provided by proceedings supplementary to execution, has been frequently held. Thus, in *Catlin* v. *Doughty,* 12 How. Pr. (N. Y.) 457, it was held that the former action by judgment creditor's bill was still in force, and might be resorted to by a judgment creditor to reach equitable assets after the return of an unsatisfied execution. In *Gere* v. *Dibble,* 17 How. Pr. (N. Y.) 31, it was held that a creditor's bill would lie in favor of judgment creditors on their own account to set aside a fraudulent conveyance made by the judgment debtor on his real estate, even after the appointment of a receiver in proceedings supplementary to execution, the judgment constituting the basis of the action having been recovered before the receiver was appointed. In *Bennett* v. *McGuire,* 58 Barb. (N. Y.) 625, it was held that a judgment creditor, even after having commenced proceedings supplementary to execution, had a right to abandon the same and maintain an action in his own name to set aside a mortgage executed by a judgment debtor as being without consideration, and fraudulent. The following cases will be found, also, to sustain this petition: *Bartlett* v. *Drew,* 4 Lans. (N. Y.) 444; *Phelps* v. *Platt,* 50 Barb. (N. Y.) 430; *Taft* v. *Wright,* 47 How. Pr. (N. Y.) 1; *Burt* v. *Hoettinger,* 28 Ind. 217; *Parsons* v. *Meyburg,* 1 Duv. (Ky.) 206; and there are others of like import. We can not assume that the legislature intended to take from creditors any of the remedies that they enjoyed under the court of chancery for the enforcement of their judgment, after having exhausted their remedy at law, and turn them over to the often inadequate and imperfect remedy provided by the statute in regard to proceedings supplementary to execution. Upon reason and authority the remedy by creditor's suit exists now as it formerly did under the court of chancery. Under the codes of procedure a suit in the nature of a creditor's bill may be main-

tained under the same rules which formerly prevailed in courts of chancery. The code has changed the form of the suit, but has not affected the rights of the parties, or impaired the powers of courts having equity jurisdiction from administering proper relief in a case showing a state of facts which formerly were sufficient to authorize a court of chancery to act. *Bartlett* v. *Drew*, 60 Barb. (N. Y.) 648, affirmed, 57 N. Y. 587. The case of *Graham* v. *Railway Co.*, 10 Wis. 459, would seem to support the proposition that the proceeding supplementary to execution provided by the statute of that state superseded the remedy by creditors' bills, and was exclusive. That case, however, has not been followed by the courts of that state. The decision of the case in which the rule there laid down was invoked was put upon other grounds, and the remedy by creditors' bills has been restored long since in that jurisdiction by legislative enactment. *Seymour* v. *Briggs*, 11 Wis. 196; *Gates* v. *Boomer*, 17 Wis. 455. The cases cited by the respondent from the California reports do not sustain his contention. In that state creditors' bills have always been maintainable. *Baker* v. *Bartol*, 6 Cal. 483; *Marshall* v. *Bushanan*, 35 Cal. 264. Such is also the rule in Colorado. *Allen* v. *Tritch*, 5 Colo. 222; *Frazer* v. *Smelting Co.*, 5 Fed. Rep. 163. And also in Kansas. *Ludes* v. *Hood*, 29 Kans. 49.

The complaint in the case at bar contains all the allegations necessary under the code, or which were formerly required by the courts having equity jurisdiction in creditors' suits brought to set aside fraudulent conveyances as obstructions to an execution at law, and is sufficient. The demurrer, therefore, must be overruled, and the pro forma judgment of the District Court reversed, with leave to the defendants to answer within thirty days, on payment of costs and disbursements. All the justices concurring.

SECTION 12. EXECUTION AGAINST THE PERSON

FORSYTHE *v.* WASHTENAW

CIRCUIT JUDGE, 1914

180 *Mich.* 633

BROOKE, J.: Relator prays for the issuance of a writ of mandamus against respondent requiring him to recall and quash a writ of capias ad satisfaciendum. The antecedent facts are briefly as follows: One Della Anthony brought suit against relator and another in an action of trespass upon the case. The suit was commenced by a summons, and the declaration charged relator with fraud. Under a plea of the general issue, the parties went to trial, and a judgment was rendered against relator on the 27th day of October, 1913. On the 24th day of November, 1913, an execution was issued upon said judgment, made returnable January 15, 1914. Under date of Janu-

ary 10, 1914, the sheriff returned the execution nulla bona. On January 12, 1914, a writ of capias ad satisfaciendum was issued, although the record is silent as to the application therefor. The relator was arrested upon said writ and on January 13, 1914, gave a bond in the penal sum of $7,500 to the jail limits of the county of Washtenaw. On January 19th relator made a motion for an order recalling and quashing said writ of capias ad satisfaciendum.[74]

It is the claim of relator that plaintiff, Della Anthony, having commenced her action by summons instead of by a capias ad respondendum, as she might have done under section 9996, 3 Comp. Laws, is now precluded from having recourse to a writ of capias ad satisfaciendum, although she would have been entitled to the latter writ had she used the more rigorous process as commencement of suit. The precise question seems never to have been raised in this court. 3 Comp. Laws, section 10301, provides: "Such execution may be either (1) Against the goods and chattels, lands and tenements of the party against whom such judgment was recovered; or (2) against the body of such party, in the cases authorized by law." The statutes are silent as to the cases in which a body execution may issue in this State. It is therefore necessary to determine the question from an examination of the precedents arising under the common law.

In an early case, *Fuller* v. *Bowker*, 11 Mich. 204, Justice Christiancy used the following language at page 210: "We understand the common-law rule to have been that a capias ad satisfaciendum could be issued in those cases, and those [cases] only, in which the suit might have been commenced by capias ad respondendum, or, in other words, when the latter was the immediate process upon the original writ. The only exception to this seems to have been when the defendant was an attorney or officer of the court; in such case he might be taken in execution, though sued by bill. 2 Arch. Pr. 276. Originally the capias ad satisfaciendum lay at common law only in trespass vi et armis. But as statutes were subsequently passed, giving the capias ad respondendum as the mesne process in other cases, the capias ad satisfaciendum was held to follow, as a common-law incident. But in no case was the latter allowed without the former unless directly authorized by statute. 1 Sellon's Pr. 513; Comyn's Dig. Execution, ch. 9; Tomlin's Law Dict. title 'Capias'; 1 Arch. Pr. 276." [75]

---

[74]Part of the opinion is omitted.

[75]The writ of capias ad satisfaciendum commands the sheriff to take the body of the defendant, and him safely keep, so that he may have his body in court, to satisfy the plaintiff the amount of his judgment. At common law, the king when plaintiff could have execution against the defendant's body, land and goods, but a subject could have execution against the body of the defendant in trespass vi et armis only. To secure the appearance of defendants the writ of capias ad respondendum was given by the statute of 52 Hen. III, ch. 23 (Marlebridge) and of 13 Edw. I, ch. 11 (Westminster II), in actions of account, by the statute of 25 Edw. III, ch. 17, in debt and detinue, and by the statute of 19 Hen. VII, ch. 9, in actions on the case. The capias ad satisfaciendum is not expressly given by statute but the

In 1 Sellon's Pr., p. 513, cited by Judge Christiancy, it is said: "A capias ad satisfaciendum, by the common law, lay only in trespass vi et armis, being a direct and wilful wrong, and wherein the capias ad respondendum was the immediate process upon the original writ. But several statutes having given the process of capias ad respondendum, as the mesne process upon the original writ in other personal actions, than those committed vi et armis, the capias ad satisfaciendum has become an executory process in them also, it being held as a rule that, where a capias lies in process before judgment, it will lie in execution upon the judgment itself." In 1 Burrill's Pr., p. 308, we find the following: "It may be considered a general rule, that a capias ad satisfaciendum will lie in all cases where a (bailable) capias ad respondendum might have been used as the process to bring the defendant before the court." Citing 1 Arch. Pr. 303. In 1 Tomlin's Law Dict., at p. 287, after describing the writ, the writer says: "Properly speaking, this writ can not be sued out against any but such as were liable to be taken upon the capias mentioned in the preceding article." Citing 3 Rep. 12; M. O. 767. See, also, 2 Tidd's Pr. (2d Am. ed.), p. 1025; Graham's New

courts have held that wherever a capias lies in process before judgment it will lie in execution upon the judgment itself. 3 Salk. 286; Y. B. 43 Edw. III 1; Y. B. 49 Edw. III 2; Y. B. 2 Hen. IV 6; Y. B. 7 Hen. VI 45b; Co. Litt. 290b; *Harbet's Case*, 3 Coke 12 (1584); *Cassidy* v. *Stewart*, 9 D. P. C. 366, 5 Jur. 25, 2 Scott (N. R.) 432 (1841); *Kintzell* v. *Olsen* (N. J.), 73 Atl. 962 (1909).

The evils incident to imprisonment for debt have led, both in England and the United States, to the passage of statutes that have greatly diminished the number of cases in which the defendant can be arrested and imprisoned in civil actions to enforce payment of money demands.

In England the Act of 32 and 33 Vict., ch. 62 (Debtor's Act of 1869), provides that no person shall be arrested or imprisoned for making default in the payment of a sum of money except defaults in the payment of (1) penalties; (2) sums recovered summarily before a justice of the peace; (3) sums ordered to be paid by trustees or fiduciaries; (4) costs ordered to be paid by a solicitor for misconduct; (5) income ordered to be paid by a bankruptcy court; (6) sums ordered to be paid in instalments by the court. *In re Edgcome*, L. R. (1902) 2 K. B. 403. Rules of Supreme Court, Order XLII, rule 3. But no person may be imprisoned in any excepted case for more than one year. *Church's Trustee* v. *Hibbard*, L. R. (1902) 2 Ch. Div. 784. Subject to prescribed rules, the court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in the payment of a debt or instalment of a debt due from him in pursuance of any order or judgment of a competent court. But such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected to pay the same. *Esdaile* v. *Visser*, L. R. (1880) 13 Ch. Div. 421, 41 L. T. 745, 28 W. R. 281; *In re Wray*, L. R. (1887) 36 Ch. Div. 138 (1887); *Preston* v. *Etherington*, L. R. (1887) 37 Ch. Div. 104; *Harris* v. *Slater*, L. R. (1888) 21 Q. B. Div. 359, 57 L. J. Q. B. 539, 37 W. R. 56; *Stonor* v. *Fowle*, L. R. (1887) 13 App. Cas. 20. The state statutes restricting execution against the person of the defendant to specified causes of action vary greatly in their terms. Generally, such proceedings are allowed in actions of tort or where the defendant has been guilty of fraud or professional misconduct. See Freeman on Executions (3d ed.), § 451; U. S. Comp. Stat. (1913), § 1636; N. Y. Code Civ. Proc. §§ 487, 549, 550; N. J. Practice Act of 1903, § 189; Mass. Rev. L. (1902), ch. 168; Pa. Act of July 12, 1842, P. L. 339, § 1, P. & L. Dig. (2d ed.) 5795.

York Pr., p. 410. In 4 Comyn's Digest, at page 228, we find the following: "So execution may be by capias ad satisfaciendum against the body of the defendant in all cases where a capias ad respondendum lies in process."

Our Constitution, article 2, section 20, provides: "No person shall be imprisoned for debt arising out of or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment. No person shall be imprisoned for a military fine in time of peace."

It is obvious that the plaintiff in the principal case might have proceeded against relator under the Constitution as well as under the statute cited, supra, by causing to issue a writ of capias ad respondendum as commencement of suit. Should she now be deprived of her right to the writ of capias ad satisfaciendum because of having chosen the less drastic writ for her mesne process? We are of the opinion that she should not.

In the case of *Hunt* v. *Burdick*, 42 Vt. 610, it is said: "There is nothing in our statutes or practice that requires the establishment of a rule that the plaintiff in an action of tort shall be deprived of the right, which the law gives him, of taking an execution against the body of the judgment debtor, because he omits to issue his original writ against the body. What operates so manifestly as matter of ease and favor to the defendant, ought not to be the ground of forfeiture of the rights of the plaintiff."

The case of *Lapham* v. *Oakland Circuit Judge*, 170 Mich. 564, cited on behalf of respondent as authority, is not controlling for the reason that in that case the question considered was only whether the body execution had been seasonably issued. The basic right of the plaintiff to the writ was not questioned.

The writ is denied.[16]

---

[16]Where the right to arrest is determined by the nature of the cause of action, an execution against the person may issue although there has been no previous arrest. *Eames* v. *Stevens*, 26 N. H. 117 (1852); *State* v. *Foote*, 83 N. Car. 102 (1880); *Haskell* v. *Jewell*, 59 Vt. 91, 7 Atl. 545 (1886); *Roeber* v. *Dawson*, 22 Abb. N. C. (N. Y.) 73, 3 N. Y. S. 122, 21 N. Y. St. 160 (1888); *Carrigan* v. *Washburn*, 18 N. Y. Civ. Pro. 77, 7 N. Y. S. 262, 25 N. Y. St. 931 (1889); *Kalbfus* v. *Rundell*, 134 Pa. 102, 19 Atl. 492 (1890); *Sawyer* v. *Nelson*, 44 Ill. App. 184 (1891); *Dungan* v. *Read*, 167 Pa. St. 393, 31 Atl. 639 (1895); *Sherman* v. *Grinnell*, 159 N. Y. 50, 53 N. E. 674 (1899); *Martin* v. *Hutto*, 82 S. Car. 432, 64 S. E. 416 (1908); *Kintzel* v. *Olsen* (N. J.), 73 Atl. 962 (1909); *Michael* v. *Leach*, 166 N. Car. 223, 81 S. E. 760 (1914). But where the grounds of arrest are extrinsic to the cause of action, an execution against the person can not issue where no order of arrest has been previously obtained. *Smith* v. *Knapp*, 30 N. Y. 581 (1864); *Elwood* v. *Gardner*, 45 N. Y. 349, 10 Abb. Prac. (N. S.) 238 (1871); *Stern* v. *Moss*, 67 How. Pr. (N. Y.) 199, 6 Civ. Pro. R. 184 (1884); *Chapin* v. *Foster*, 101 N. Y. 1, 3 N. E. 786 (1885); *Griffith* v. *Hubbard*, 9 S. Dak. 15, 67 N. W. 850 (1896); *Fenton* v. *Duckworth*, 131 App. Div. 291, 115 N. Y. S. 686 (1909).

OSMAN *v.* CROWLEY

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1905

101 *App. Div.* (*N. Y.*) 597

INGRAHAM, J.: The plaintiff, an infant, eight years of age, brought this action to recover for the injuries sustained by being run over by a hansom cab, the property of the defendant. He alleged in the complaint that "said defendant and servant were negligent, reckless and careless and unskillful in the management and operation of said hansom vehicle and the management and control of said horse or horses and in the manner of driving the same and in consequence thereof and without fault on the part of the plaintiff he was knocked violently to the ground by said horse and vehicle and run over"; that "solely by reason of the defendant's negligence as aforesaid plaintiff was run over," and that by reason thereof the plaintiff sustained damage. An answer was interposed which was substantially a denial of the allegations of the complaint. The action was tried and a verdict rendered for the plaintiff for the sum of $3,000, upon which judgment was entered. Execution against the property of the defendant having been returned unsatisfied, an execution against the person was issued, whereupon he moved to set aside this execution on the ground that the same "is irregular and void for the reason that no order of arrest was or could have been issued in this action against the defendant." This motion was denied and the defendant appeals.

The right to issue an execution depends upon the Code of Civil Procedure. Section 1487 provides that an execution against the person of the judgment debtor may be issued thereupon (Subd. 1) where the plaintiff's right to arrest the defendant depends upon the nature of the action, and (Subd. 2) in any other case where an order of arrest has been granted and executed in the action. Section 549 of the Code of Civil Procedure provides that the defendant may be arrested in an action brought to recover damages for a personal injury. Section 3343 provides that "In construing this act . . . 9. A 'personal injury' includes libel, slander, criminal conversation, seduction and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another." Thus in an action to recover damages for actionable injury to the person of the plaintiff, the defendant may be arrested, and a judgment in such an action may be enforced by execution against the person, as the plaintiff's right to arrest the defendant depends upon the nature of the action. This construction was given to these provisions of the Code of Civil Procedure by the General Term of the New York Superior Court in *Ritterman* v. *Ropes*, 52 N. Y. Super. Ct. 237.

The defendant claims that the right to arrest in an action to recover for personal injuries depends, not upon the nature of the

action, but upon proof that the defendant was personally negligent, as distinguished from a liability created by the negligence of his servant, a distinction which I can not find in the provisions of the Code of Civil Procedure. There are two cases which sustain the defendant's contention. The first is the case of *Lasche* v. *Dearing*, 23 Misc. (N. Y.) 722, a decision of the Special Term of the Supreme Court. The second is *Davids* v. *Brooklyn Heights R. R. Co.*, 45 Misc. 208, 92 N. Y. S. 220, a decision of the County Court of Kings County. In *Lasche* v. *Dearing* the court construes the words "other actionable injury to the person" in subdivision 9 of section 3343 of the Code of Civil Procedure as applying only to cases of the same character as those before specifically mentioned in the subdivision of the sections; thus restricting the definition of the words "personal injury" to a case where the cause of action is based upon "affirmative and active wrong with more or less of turpitude, according to the character of the wrong." But this limitation is not specified in the section which defines words that are used in the Code of Civil Procedure; and if this construction could be sustained there would be no action for personal injuries regulated by the Code of Civil Procedure, unless the defendant personally participated in the act which caused the injury. Section 549 of the Code of Civil Procedure gives the plaintiff in an action for a "personal injury" a right to arrest the defendant. Subdivision 9 of section 3343 of the Code of Civil Procedure defines the words "personal injury" as used in said code. This is not of a penal nature, but is a general provision applicable to the whole Code of Civil Procedure, simply defining the words "personal injury" when there used and includes any action brought to recover for injury to the person of an individual. The case of *Davids* v. *Brooklyn Heights R. R. Co.*, 45 Misc. 208, 92 N. Y. S. 220, is based upon an alleged distinction, which the defendant here seeks to sustain, between an action for personal injury based upon the personal act of the defendant and that based upon the act of his servant, a distinction which is not justified by any provision of the Code of Civil Procedure. It is the nature of the cause of action which has resulted in the judgment sought to be enforced that controls. That cause of action is for a "personal injury," whether the injury to the person is caused by the personal act of the defendant or by the act of his servant for which he is responsible. I think, therefore, that the execution was properly issued and that the order appealed from should be affirmed, with ten dollars costs and disbursements.

Van Brunt, P. J., O'Brien and Hatch, JJ., concurred; Patterson, J., concurred in result.[77]

---

[77]Accord: *Ritterman* v. *Ropes*, 52 N. Y. Super. Ct. 236 (1885); *Romberger* v. *Henry*, 167 Pa. St. 314, 31 Atl. 634 (1895); *Gallagher* v. *Dolan*, 27 Misc. 122, 57 N. Y. S. 334, 6 N. Y. Ann. Cas. 412 (1899); *People ex rel. Harris* v. *Gill*, 85 App. Div. 192, 83 N. Y. S. 135 (1903), Affd. 176 N. Y. 606, 68 N. E. 1122. See also *Delamater* v. *Russell*, 4 How. Pr. (N. Y.) 234, 2 Code Rep. 147 (1850); *Judd* v. *Ballard*, 66 Vt. 668, 30 Atl. 96 (1894); *In re Smyser*, 182 Ill. App. 208 (1913). And compare *Ex parte Prader*, 6 Cal. 239 (1856); *Wagner* v. *Lathers*, 26 Wis. 436 (1870); *Cohen* v. *Fox*, 26 Colo. App. 55, 141 Pac. 504 (1914).

THOMPSON'S CASE

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1877

122 Mass. 428

Habeas corpus. At the hearing before Colt, J., it appeared that the petitioner, a resident of Charlestown, in the state of New Hampshire, was arrested on March 20, 1877, and was now held, by a deputy of the sheriff of Suffolk, upon an execution issued upon a judgment of this court against him, in favor of a citizen of the commonwealth, while he was in attendance as a witness in his own behalf before a joint committee of the legislature, having petitioned for the allowance of a claim made by him against the commonwealth; that his claim had been presented to the committee, and was under discussion on that day while he was present; that its further consideration had been adjourned to March 22, 1877; and that as he was leaving the state house, and after he had got into the street, he was arrested on the execution. It also appeared that the petitioner had not been summoned as a witness, but the judge found that he was in attendance in good faith solely for the purpose of presenting and proving his claim, and with the intention of returning home without unnecessary delay.

The petitioner contended that he was exempt from arrest and was entitled to his discharge. The judge admitted the petitioner to bail, and reserved the case for the consideration of the full court.[81]

J. A. Loring and C. F. Choate, for the petitioner.

A. A. Ranney and I. R. Clark, contra.

GRAY, C. J.: Parties and witnesses, attending in good faith any legal tribunal, whether a court of record or not, having power to pass upon the rights of the persons attending, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether they are residents of this state or come from abroad, whether they attend on summons or voluntarily, and whether they have or have not obtained a writ of protection. *Walpole* v. *Alexander*, 3 Doug. 45; *Meekins* v. *Smith*, 1 H. Bl. 636; *Arding* v. *Flower*, 8 T. R. 534; *Spence* v. *Stuart*, 3

---

prohibition is for the debtor's benefit and may be waived by him. *N. Y. Guaranty Co.* v. *Rogers*, 71 N. Y. 377 (1877).

In Massachusetts there is "one form of execution in ordinary personal actions, which is framed in the alternative and leaves to the officer or to the creditor under whose direction he acts, a choice of methods for the service of it. This writ of execution commands the officer to levy the goods, chattels, lands and tenements of the debtor, and for want thereof upon his body. The creditor can not proceed under the execution against the property and against the body of the debtor at the same time." Per Knowlton, J., in *Hoar* v. *Tilden*, 178 Mass. 157, 59 N. E. 641 (1901). See also, *Lyman* v. *Lyman*, 11 Mass. 317 (1814); *Davis* v. *Richmond*, 14 Mass. 473 (1768); *Twining* v. *Foot*, 59 Mass. (5 Cush.) 512 (1850); *Dooley* v. *Cotton*, 3 Gray (Mass.) 496 (1855); *Plympton's Case*, 196 Mass. 571, 82 N. E. 715 (1907).

[81] Part of the opinion of the court is omitted.

East 89; *Ex parte Byne*, 1 Ves. & B. 316; *Persse* v. *Persse*, 5 H. L. Cas. 671; *M'Neil's Case*, 6 Mass. 245; *Wood* v. *Neale*, 5 Gray (Mass.) 538; *May* v. *Shumway*, 16 Gray (Mass.) 86.

Petitioner discharged from custody.[82]

---

[82]Accord: Y. B. 4 Edw. IV 21; Y. B. 9 Hen. VI 7; Y. B. 27 Hen. VIII 20; *Anonymous*, Latch 198; *Clarke* v. *Molyneux*, 1 Lev. 159 (1664); *Lightfoot* v. *Cameron*, 2 Wm. Bl. 1113 (1776); *Walpole* v. *Alexander*, 3 Doug. 45 (1782); *Meekins* v. *Smith*, 1 H. Bl. 636 (1791); *Walker* v. *Webb*, 3 Anst. 941 (1797); *Arding* v. *Flower*, 8 T. R. 534 (1800); *Ex parte King*, 7 Ves. Jr. 312 (1802); *Spence* v. *Stuart*, 3 East 89 (1802); *Solomon* v. *Underhill*, 1 Camp. 229 (1808); *Childerston* v. *Barrett*, 11 East 439 (1809); *Lists' Case*, 2 Ves. & Bea. 374 (1814); *Rimmer* v. *Green*, 1 M. & S. 638 (1813); *Willingham* v. *Matthews*, 6 Taunt. 356 (1815); *Randall* v. *Gurney*, 1 Chitty 679 (1819); *Pitt* v. *Coombs*, 5 B. & Ad. 1078 (1834); *Webb* v. *Taylor*, 1 D. & L. 676 (1843); *Persse* v. *Persse*, 5 H. L. Cas. 671 (1856); *Montague* v. *Harrison*, 3 C. B., N. S. 292 (1857); *Ex parte Cobbett*, 7 El. & B. 955 (1857); *Harris* v. *Grantham*, 1 Coxe (N. J. L.) 142 (1792); *Commonwealth* v. *Ronald*, 4 Call. (Va.) 97 (1786); *Ex parte Hurst*, 4 Dall. (U. S.) 387, 1 L. ed. 878, 1 Wash. (C. C.) 186, Fed. Cas. No. 6924 (1804); *Norris* v. *Beach*, 2 Johns. (N. Y.) 294 (1807); *Bours* v. *Tuckerman*, 7 Johns. (N. Y.) 538 (1811); *Ex parte McNeil*, 6 Mass. 245 (1810); *United States* v. *Edme*, 9 Serg. & R. (Pa.) 147 (1822); *Sanford* v. *Chase*, 3 Cow. (N. Y.) 381 (1824); *In re Dickenson*, 3 Harr. (Del.) 517 (1842); *Vincent* v. *Watson*, 1 Rich. L. (S. Car.) 194 (1845); *Seaver* v. *Robinson*, 3 Duer. (10 N. Y. Super. Ct.) 622 (1854); *Wood* v. *Neale*, 71 Mass. (5 Gray) 538 (1855); *Henegar* v. *Spangler*, 29 Ga. 217 (1859); *May* v. *Shumway*, 82 Mass. (16 Gray) 86, 77 Am. Dec. 401 (1860); *Merrill* v. *George*, 23 How Pr. R. (N. Y.) 331 (1862); *Huddeson* v. *Prizer*, 9 Phila. (Pa.) 65 (1872) semble; *Brett* v. *Brown*, 13 Abb. Pr. (N. S.) (N. Y.) 295 (1872); *Ballinger* v. *Elliott*, 72 N. Car. 596 (1875); *Person* v. *Grier*, 66 N. Y. 124, 23 Am. Rep. 35 (1876); *Ralston* v. *Tobin*, 9 Pa. Dist. R. 234 (1900); *Ginn* v. *Alney*, 212 Mass. 486, 99 N. E. 276 (1912). Contra as to a capias ad satisfaciendum. *Starret's Case*, 1 Dall. (Pa.) 356 (1788); *Hannum* v. *Askew*, 1 Yeates (Pa.) 25 (1791). In some cases it is held that a witness whose attendance is voluntary is not privileged unless he is a nonresident. *Hardenbrook's Case*, 8 Abb. Pr. (N. Y.) 416 (1859); *Dungan* v. *Miller*, 37 N. J. L. 182 (1874; *Jones* v. *Knauss*, 31 N. J. Eq. 211 (1879). By the weight of authority the defendant in a criminal case is not privileged from arrest on civil process. *Anonymous*, 1 Dowl. P. C. 157 (1832); *Goodman* v. *London*, 2 Dowl. P. C. 504, 1 Ad. & El. 378 (1834); *Williams* v. *Bacon*, 10 Wend. (N. Y.) 636 (1834); *Jacobs* v. *Jacobs*, 3 Dowl. P. C. 675 (1835); *Commonwealth* v. *Daniel*, 4 Clark (Pa.) 330 (1847); *Hare* v. *Hyde*, 16 Q. B. 394 (1851); *Scott* v. *Curtis*, 27 Vt. 762 (1855); *Moore* v. *Green*, 73 N. Car. 394, 21 Am. Rep. 470 (1875); *Lucas* v. *Albee*, 1 Denio (N. Y.) 666 (1845); *Wood* v. *Boyle*, 177 Pa. St. 620, 35 Atl. 853, 55 Am St. 747 (1896); *Rogers* v. *Rogers*, 138 Ga. 803, 76 S. E. 48 (1912); *Ex parte Henderson*, 27 N. Dak. 155, 145 N. W. 574 (1914). Contra: *Bours* v. *Tuckerman*, 7 Johns. (N. Y.) 538 (1811); *Callans* v. *Sherry*, Alc. & N. 125 (1832); *Rex* v. *McLoughlin*, Alc. & N. 130 (1832); *Rex* v. *Wigley*, 7 C. & P. 4 (1835); *Gilpin* v. *Cohen*, L. R. 4 Exch. 131 (1869); *Moletor* v. *Sinned*, 76 Wis. 308, 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. 71 (1890). And it is agreed that where the criminal proceeding is a mere contrivance by the plaintiff to get the defendant into custody in the civil suit he will be discharged. *Wells* v. *Gurney*, 8 B. & C. 769 (1828); *Addicks* v. *Bush*, 1 Phila. 19, 7 Leg. Int. (Pa.) 7 (1850); *Snelling* v. *Watrous*, 2 Paige (N. Y.) 314 (1830) semble; *Benninghoff* v. *Oswell*, 37 How. Pr. (N. Y.) 235 (1868).

The privilege is also allowed to persons while engaged in the performance of some public duty as a member of Parliament or of Congress, *Holiday* v. *Pitt*, 2 Str. 985 (1733); *Coxe* v. *M'Clenachan*, 3 Dall. (Pa.) 478, 1 L. ed. 687 (1798); foreign consul, *Dupont* v. *Pichon*, 4 Dall. (Pa.) 321, 1 L. ed. 851 (1805); soldier, *People ex rel. Gaston* v. *Campbell*, 40 N. Y. 133 (1869); *Squire's Case*, 12 Abb. Pr. (N. Y.) 38 (1861).

HORNER *v.* BATTYN

IN THE KING'S BENCH, 1738

Buller's Nisi Prius 62

Note: That bare words will not make an arrest, but if the bailiff touch the person, it is an arrest and the retreat a rescous.[83] On a motion for an attachment against three persons for a rescous of a person taken in execution, it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant.

Per curiam. This is a good arrest; and if the bailiff who has a process against one, says to him when he is on horseback, or in a coach, "You are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest unless the bailiff had laid hold of him.[84]

---

[83] *Genner* v. *Sparks*, 1 Salk. 79, 6 Mod. 174 (1704).

[84] An officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." Per Metcalf, J., in *Whitehead* v. *Keyes*, 85 Mass. 495 (1862); *Williams & Jones*, Temp. Hardwicke, Lee 298 (1735); *Sheriff of Hampshire* v. *Godfrey*, 7 Mod. 288 (1738); *Berry* v. *Adamson*, 6 B. & C. 528 (1827); 9 D. & R. 558, 2 Car. & P. 503, 5 L. J. (O. S.) K. B. 215; *George* v. *Radford*, 3 Car. & P. 464 (1828); *Baldwin* v. *Murphy*, 82 Ill. 485 (1876); *Hawkins* v. *Commonwealth*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147n (1854); *Sandon* v. *Jervis*, El. B. & El. 935 (1859). But an arrest will be valid without physical contact, if the defendant submits and goes with the officer. *Gold* v. *Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480 (1828); *Wood* v. *Lane*, 6 Car. & P. 774 (1834); *Lawson* v. *Busines*, 3 Harr. (Del.) 416 (1842); *Grainger* v. *Hill*, 4 Bing. N. Cas. 212 (1838); *Emery* v. *Chesley*, 18 N. H. 198 (1846); *McCracken* v. *Ansley*, 4 Strob. (S. Car.) 1 (1849); *Jones* v. *Jones*, 13 Ired. (N. Car.) 448 (1852); *Morse* v. *Teetzel*, 1 Ont. Pr. R. 369 (1854); *Mowry* v. *Chase*, 100 Mass. 79 (1868); *Josselyn* v. *McAllister*, 25 Mich. 45 (1872); *Richardson* v. *Rittenhouse*, 40 N. J. L. 230 (1878). In *Russen* v. *Lucas*, 1 Car. & P. 153 (1824), a sheriff's officer went to a tavern where the defendant was sitting and said to him: "I want you." The defendant replied: "Wait for me outside the door, and I will come to you." The officer went to wait and the defendant got away. In an action by the plaintiff against the sheriff for an escape, it was held that there was no arrest and a nonsuit was entered. Abbott, C. J., said: "If Hamer (the defendant) had gone even into the passage with the officer, the arrest would have been complete."

In *Nicholl* v. *Darley*, 2 Y. & J. 399 (1828), a sheriff's officer went to the defendant's house to arrest him on capias ad satisfaciendum and read the warrant to him, whereupon the defendant rushed out against the officer who caught him round the waist but was unable to hold him. The sheriff was held liable in debt for the escape. Garrow, B., said: "Had the officer done his duty, had he chosen a better opportunity, or had he been armed with force sufficient to repel opposition, the process of the law could not have been intercepted." See *People ex rel McCallum* v. *Gebhardt*, 154 Mich. 504, 118 N. W. 16 (1908), where the sheriff was held liable for the escape of the defendant, a minor, who after submitting to arrest, was rescued by a trick. And see also, *Winborne* v. *Mitchell*, 111 N. Car. 13, 15 S. E. 882 (1892).

GWINN v. HUBBARD

SUPREME COURT OF INDIANA, 1832

3 *Blackf.* (*Ind.*) 14

Appeal from judgment for the defendant on demurrer to the defendant's plea in an action of debt by the plaintiff against the sheriff for the escape of a debtor taken in execution and released.

STEVENS, J.: Three points have been raised for the consideration of the court.[85]

The first is, whether the action of debt will lie in this state against a sheriff for an escape on the writ of capias ad satisfaciendum. By the common law debt only lies upon contracts. Escapes are considered torts, and are so treated by courts of justice. Hence, at common law, the remedy is an action on the case. The statutes of Westm. I, ch. 11 (13 Ed. 1) and 1 Rich. 2, ch. 12, give the action of debt for escape on the writ of ca. sa., and if these statutes are in force here the action of debt lies. This state has adopted not only the common law of England, but also all the statutes in aid thereof, made prior to the fourth year of the reign of Jac. 1 (except the second section of the sixth chapter 43 Eliz., the eighth chapter of the 13 Eliz., and ninth chapter 37 Hen. 8), of a general nature and not local to that kingdom. Those statutes are affirmative; they take away no common law remedy, but add one, leaving the party at liberty to make his own election as to what remedy he will adopt, and are clearly in aid of the common law and in full force here. *Steere* v. *Field*, 2 Mason (C. Ct.) 486; *Bonafous* v. *Walker*, 2 T. R. 129; *Alsept* v. *Eyles*, 2 H. Bl. 108.[86]

The second point is, whether the sheriff is liable for escapes, until the county authorities have erected a gaol for the reception of prisoners. By the common law, each county has two prisons—one for the reception of criminals furnished by the public and called public gaols, the other for the reception of debtors, furnished by the sheriff himself. The sheriff may appropriate his own house for that use, or he may furnish any other house he pleases in the bounds of his county; and the government is bound to indemnify him. He is bound at his peril to safely keep all such prisoners in safe custody, until the debt is paid or the prisoner otherwise legally discharged; and to enable him to do so, the whole means and power of the county are at his disposal. Nothing except public enemies,

[85] The third part of the opinion which holds the commitment of the debtor illegal and the defendant entitled to judgment is omitted.

[86] Where the action of debt is brought, under the statutes, the plaintiff claims the sum for which the debtor was charged in execution. But the plaintiff may, at his election, bring an action on the case and claim damages. *Bonafous* v. *Walker*, 2 T. R. 127 (1787); *Rawson* v. *Dole*, 2 Johns. (N. Y.) 454 (1807); *Porter* v. *Sayward*, 7 Mass. 377 (1811); *Van Slyck* v. *Hogeboom*, 6 Johns. (N. Y.) 270 (1810); *Sawyer* v. *Ballew*, 4 Port. (Ala.) 116 (1836); *Plumleigh* v. *Cook*, 13 Ill. 669 (1852); *Hutchinson* v. *Brand*, 9 N. Y. 208 (1853).

or the act of God, can release him from that obligation. *Smith* v. *Hillier*, Cro. Eliz. 167; 6 Bac. tit. sheriff (H.) 5; *Day & Whittlesey* v. *Brett*, 6 Johns. (N. Y.) 22; *Bartlett* v. *Willis*, 3 Mass. 86. The defendant rests his defense in this particular, on the statutes which require the boards doing county business in the several counties, to cause a court house, gaol, and other public buildings to be erected in their respective counties as soon as convenient. He insists that these statutes have taken the power and responsibility out of the sheriff's hands, and given them to these boards; and that the sheriff is no longer liable. In South Carolina, in the case of *Smith* v. *Hart*, 2 Bay (S. Car.) 395, and in Massachusetts, in the case of *Burrell* v. *Lithgow*, 2 Mass. 526, where there are statutes similar in substance to ours, it was held that although the public authorities may have erected prisons, yet if the prisoners escape by reason of the insufficiency of the prison, the sheriff is liable—he being bound to see and know that his prison was sufficient. By our statutes, the time of erecting those public buildings is left entirely to the discretion and convenience of those boards, without any provision for the detention of prisoners until the public prison may be erected. It can not be presumed that the legislature intended that no person should be imprisoned, until it might suit the convenience of the county authorities to erect prisons. The record in this case shows that there was no public prison in the county in which the prisoner could have been detained; and, in such cases, the court thinks it is very clear that the common law governs. The sheriff ought to have furnished a prison and detained the debtor in close custody until the debt was paid or the prisoner otherwise legally discharged, if he was legally in his custody as such debtor.[87]

---

[87] In *Green* v. *Hern*, 2 Pen. & W. (Pa.) 167 (1830), debt was brought against the sheriff for the escape of a debtor by breaking the wall around the jail yard. The defendant was permitted to prove that the jail and jail yard of the county were defective and insufficient to keep in prisoners and that they had been presented by the grand jury. *Held*, error. Gibson, C. J., said there was an actual escape which according to the common law "has uniformly fixed the gaoler, who can avail himself of nothing as matter of defense but an act of God or of the common enemy." Accord: *Burrell* v. *Lithgow*, 2 Mass. 526 (1807); *Slemaker* v. *Marriott*, 5 Gill & J. (Md.) 406 (1833); *Smith* v. *Hart*, 2 Bay (S. Car.) 395 (1802); *Fairchild & Bacon* v. *Case*, 24 Wend. (N. Y.) 381 (1840); *O'Neil* v. *Marson*, 5 Burr. 2812 (1771); *Wheeler* v. *Hambright*, 9 Serg. & R. (Pa.) 390 (1823). But he may be exonerated by the act of the plaintiff. *Dexter* v. *Adams*, 2 Denio (N. Y.) 646 (1846); *Dowdel* v. *Hamm*, 2 Watts (Pa.) 61 (1833). Where the sheriff has been held liable for an escape he may have an action over against the gaoler, as his deputy, on his bond or on his implied undertaking to serve faithfully. *Kain* v. *Ostrander*, 8 Johns. (N. Y.) 207 (1811); *Duncan* v. *Klinefelter*, 5 Watts (Pa.) 141, 30 Am. Dec. 295 (1836); *Scarborough* v. *Thornton*, 9 Pa. St. 451 (1848).

A sheriff at common law is not liable for an escape on mesne process, if he have the body of the defendant at the return of the writ. 3 Bl. Comm. 415; *Langdon* v. *Hathaway*, 1 N. H. 367 (1819); *Williams* v. *Mostyn*, 4 M. & W. 144 (1838); *Gebhardt* v. *Holmes*, 149 Wis. 428, 135 N. W. 860 (1912). But on final process any liberty allowed which involves the risk of losing control of the body of the debtor is a voluntary escape for which the sheriff is responsible. *Browning* v. *Rittenhouse*, 40 N. J. L. 230 (1878); *Planck* v.

MANBY *v.* SCOTT

IN THE EXCHEQUER CHAMBER, 1663

1 *Mod.* 124[88]

HYDE, J.: If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink and clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law; and so say I.[89]

Anderson, 5 T. R. 37 (1792); *Benton* v. *Sutton,* 1 B. & P. 24 (1797); *Hopkinson* v. *Leeds,* 78 Pa. St. 396 (1875).

If the sheriff permits an escape, he can not retake the debtor without new process. But if the escape is not permissive, or voluntary, but the result of negligence, the sheriff may recapture the debtor and this if accomplished before suit brought will constitute a defense. *Buxton* v. *Home,* 1 Show. 174 (1691); *Davis* v. *Chapman,* 2 Mann. & G. 921 (1841); *Lansing* v. *Fleet,* 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142 (1800); *Cheever* v. *Mirrick,* 2 N. H. 376 (1821); *Clark* v. *Cleveland,* 6 Hill (N. Y.) 344 (1844) semble; *Colley* v. *Morgan,* 5 Ga. 178 (1848); *Butler* v. *Washburn,* 25 N. H. 251 (1852).

[88]An extract from the opinion at page 132.

[89]Accord: *Dive* v. *Maningham,* Plow. 60 (1550); *London* v. *Wood,* 12 Mod. 683, 2 Salk. 682 (1701). See *King* v. *Justices,* 2 B. & C. 286 (1823). But parish relief might be afforded, 14 Eliz., chaps. 5, 37; 53 Geo. III, ch. 113; 52 Geo. III, ch. 160. At the common law, a prisoner in execution was to be kept in salva et arcta custodia until he satisfied the plaintiff. In the eighteenth century, by rule of court and by statute, various measures were adopted to lesson the hardships of poor debtors confined in prison on civil process. Prisoners were allowed, on entering security, to go about within certain limits outside of the jail walls, 3 D. & E. 583 (1790); 2 Bingh. 163 (1824). By the statute of 32 Geo. II, ch. 28, § 13 ("Lord's Act"), if a defendant charged in execution for a debt not exceeding £100 (extended to £300 by 3 Geo. III 50), surrender his effects to his creditors (except apparel, bedding and tools of trade not amounting in the whole to the value of £10) and make oath to comply with the statute, he may be discharged unless the creditor insists on detaining him, in which case he shall allow him *2s. 4d.* per week, on failure to pay which the prisoner shall be discharged. 3 Bl. Comm. 416; 1 Tidd's Pr. (9th ed.) 375; *Fisher* v. *Bull,* 5 T. R. 36 (1792); *Anonymous,* Sayer 102 (1753). In England the practice is now regulated by the Debtor's Act of 1869 (32 and 33 Vict., ch. 62), § 4, and its amendments which abolishes imprisonment for debt except in the case of fraudulent debtors. *Marris* v. *Ingram,* L. R. 13 Ch. Div. 338 (1879); 2 Halsbury's Laws of England 337. In the United States the measure of relief to which an imprisoned debtor is entitled is wholly dependent upon the construction of the statutes of the particular states. 16 Enc. Pl. & Pr. 703, 17 Cyc. 1541. See N. Y. Code of Civ. Pro., § 111, limiting the term of imprisonment to three months where the execution is for less than $500 and to six months in any case; Consolidated Laws of New York (1909), Debtor and Creditor Law, art. 5-7, regulating the procedure for the discharge of debtors from imprisonment; Rev. L. of Massachusetts (1902), ch. 168, §§ 33-49; 2 Comp. L. of New Jersey (1910), Insolvent Debtors, §§ 1-17; Pa. Act of March 26, 1814, 6 Sm. L. 195, 19, 2 P. & L. Dig. (2d ed.) 3973; Act of June 16, 1836, P. L. 720, 2 P. & L. Dig. (2d ed.) 4003. See also *People ex rel Lust* v. *Grant,* 10 Civ. Pro. 158, 18 Abb. N. C. 220, 1 N. Y. St. 537 (1886); *Padreshefsky* v. *Walton,* 65 App. Div. 432, 72 N. Y. S. 979 (1901); *Snow* v. *Shreffler,* 148 App. Div.

SECTION 13. EXECUTIONS TO RECOVER SPECIFIC PROPERTY

3 Blackst. Comm. 412, 413

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an habere facias seisinam, or writ of seisin, of a freehold; or an habere facias possessionem, or writ of possession, of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered; in the execution of which the sheriff may take with him the posse comitatus, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ.

In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As, upon an assize of nuisance, or quod permittat prosternere, where one part of the judgment is quod nocumentum amoveatur, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment. Upon a replevin, the writ of execution is the writ de retorno habendo; and, if the distress be eloigned, the defendant shall have a capias in withernam; but on the plaintiff's tendering the damages and submitting to a fine, the process in withernam shall be stayed.[80] In detinue, after judgment, the plaintiff shall have a distringas, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a scire facias against any third person in whose hands they may happen to be, to show cause why they should not be delivered; and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages; which

---

422, 132 N. Y. S. 895 (1911); *Battle* v. *Surety Co.*, 78 Misc. 253, 138 N. Y. S. 46 (1912); *Goldreyer* v. *Foley*, 154 App. Div. 584, 139 N. Y. S. 190 (1913); *Stockwell* v. *Silloway*, 100 Mass. 287 (1868); *Kellogg* v. *Underwood*, 163 Mass. 214, 40 N. E. 104 (1895); *Carpenter* v. *Goddard*, 191 Mass. 54, 76 N. E. 953 (1906); *Henderson* v. *Parsons*, 211 Mass. 69, 97 N. E. 613 (1912); *Hulshizer* v. *Kocker*, 20 N. J. L. 390 (1845); *Louis* v. *Kaskel*, 51 N. J. L. 236, 17 Atl. 120 (1889); *Commonwealth* v. *Sheriff of Allegheny*, 6 Pa. St. 445 (1847); *Power* v. *Graydon*, 53 Pa. St. 198 (1866); *Keim* v. *Saunders*, 120 Pa. St. 121, 13 Atl. 710 (1888); *Greenwaldt* v. *Kraus*, 148 Pa. St. 517, 24 Atl. 67 (1892); *Crissy* v. *Vogt*, 9 Pa. Super. Ct. 418 (1899); *Doescher's Petition*, 18 Pa. Super. Ct. 346 (1901); *Irwin* v. *Hudson*, 24 Pa. Super. Ct. 72 (1903); *Kellar* v. *Norton*, 228 Ill. 356, 81 N. E. 1037 (1907); *Stroheim* v. *Deimel*, 73 Fed. (Ill.) 430 (1896); *Lambert* v. *Wiltshire*, 144 Ill. 517, 33 N. E. 538 (1893).

[80] See 2 Tidd's Practice (9th ed.) 1038; *Beel* v. *Bartlett*, 7 N. H. 178 (1834); Cobbey on Replevin (2d ed.) 322.

(being either so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrongdoer be very perverse, he can not be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value; an imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amenable to the magistrate.

(a) Personalty

WAITE *v.* DOLBY

SUPREME COURT OF TENNESSEE, 1847

8 *Humph.* (*Tenn.*) 406

Waite sued Dolby in the Circuit Court of Coffee County in detinue. Dolby pleaded non detinet, and a verdict and judgment were entered in the following language: "The jury sworn," etc., "do say that the defendant doth detain the mare Rollo, described in the declaration in manner and form as the plaintiff hath complained, and they do assess the plaintiff's damage, by reason of the detention thereof to ten dollars, and the jurors aforesaid upon their oaths aforesaid do further say, that the mare Rollo was of the value of one hundred and thirty-five dollars. It is therefore considered by the court that the plaintiff recover of the said defendant, the mare Rollo, if she can be had; and the damages aforesaid assessed for her detention, and also his costs about his suit in this behalf expended; and it is further considered by the court, that in case said mare can not be had, that the plaintiff recover of the defendant the sum of one hundred and thirty-five dollars, the value of the mare, as ascertained by the jury, together with the damages as aforesaid assessed, and his costs," etc.

On this judgment the clerk issued a fieri facias, in the usual form, for the value of the mare, to wit, one hundred and thirty-five dollars and ten dollars damages and costs.

The fieri facias was levied on the land of Dolby, lying in the county of Coffee. It was sold, and the plaintiff, Waite, became the purchaser, and instituted his action of ejectment against Dolby, and at the February term, 1847, of the Circuit Court of Coffee County, the case was tried by Judge Marchbanks, and a jury, and a verdict and judgment were entered for the plaintiff. The defendant appealed.[91]

GREEN, J.: The action of detinue is for the thing detained, and damages for detention; the value of the property is ascertained by

[91] The argument of counsel, and part of the opinion is omitted.

the jury, and the judgment is in the alternative, for the sum so found as the value, in case the thing recovered can not be had. In fixing this value, the practice is to render a verdict for the highest price, in order to enforce the delivery of the thing. It is manifest from the form of the judgment, and the object in fixing the value, that a distringas for the thing recovered must be issued in the first instance. How can it be ascertained that the thing can not be had, unless by the return of process, which had issued to obtain it? And the judgment for the money is conditional; if the thing can not be had; therefore, if execution for the money issue, before it is ascertained by the return of a distringas, that the thing can not be had, it is certainly erroneous, if not irregular, and void. It is often difficult to determine whether process be irregular, or erroneous only; but we are inclined to regard the execution in this case as irregular and void.

It is not like the case of the issuance of a fieri facias after a year and a day without a scire facias. In such case there is a regular judgment which authorizes the fieri facias; but by reason of the lapse of time, it is erroneous to take it out, until a scire facias has been issued to revive the judgment. But here, the judgment for the value of the mare, was, on condition the mare could not be had; until it was ascertained the mare could not be had, there was nothing in this judgment for the execution to rest upon.

But be this as it may, there can be no doubt but that the distringas should first issue—until which, the issuance of the fieri facias was unlawful. This being the case, the defendant in error acquired no title by his purchase of the land, though the sale might have been valid had a stranger purchased; 1 Tenn. 222.

Judgment reversed.[92]

---

[92]At common law upon judgment in detinue a distringas issued to compel the delivery of the goods and if the goods were not recovered execution issued against the person or property of the defendant. 3 Blackst. Comm. 413; 8 Viner's Abr. 40, pl. 15; Keilwey 64 b (1504); *Peters* v. *Heyward*, Cro. Jac. 682 (1623); *Molloy* v. *M'Daniel*, 1 Overt (Tenn.) 222 (1805); *Garland* v. *Bugg*, 5 Munf. (Va.) 166 (1816); *Jordan* v. *Williams*, 3 Rand. (Va.) 501 (1825); *Boyd* v. *Williams*, 5 J. J. Marsh. (Ky.) 56 (1830); *Vines* v. *Brownrigg*, 18 N. Car. 239 (1835); *Jordan* v. *Thomas*, 34 Miss. 72, 69 Am. Dec. 387 (1857); *Keith* v. *Johnson*, 1 Dana (Ky.) 604 (1833); *Robinson* v. *Richards*, 45 Ala. 354 (1871); *Ex parte Vaughan*, 168 Ala. 187, 53 So. 270 (1910).

Under the modern English practice a judgment for the recovery of any property other than land or money may be enforced by writ for the delivery of the property, Order XLII, rule 6; Ann. Pr. Appendix H, 10. And ordinarily the sheriff either causes the property to be returned or levies the value assessed in the judgment. But the court may, under Order XLVIII, rule 1, upon the plaintiff's application, order the execution to issue for the delivery of the chattel, without giving the defendant the option of returning the property on paying the value assessed. Upon this order, the writ directs that if the property can not be found, the sheriff shall distrain the defendant by all his lands and chattels till the defendant deliver the property. Where the order to return the chattels is personal, disobedience of the defendant may be punished as contempt. *Hymas* v. *Ogden*, L. R. (1905) 1 K. B. 246. So also, where the writ of delivery would be futile, as where the defendant is out of the jurisdiction, a writ of assistance may issue. *Wyman* v. *Knight*, L. R. 39 Ch. Div. 165 (1888); *Borde* v. *Othon*, 23 W. R. 110 (1874).

REBER *v.* SCHROEDER

SUPREME COURT OF PENNSYLVANIA, 1908

221 Pa. 152

Appeal by defendant from judgment of Common Pleas of Berks County on verdict for plaintiff in the case of *Sarah Reber* v. *Daniel E. Schroeder, executor of George F. Hagenman.*[93]

FELL, J.: This was an action of replevin for certificates of stock of a national bank, which were in the name and possession of George F. Hagenman at the time of his death, and were found in his safe by his executor, enclosed in a sealed envelope, with a power of attorney transferring them to the plaintiff.

The thirteenth and fourteenth assignments relate to the verdict and the judgment entered thereon, and give rise to questions under the Act of April 19, 1901, P. L. 88, regulating the practice in replevin. The defendant had entered a claim property bond and retained possession of the stock certificate. The verdict rendered was for the plaintiff without a finding of the value of the shares and damages for their detention, and the judgment entered was a general one in favor of the plaintiff. At common law and before the Act of 1901, where the defendant retained possession of the property, the action proceeded for damages only. The property could not be recovered from him, nor could he tender it in satisfaction of the verdict. The giving of the claim property bond put an end to the plaintiff's title, which was thereupon turned into a chose in action to be compensated for in damages. The defendant was the only party who could have a judgment de retorno habendo; *Fisher* v. *Whoollery,* 25 Pa. 197; *Schofield* v. *Ferrers,* 46 Pa. 438; *Rockey* v. *Burkhalter,* 68 Pa. 221; Morris on Replevin, 210.[94] The Act of 1901 has changed the practice in this respect, and a plaintiff who has not been given possession of the property is entitled to a writ of retorno habendo, as well as to a writ of fieri facias, to recover the value of the property and damages awarded, and costs. It is provided by section 5, that where judgment has been entered for the plaintiff for the want of a sufficient affidavit of defense, for a portion of the goods and chattels replevied, he may proceed to recover such goods and chattels by a writ of retorno habendo, or the value thereof, after assessment of damages on a writ of inquiry.[95] Section 7 pro-

[93] The arguments of counsel and part of the opinion are omitted.

[94] In *Powell* v. *Hinsdale,* 5 Mass. 343 (1809), it is said, per Parsons, C. J.: "In replevin each party may be an actor. If the plaintiff prevails, he shall have damages for the unlawful caption and detention by the defendant and also his costs. But if the defendant prevails, he shall have a return of the goods, and damages for the taking of them on the writ and also his costs." *Easton* v. *Worthington,* 5 Serg. & R. (Pa.) 130 (1819); *Parker* v. *Simonds,* 49 Mass. (8 Metc.) 205 (1844); *Frazier* v. *Fredericks,* 24 N. J. L. 162 (1853); *State* v. *Carrick,* 70 Md. 586, 17 Atl. 559, 14 Am. St. 387 (1889).

[95] In *Painter* v. *Snyder,* 22 Pa. Super. Ct. 603 (1903), the mere entry of judgment was held not error. But in *Wilburn* v. *Cologers,* 97 Miss. 511, 52 So. 794 (1910), judgment by default without writ of inquiry was held erroneous.

vides that "if the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party, and he may, at his option, issue a writ in the nature of a writ of retorno habendo, requiring the delivery thereof to him, with an added clause of fieri facias as to damages awarded and costs; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof, and the damages awarded and costs; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs, in the same manner that recovery is had upon other official bonds."

Before the Act of 1901, the verdict rendered in this case would have been of no avail to the plaintiff, because a judgment retorno habendo could not have been entered upon it; *Moore* v. *Shenk*, 3 Pa. 13; and there was no award of damages for which a writ of execution could issue. But by virtue of the act, the plaintiff is entitled to a return of the property, and she may have a writ to enforce the right. A judgment on the verdict is sufficient to sustain such a writ. She has not obtained all that she was entitled to by the trial, because of the failure of the jury to find the value of the property and damages for its detention, but the judgment on the verdict is not invalid.

The judgment is affirmed.[96]

---

[96]Accord: *Duroth Mfg. Co.* v. *Cauffiel*, 243 Pa. 24, 89 Atl. 798 (1914). In replevin and the corresponding code remedy "claim and delivery" the procedure is now largely statutory and varies greatly. As in the principal case, the statutes in some jurisdictions permit the successful party to elect whether he will take a return of the property or payment of its value. *White* v. *Graves*, 68 Mo. 218 (1878); *Koelling* v. *August Gast Co.*, 103 Mo. App. 98, 77 S. W. 474 (1903); *Oskaloosa Steam Engine Works* v. *Nelson*, 54 Iowa 519, 6 N. W. 718 (1880); *Martin* v. *Ferguson* (Ky.), 111 S. W. 281 (1911). Under codes which allow an execution for the return of the specific property and, if the property can not be had, satisfaction by levy, it is generally held that a return of the property and payment of damages by the unsuccessful party discharges his liability. *Dwight* v. *Enos*, 9 N. Y. 470, Seld. Notes 226 (1854); N. Y. Code Civ. Pro., § 1731; Cal. Code Civ. Pro. § 667; *Bales* v. *Scott*, 26 Ind. 202 (1866); *Marks* v. *Willis*, 36 Ore. 1, 58 Pac. 526, 78 Am. St. 752 (1899); *Carson* v. *Applegarth*, 6 Nev. 187 (1870); *Johnson* v. *Gallegos*, 10 N. Mex. 1, 60 Pac. 71 (1900); *Pabst Brewing Co.* v. *Rapid Safety Filter Co.*, 56 Misc. 445, 107 N. Y. S. 163 (1907); *Leve* v. *Frazier*, 42 Ore. 141, 70 Pac. 376 (1902); *N. Y. & Brooklyn Brewing Co.* v. *Angels*, 144 App. Div. 655, 129 N. Y. S. 713 (1911); *Chestnut* v. *Sales*, 44 Mont. 534, 121 Pac. 481 (1912). Compare *Swants* v. *Pillow*, 50 Ark. 300, 70 S. W. 167, 7 Am. St. 98 (1887). In New Jersey a defendant who has given bond and retained possession, if unsuccessful, can not tender the goods to plaintiff in lieu of damages. *Leinbeck & Betz Brewing Co.* v. *Tarrant*, 79 N. J. L. 372, 75 Atl. 474 (1910). In Wyoming an unsuccessful plaintiff can not satisfy a judgment by a return of the property. *Montana & W. Oil Co.* v. *Gibson*, 113 Pac. 784 (1911).

LEEPER, GRAVES & CO. *v.* FIRST NAT. BANK

SUPREME COURT OF OKLAHOMA, 1910

26 Okla. 707

Error from the District Court of Kiowa County. The First National Bank of Hobart was pledgee in possession of eight steel bridges, valued at $4,855, held as security for an indebtedness of $6,000. On April 18, 1904, Leeper, Graves & Co., a corporation, having given bond signed by itself and D. S. Dill, J. G. Leeper and John W. Graves, brought replevin and the property was taken from the possession of the bank and delivered to it. On the trial of this action of replevin judgment was rendered in favor of the bank for the return of the property if it could be had, and if the same could not be returned, then for $4,855 with costs. Afterwards an agent of Leeper, Graves & Co. went to Hobart and tendered a return of the bridges, which was rejected by the bank, after checking over the bridges and ascertaining that certain parts were missing, and an action was begun by the bank within a few days on the replevin bond. On the trial the court found, as a conclusion of law, that to escape liability on the bond it was necessary for the company to tender a return of the complete structures or to have obligated itself to make them complete by supplying any necessary parts found to be missing. Judgment was entered for the bank for $4,855, with interest. The defendants bring error.[97]

DUNN, C. J.: No contention is made that the company did not receive these missing articles in the replevin action, nor was there any evidence offered to show that they were withheld in bad faith, nor were not such that either of the parties could go into the open market and readily purchase and replace, as they would any other item of personal property. And, if the rule obtains that a plaintiff who in an action of replevin under a judgment requiring him to return the property taken may return less than the whole when part is lost, then to our minds the bond which is given in such a case would be responsive to the requirements suggested by the court in its second conclusion, wherein it is held that the company should have obligated itself to have made the structures complete by supplying any necessary part found to be missing. On the question as to whether a plaintiff against whom a judgment has been rendered in replevin may return a portion of the property, and receive credit therefor, being liable for the unreturned portion on his bond, or whether he must tender all or none, the authorities are not entirely harmonious. The following cases hold that a partial return with a monetary liability for the unreturned portion is not permissible, and that a plaintiff under such a state of facts must return all or pay the judgment for the entire amount of the property

[97] The statement of facts is abridged from the opinion of the court, part of which is omitted.

received. *Whetmore* v. *Rupe*, 65 Cal. 237; *Pauls* v. *Mundine*, 37 Tex. Civ. App. 601; *Kingsley* v. *Sauer*, 17 Misc. (N. Y.) 544; *Stevens* v. *Tuite*, 104 Mass. 328. However, by far the greater number of authorities, and in our judgment with the better reasoning, depending somewhat on the particular facts in each case, support the rule that in an action of replevin where the plaintiff secures possession of the property and on the trial a judgment is rendered requiring its return or the value thereof in case a return can not be had, it is the duty of plaintiff in good faith to tender in as good condition as received all of the same within a reasonable time, and it is the duty of defendant to accept such a tender and receive the property or a substantial part thereof and recoup any damages suffered on the replevin bond.[98]

In the case at bar, as the parts of the different bridges which were not tendered constituted but a small fraction of the entire amount of the property taken, and there was no showing that the same could not be readily procured in the open market, or were within plaintiff's control, we can see no reason why a party in such a case should not be required to accept the great bulk of the property involved and recoup on the bond given for such as was missing. Counsel for the bank in their brief ask if a wagon be replevied, and plaintiff be required to restore, could he tender the tail-gate, and require its acceptance? To this we will say that we think not, but should the wagon be tendered entire with the exception of the tail-gate, which it was not within the power of the plaintiff to restore—that is, was lost and not wilfully withheld—we believe that its acceptance would be required with an allowance of damages therefor. So it will be seen the conclusion to which we have come is that by the bond given the company had obligated itself to make the structures tendered complete as they were when they received them, or, to the same end, make the obligees whole for all loss or damages suffered.[99]

Cause remanded to trial court to enable plaintiffs to establish and recover damages in accordance with this opinion.

---

[98]Citing Wells on Replevin, § 422; Shinn on Replevin, § 679; Cobbey on Replevin, § 1389; *Washington Ice Co.* v. *Webster*, 125 U. S. 426, 31 L. ed. 799 (1887); *Larabee* v. *Cook*, 8 Kans. App. 776, 61 Pac. 815 (1899); *Harts* v. *Wendell*, 26 Ill. App. 274 (1887); *Edwin* v. *Cox*, 61 Ill. App. 567 (1895); *Allen* v. *Fox*, 51 N. Y. 562, 10 Am. Rep. 641 (1873); *Yelton* v. *Slinkhard*, 85 Ind. 190 (1882); *Archer* v. *Long*, 47 S. Car. 556, 25 S. E. 84 (1896); *Reavis* v. *Horner*, 11 Nebr. 479, 9 N. W. 643 (1881); *Johnston* v. *Mason*, 64 N. J. L. 258, 45 Atl. 618 (1899); *Pickett* v. *Bridges*, 10 Humph. (Tenn.) 171 (1849); *Pabst Brewing Co.* v. *Rapid Filter Co.*, 54 Misc. 305, 105 N. Y. S. 962 (1907). Accord: *Franks* v. *Matson*, 211 Ill. 338, 71 N. E. 1011 (1904); *Trundle* v. *Register P. Co.*, 58 Colo. 81, 143 Pac. 282 (1914); *Schleaning* v. *West*, 34 S. Dak. 356, 148 N. W. 604 (1914). See *Black* v. *Black*, 74 Cal. 520, 16 Pac. 311 (1888), and compare *Burke* v. *Koch*, 75 Cal. 356, 17 Pac. 228 (1888).

[99]In *Rennebaum* v. *Atkinson*, 21 Ky. L. J. 587, 52 S. W. 828 (1899), where part of the property could not be delivered, it is said: "The plaintiff in such a case is entitled to the whole of the property claimed, or, if the whole of the property is not produced, he is entitled to the value of the whole of it unless good cause be shown for its nonproduction." The successful party is not under any obligation to accept property not identical with that taken under the writ of replevin. *Irvin* v. *Smith*, 68 Wis. 227, 31 N. W. 912 (1887);

(b) Realty

CALVART *v.* HORSFALL

AT NISI PRIUS IN THE KING'S BENCH, 1802

4 *Esp.* 167

Trespass for the mesne profits of certain premises, situated in the parish of Pancras.

The plaintiff proved the judgment in ejectment, in a cause of Doe on the demise of *Calvart* v. *Roe.*

To prove that the defendant was in possession of the premises at the time of the ejectment, the plaintiff called the person by whom the declaration in ejectment was served upon the premises; he said, that he served the declaration on a person who said his name was Horsfall; and that he explained to him the notice, at the foot of the declaration to appear.

The defendant had let the plaintiff into possession of the premises; but no writ of possession had ever been executed after the judgment in ejectment.

Gibbs said, the only question was, whether the plaintiff could maintain an action of trespass for the mesne profits, without having a writ of possession executed? That as possession was necessary to maintain trespass, it appeared by the proceedings in the ejectment, that he was not in possession when the ejectment was brought, nor legally so until put into possession under the writ of possession.

LORD ELLENBOROUGH: It has been proved that the plaintiff has been in possession by consent of the party. I hold, that being in possession by the act of the party when he brings this action, that that is sufficient to entitle him to maintain the action.[1]

Eickhoff v. *Eikenbary,* 52 Nebr. 332, 72 N. W. 308 (1877). But in debt on a replevin bond it was held a sufficient defense that the losing party surrendered all the property replevied except a part which was missing, and that instead of the latter other and more valuable articles had been delivered to and accepted by the successful party. *Sands* v. *Frits,* 84 Pa. St. 15 (1877). Compare *Commonwealth* v. *Schroeder,* 1 Berks Co. (Pa.) 61 (1908), where it was held that the voluntary surrender and acceptance of stock certificates, the subject of the replevin suit was not a waiver of an action on the bond to recover dividends received pending the suit.

If the goods have been destroyed or disposed of so that a return can not be had the judgment need not be in the alternative. *Richardson Drug Co.* v. *Teasdall,* 59 Nebr. 150, 80 N. W. 488 (1899), where it was established that the property in controversy had been destroyed by fire. *Clouston* v. *Gray,* 48 Kans. 31, 28 Pac. 983 (1892); *Burke* v. *Koch,* 75 Cal. 356, 17 Pac. 228 (1888); *Seligman* v. *Armando,* 94 Cal. 314, 29 Pac. 710 (1892); *Washington Ice Co.* v. *Webster,* 62 Maine 341, 16 Am. Rep. 462 (1873). See also *Johnson* v. *Mason,* 70 N. J. L. 13, 56 Atl. 137 (1903); *Maguire* v. *Pan-American Amusement Co.,* 205 Mass. 64, 91 N. E. 135, 137 Am. St. 422 (1910).

[1]Accord: *Jackson* v. *Combs,* 7 Cow. (N. Y.) 36 (1827); *Caldwell* v. *Walters,* 22 Pa. St. 378 (1853) semble. A writ of hebere facias possessionem is not indispensable in all cases. Where possession is peaceably surrendered by the defendant, the entry of the plaintiff is sufficient without writ. *Lacy* v.

UPTON *v.* WELLS

IN THE KING'S BENCH, 1588

1 *Leon.* 145

In an ejectione firmae by Upton against Wells, judgment was given for the plaintiff, and upon the habere facias possessionem the sheriff returned that in the execution of the said writ he took the plaintiff[2] with him and came to the house recovered, and removed thereout a woman and two children, which were all the persons which upon diligent search he could find in the said house, and delivered to the plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after three other persons which were secretly lodged in the said house expulsed the plaintiff again; upon notice of which he returned again to the said house to put the plaintiff in full possession, but the other did resist him, so as without peril of his life and of them that were with him in company he could not do it. And upon this return the court awarded a new writ of execution, for that the same was no execution of the first writ,[3] and also awarded an attachment against the parties.

Berry, 2 Sid. 155 (1659); *Withers* v. *Harris*, 2 Ld. Raym. 806 (1702); *Taylor* v. *Horde*, 1 Burr. 60 (1757), at pp. 88, 113; *Doe ex dem. Stephens* v. *Lord*, 7 Ad. & El. 610 (1837) semble; *Jackson* v. *Haviland*, 13 Johns. (N. Y.) 229 (1816); *Bowman* v. *Violet*, 4 T. B. Mon. (Ky.) 351 (1827); *Davis* v. *Lee*, 2 B. Mon. (Ky.) 300 (1842); *Creighton* v. *Proctor*, 66 Mass. (12 Cush.) 433 (1853); *Vasquez* v. *Ewing*, 24 Mo. 31, 66 Am. Dec. 694 (1856); *Fisher* v. *Johnston*, 25 U. C. Q. B. 616 (1866); *Craft* v. *Yeaney*, 66 Pa. St. 210 (1870); *Witbeck* v. *Van Rensselaer*, 64 N. Y. 27 (1876); *Bowar* v. *Chicago West Division R. Co.*, 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81 (1891). But in *Hildreth* v. *Thompson*, 16 Mass. 191 (1809), the rule is said to be otherwise "where the judgment is for an uncertain portion of or interest in land; for in such case it can not be ascertained into what part of the land the demandant has a right of entry."

At common law "unless the writ of possession were issued within a year and a day after judgment, the judgment must be revived." *King* v. *Davis*, 137 Fed. 198 (1903). For the present English practice see Rules of the Supreme Court, Order XLVII; *Savage* v. *Bentley*, 90 L. T. 641 (1904).

[2]The plaintiff, or his agent, must accompany the officer to the premises, and, at his peril, point out the property to be delivered. *Queen* v. *Ayleworth*, Saville 28 (1581); *Floyd* v. *Bethell*, 1 Roll. (K. B.) 322 (1617); *Connor* v. *West*, 5 Burr. 2672 (1770); *Young* v. *Bruces*, 5 Litt. (Ky.) 324 (1824); *Jackson* v. *Rathbone*, 3 Cow. (N. Y.) 291 (1824); *Den ex dem. McAndrews* v. *O'Hanlin*, 18 N. J. L. 127 (1840); *Johnson* v. *Nevill*, 65 N. Car. 677 (1871). If more property is taken than is awarded by the judgment, the court will restore the injured party to that of which he is improperly deprived. *Roe* v. *Dawson*, 3 Wils. 49 (1770); *Jackson* v. *Hasbrouck*, 5 Johns. (N. Y.) 366 (1810); *Jackson ex dem. Sutherland* v. *Stiles*, 5 Cow. (N. Y.) 418 (1826); *Den ex dem. Hicks* v. *Johnson*, 12 N. J. L. 275 (1831); *Coleman* v. *Doe ex dem Henderson*, 3 Ill. (2 Scam.) 251 (1840); *Shaw* v. *Bayard*, 4 Pa. St. 257 (1846); *Natches* v. *Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581 (1856); *Skinner* v. *Hannan*, 81 Hun (N. Y.) 376, 30 N. Y. S. 987, 63 N. Y. St. 180 (1894); *Russell* v. *Webb*, 96 Ark. 190, 131 S. W. 456 (1910). See also *Oetgen* v. *Ross*, 47 Ill. 142, 95 Am. Dec. 468 (1868).

[3]The execution is not complete until the sheriff and his officers are gone and the plaintiff left in full, quiet and peaceful possession. *Dame*

CLARK *v.* PARKINSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1865

92 *Mass.* 133

Petition by a deputy sheriff for an attachment for contempt against the respondents, for resisting the service of a writ of possession issued by this court and committed to the petitioner for service.

At the hearing in this court, before Hoar, J., notice having been given to the respondents, it appeared that the suit in which the writ of possession issued was brought against a widow who, at the time of the commencement thereof, was in actual occupation of the premises, her son and daughter living with her and claiming title to the premises under their father. The son, who was one of the respondents in this petition, was then under twenty-one years of age. The other respondent married the daughter after the commencement of the suit, and at the time of the marriage came upon the premises, claiming title in right of his wife. The respondents were not parties to the suit in which the writ of possession issued; and they did not resist the removal of the defendant in that suit from the premises, or oppose the officer's putting the plaintiff in possession, so far as that could be done without removing them; but they did threaten and were prepared to use force to prevent the officer from removing them from the land, contending that the precept gave him no right or authority so to expel them, and that it could be fully executed without putting them out.

Molineux v. *Fulgam*, Palm. 289 (1622); *Kingsdale* v. *Mann*, 6 Mod. 27 (1703); *Den ex dem. Smallwood* v. *Bilderback*, 16 N. J. L. 497 (1838); *Scott* v. *Richardson*, 2 B. Mon. (Ky.) 507 (1842); *Farnsworth* v. *Fowler*, 1 Swan (Tenn.) 1, 55 Am. Dec. 718 (1851); *Witbeck* v. *Van Renselaer*, 64 N. Y. 27 (1876); *Lankford* v. *Green*, 62 Ala. 314 (1878); *People ex rel. Daniel C. Scudder* v. *Cooper*, 20 Hun (N. Y.) 486 (1880); *Newell* v. *Wrigham*, 102 N. Y. 20, 6 N. E. 673 (1886); *Lee Chuck* v. *Quan Wo*, 81 Cal. 222, 22 Pac. 594, 15 Am. St. 50 (1889); *Loeb* v. *Waller*, 110 Ala. 487, 18 So. 268 (1895); *Butler* v. *Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. 563 (1906). Thus, the writ is not duly executed where the sheriff gives formal possession but the plaintiff is obliged to leave immediately to avoid personal violence by a mob. *Gresham* v. *Thun*, 3 Metc. (Ky.) 287, 77 Am. Dec. 174 (1860). So, where on the removal of the tenants another person with an officer to support his pretensions assumes possession. *Union Township* v. *Bayliss*, 40 N. J. L. 60 (1878). But a physical expulsion is unnecessary if the defendant peaceably submits to the writ. *Smith* v. *White*, 5 Dana (Ky.) 376 (1837), where it is said: "A defendant may surely yield obedience to the process of the court, without being forcibly turned out, neck and heels." In *Wengert* v. *Zimmerman*, 33 Pa. St. 508 (1859), it is said: "It is very common, and in the winter time a most proper mode of executing such writs, to take a lease on a nominal rent from the defendant, and leave him in possession." The removal of the defendant's furniture, while proper, is not indispensable in all cases. *Witbeck* v. *Van Rensselaer*, 64 N. Y. 27 (1876); *Union Township* v. *Bayliss*, 40 N. J. L. 60 (1877); *Commonwealth* v. *Lennon*, 172 Mass. 434, 52 N. E. 521 (1899).

Upon these facts the case was reserved for the determination of the whole court.[4]

HOAR, J.: The court are of opinion that an attachment for contempt should not be granted; because an officer, serving a writ of possession, has no authority by his precept to remove from the land described therein any person who is not a defendant in the suit in which the writ issued, nor holding under a defendant, and who was in occupation of the land at the time the suit was commenced, claiming by a title independent of the defendant. The writ of possession is the result or fruit of a judgment; and the judgment is the legal determination of the rights of those only who are parties or privies to it. Even a judgment in rem is binding upon all persons in interest, only because all persons in interest are required, and have a right to come in and assert their title to the property which the judgment binds, in the suit or proceeding in which the judgment is rendered.

It is apparent that the judgment of the court in a real action, although it may determine, as against the tenant, that he held unlawful possession of the demanded premises at the time of bringing the suit, can not decide this as against any person not privy in estate with him. The judgment may be recovered upon default, which is taken as the confession of the tenant, and can bind no one but himself and those claiming under him. If it is the result of a trial, there is no good reason why it should be held more conclusive upon the possession than upon the title. In either case it is a judgment between the parties, upon such a case as they have chosen or have been able to present.

The officer who serves the writ may take a bond of indemnity, and the English text-books all state that it is the usual practice to do so.[5] This may dispose of the objection that he is required by his precept to do a precise thing, and that he should not have to determine at his peril whether he is thereby committing a trespass. The writ is procured by the demandant in the real action, and it is for him to take care that he includes in his suit all the actual parties in possession, claiming title.

We find that the text-books on the duties of sheriffs all state in general terms that in serving a writ of possession he should remove all persons from the premises; and the digest and dicta in reported cases undoubtedly contain a similar statement. They all adopt substantially the same language, which is taken from *Upton*

---

[4] The arguments of counsel are omitted.

[5] If there is a reasonable doubt whether a person in possession should be turned out, the officer before acting may demand indemnity. *Dupont* v. *Ervin*, 2 Brev. (S. Car.) 400 (1810); *Long* v. *Neville*, 36 Cal. 455, 95 Am. Dec. 199 (1868); *Grace* v. *Mitchell*, 31 Wis. 533, 11 Am. Rep. 613 (1872); *Hamberger* v. *Seavey*, 165 Mass. 505, 43 N. E. 297 (1896). But the officer is not clothed with any judicial power to pass on the rights of the parties, and, unless instructed differently by the court, his duty is to deliver possession according to the mandate of the writ. *Mason* v. *Paynter*, 1 Ad. & El. (N. S.) 974 (1841); *Bowie* v. *Brahe*, 4 Duer 676, 2 Abb. Prac. 161, 11 N. Y. Super. Ct. 676 (1855); *Powell* v. *Lawson*, 49 Ga. 290 (1873); *Hall* v. *Dexter*, Fed. Cas. No. 5929, 3 Sawy. (U. S.) 434 (1875); *Huntington* v. *Taylor*, 156 Fed. 700 (1907), affd. 185 Fed. 703.

v. Wells, 1 Leon. 145; Com. Dig. Execution, A. 5; Crocker on Sheriffs, sections 554, 556, 557; Allen on Sheriffs, 251; N. E. Sheriff, 141. In *Howe* v. *Butterfield,* 4 Cush. (Mass.) 305, it was said by Mr. Justice Wilde that an officer was authorized and bound, for the purpose of delivering possession of a house, "to remove from the possession all persons therein, and especially those claiming under the party against whom judgment had been recovered." But all these expressions must be construed secundum subjectam materiem, and as referring to the tenant, or persons in privity with the tenant, or mere strangers or intruders. No case has been cited in which it was decided that one in possession before the commencement of the suit could be lawfully dispossessed upon an execution issuing upon a judgment in a suit between third persons. And in Gwynne on Sheriffs, 418, the rule is stated otherwise, and the true distinction made. In *Ex parte Reynolds,* 1 Caines (N. Y.) 500, it is said to be "a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession, to which he is no party"; and a writ of restitution was ordered. To the same effect are the Kentucky cases in 5 Littell 305; 1 A. K. Marsh. 333; 2 A. K. Marsh. 40. See also 2 Tidd's Practice 1033; *Johnson* v. *Fullerton,* 44 Pa. St. 466.

Petition dismissed.[6]

---

[6]Under the writ of possession the officer must remove not only the defendant but all others in possession in subordination to or in privity with him. *Ex parte Black,* 2 Bailey (S. Car.) 8 (1830); *Howe* v. *Butterfield,* 58 Mass. 302, 50 Am. Dec. 785 (1849); *Den ex dem. Thomas Hancock* v. *Fen,* 24 N. J. L. 544 (1854); *Hanson* v. *Armstrong,* 22 Ill. 442 (1859); *Johnson* v. *Fullerton,* 44 Pa. St. 466 (1863); *Wetherbee* v. *Dunn,* 36 Cal. 147, 95 Am. Dec. 166 (1868); *Fiske* v. *Chamberlin,* 103 Mass. 495 (1870); *Monongahela V. C. M. A.* v. *Patterson,* 96 Pa. St. 469 (1880); *Gray* v. *Nunan,* 63 Cal. 220 (1883); *Huerstal* v. *Muir,* 64 Cal. 450, 2 Pac. 33 (1884); *Ritchie* v. *Johnson,* 50 Ark. 551, 8 S. W. 942, 7 Am. St. 118 (1888); *Hessel* v. *Johnson,* 124 Pa. St. 233, 16 Atl. 855 (1889); *Kelly* v. *Northrop,* 159 Pa. St. 537, 28 Atl. 364 (1894); *State* v. *Staed,* 143 Mo. 248, 45 S. W. 50 (1897); *Campbell* v. *Rockwell,* 62 App. Div. 266, 70 N. Y. S. 1101 (1901); *Harrod* v. *Burke,* 76 Kans. 900, 92 Pac. 1128, 123 Am. St. 179 (1907); *Delacey* v. *Commercial Trust Co.,* 51 Wash. 542, 99 Pac. 574 (1909); *Hillyard* v. *Fick,* 89 Kans. 108, 130 Pac. 675 (1913). But not strangers to the proceeding in possession under a claim of title anterior to the suit nor persons whose possession is distinct from that of the parties to the action. *Howard* v. *Kennedy,* 4 Ala. 592, 39 Am. Dec. 307 (1843); *Kercheval* v. *Ambler,* 7 J. J. Marsh. (Ky.) 626, 23 Am. Dec. 446 (1832); *Smith* v. *Pretty,* 22 Wis. 655 (1868); *Goerges* v. *Hufschmidt,* 44 Mo. 179 (1869); *Mayo* v. *Sprout,* 45 Cal. 99 (1872); *Irving* v. *Cunningham,* 77 Cal. 52, 18 Pac. 878 (1888); *Bushong* v. *Rector,* 32 W. Va. 311, 9 S. E. 225, 25 Am. St. 817 (1889); *Hessel* v. *Fritz,* 124 Pa. St. 229, 16 Atl. 853 (1889); *Krepps* v. *Mitchell,* 156 Pa. St. 320, 27 Atl. 161 (1893); *Haviland* v. *Chase,* 116 Mich. 214, 74 N. W. 477, 72 Am. St. 519 (1898); *Cypreanson* v. *Berge,* 112 Wis. 260, 87 N. W. 1081 (1901); *Moseby* v. *Fleck,* 242 Pa. 154, 88 Atl. 940 (1913); *Puckett* v. *Jameson,* 157 Ky. 172, 162 S. W. 801 (1914).

Where the recovery is of an undivided interest in an estate, it is not the duty of the sheriff to eject the co-tenants, but to put the plaintiff in possession with the others. *Dupont* v. *Ervin,* 2 Brev. (S. Car.) 400 (1810); *Ash* v. *McGill,* 6 Whart. (Pa.) 391 (1841); *Doe ex dem. Hellyer* v. *King,* 6 Exch. 791 (1851); *Tevis* v. *Hicks,* 38 Cal. 234 (1869); *Stokes* v. *Morrow,* 54 Ga. 597 (1875); *Skinner* v. *Hannan,* 81 Hun (N. Y.) 376, 30 N. Y. S. 987, 63 N. Y. St. 180 (1894).

JACKSON EX DEM. MILLER *v.* HAWLEY

SUPREME COURT OF NEW YORK, 1834

11 *Wend.* (*N. Y.*) 182

At the last January term judgment was entered for the plaintiff upon a cognovit. About the first of March a writ of habere facias possessionem, returnable at the next May term, was issued and executed by delivering possession of the premises claimed to an agent of the plaintiff, who continued in possession four or five days; when one Alfred Pitcher entered by force, as alleged on the part of the plaintiff; Pitcher, however, insisting that he found the possession vacant when he entered. A motion was made for an alias habere facias, which was resisted by Pitcher, on various grounds and among others, that he was the owner of the property. The court, however, in the decision of the motion, say that he is not a stranger to the suit, and that he is estopped from alleging title, in himself, no collusion being alleged between the plaintiff and Hawley, the defendant, who gave the cognovit.[1]

SAVAGE, C. J.: The question is, whether the plaintiff can have a new writ, or whether he is compelled to bring a new action. It is remarkable that so little is to be found on this subject, either in our own or the English books. In our own reports we find nothing, and in the English reports contradictory decisions. The old rule is stated by Adams, in his Treatise on Ejectment, page 309. If the lessor be ousted by the defendant after possession delivered to him, upon a hab. fac. poss. and before the writ is returned and filed, he shall have a new writ or attachment; but if he be ousted by a stranger, he shall be driven to a new ejectment. The reason assigned for the distinction is this, that the defendant shall not by his own act keep the possession which has been recovered from him by due course of law; but as to the stranger, there has been no trial between him and the plaintiff, and he may have the better title. In *Goodright* v. *Hart,* 2 Str. 830, the plaintiff had obtained judgment by prevailing upon the tenants not to appear; after writ of possession executed, the landlord prevailed upon the tenants to attorn to him. The plaintiff moved for a new writ of possession, which the court refused saying, if immediately after the writ executed, the tenants had attorned, a new writ should have been issued, but not where the possession had been delivered for about a month, as it had in that case. In *Rex* v. *Harris,* Ld. Raym. 482, Holt, Chief Justice, said if possession be delivered by hab. fac. poss. and that is avoided immediately, the party shall have a new writ; but if, after restitution awarded, the party enjoys quiet possession, and then is removed by new force, he must resort to a new remedy. In *Kingsdale* v. *Mann,* Salk. 321, 6 Mod. 27, possession was delivered

[1] Part of the opinion of the court is omitted.

about nine in the morning, and at six at night the plaintiff was forcibly put out of possession; the court doubted whether a new writ should issue. They said if the disturbance had been made before the officer had departed, an attachment would have been issued. Powell quoted a case where an entry upon the plaintiff was made the same day of the execution of the writ, and the Court of Common Pleas granted a new writ; to which Holt answered, so they might, if the first writ were not returned, otherwise not. From this case the remedy would seem to depend upon the fact whether the first writ had been returned; and from the case in Strange, upon the plaintiff's enjoying quiet possession for a month or more. But these cases and some others, it is supposed, were disregarded and perhaps overruled by the case of *Doe* v. *Roe,* 1 Taunt. 55, where the court held that an alias can not issue after a writ is executed; and it is added that if it could, the plaintiff, by not having the first writ returned, might retain the right of suing out a new writ, as a remedy for any trespass by the tenant within twenty years after the date of the judgment. In that case possession had been delivered to the plaintiff in February, and in October following the tenant forcibly entered. This last case is certainly not obligatory upon us, and all the older cases agree that where the entry upon the plaintiff is before the return of the writ and such entry is by the tenant or under his title, the plaintiff is entitled to a new writ. In one case the court were willing to extend this remedy for a month; in another they doubted where the execution of the writ and the subsequent forcible entry were upon the same day. From the remark of Lord Holt, the writ in that case must have been returned before the motion was made; and he probably applied the reason given in 1 Taunt, that if the first execution is returned satisfied, there can be no alias. I am satisfied that the practice in this state has been to award a new writ of possession where the first has not been returned, where the defendant has entered upon the plaintiff's possession.[8]

Motion granted.

---

[8]The plaintiff, if dispossessed by the defendant before the return of the writ, may apply for another writ of possession or call upon the sheriff to place him again in possession. *Dame Molineux* v. *Fulgam,* Palm. 289 (1622); *Ratcliff* v. *Tate,* 1 Keb. 779 (1664); *Dogget* v. *Roe,* Comb. 150 (1689); *King* v. *Harris,* 12 Mod. 268 (1699); *Linehan* v. *Anthony,* Batty 453 (1826); *Doe ex dem. Thompson* v. *Mirehouse,* 2 Dowl. 200 (1833); *Doe ex dem. Pitcher* v. *Roe,* 9 Dowl. 971 (1841); *Doe ex dem. Lloyd* v. *Roe,* 2 Dowl. (N. S.) 407, 7 Jur. 352 (1842); *Massey* v. *Ejector,* 1 Jones Exch. 457 (1835); *Stacpoole* v. *Walsh,* L. R. 6 Ir. 444 (1880); *Jackson ex dem. Thompson* v. *Stiles,* 9 Johns. (N. Y.) 391 (1812); *United States* v. *Slaymaker,* 4 Wash. C. C. 169, Fed. Cas. No. 16313 (1821); *Griffeth* v. *Dobson,* 3 Pen. & Watts (Pa.) 228 (1831); *Gresham* v. *Thum,* 3 Metc. (Ky.) 287, 77 Am. Dec. 174 (1860); *Van Rensselaer* v. *Witbeck,* 2 Lans. (N. Y.) 489 (1870). If the sheriff has returned the writ showing due execution, the plaintiff, if afterward dispossessed, is left to his remedy by action. *Loveless* v. *Ratcliff,* 1 Keb. 785 (1664); *Doe ex dem. Pate* v. *Roe,* 1 Taunt. 55 (1807); *Wilson* v. *Chanton,* 6 L. T. (N. S.) 255 (1862); *Mayo* v. *Chiles,* 3 T. B. Mon. (Ky.) 258 (1826); *Dent* v. *Simmons,* 7 J. J. Marsh. (Ky.) 42 (1831); *Hinton* v. *McNeil,* 5 Ohio 509, 24 Am. Dec. 315 (1832); *Fowler* v. *Currie,* 2 Dana (Ky.) 52, 26 Am. Dec. 436 (1834);

Weatherhead v. *Cunningham*, 4 Dana (Ky.) 78 (1836); *Hough* v. *Norton*, 9 Ohio 45 (1839); *Atwood* v. *State*, 59 Kans. 728, 54 Pac. 1057, 68 Am. St. 393 (1898).

In Pennsylvania under the Act of February 1, 1834, P. L. 26, P. & L. Dig. (2d ed.) 3034, alias and pluries writs may be allowed by the court on cause shown. *Philadelphia* v. *Hood*, 3 Pa. Super. Ct. 373 (1897). In California under § 1210 of the Code of Civil Procedure a person re-entering after being dispossessed by process of law is guilty of contempt of court and upon conviction the court must issue an alias process to restore to possession the person entitled. *Batchelder* v. *Moore*, 42 Cal. 412 (1871); *Huerstal* v. *Muir*, 62 Cal. 479 (1880); *Dutra* v. *Pereira*, 135 Cal. 320, 67 Pac. 281 (1902). See also *Baker* v. *Butte Water Co.*, 40 Mont. 583, 107 Pac. 819 (1910).

CHAPTER VII

APPEAL AND ERROR

"'A writ of error'. This writ lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution, and thereupon it is called breve de errore corrigendo. But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, si judicium redditum sit, and that judgment must regularly be given by judges of record, and in a court of record, and not by any other inferior judges in base courts, for thereupon a writ of false judgment doth lie." Coke on Littleton, f. 288b.[1]

SECTION 1. NATURE OF THE REMEDY

STEVENS *v.* CLARK

CIRCUIT COURT OF APPEALS OF UNITED STATES, SEVENTH CIRCUIT, 1894

62 *Fed.* 321

Appeal from the Circuit Court of the United States for the Northern District of Illinois.[2]

BUNN, J.: There is in this case a preliminary question of jurisdiction to be decided. The action was one at law, to recover damages upon a contract for the delivery of ice. The case was tried before a jury in January, 1893, and a verdict rendered for the plaintiff on January 13, 1893, for $4,397.97. On February 20, 1893,

---

[1] At common law a writ of error was an original writ, issuing out of chancery at the instance of a party aggrieved by any error in the foundation, proceeding, judgment or execution of a suit in a court of record and was in the nature of a commission to the judges of the superior court to examine the record upon which the judgment was given and to affirm or reverse it according to law. *Jaques* v. *Cesar*, 2 Saund. 100 (1670) note; 2 Bac. Abr. 187. The writ was grantable ex debito justitiae in all cases except in treason and felony. *Queen* v. *Paty*, 2 Salk. 504 (1705); *Yates* v. *People*, 6 Johns. (N. Y.) 337 (1810); *Lynes* v. *State*, 5 Porter (Ala.) 236, 30 Am. Dec. 557 (1837); *Lippitt* v. *Bidwell*, 87 Conn. 608, 89 Atl. 347 (1913); 2 Tidd's Pr. (9th ed.) 1134; 1 Archbold's Pr. 1345.

In England the judicature acts have abolished proceedings in error and substituted an appeal in all cases where the Court of Appeal has occasion to deal with proceedings in the High Court. These acts give the Court of Appeal more elastic powers than were formerly exercised on writ of error. Appeals are by way of rehearing with full discretionary power to receive further evidence on questions of fact; and to give any judgment or make any order which ought to have been made or to grant a new trial. Appeals are brought in a summary way and no petition, case or other formal proceedings other than notice of motion are necessary. Rules of the Supreme Court, Order LVIII, rules 1-20. Judicature Act of 1873, §§ 18, 19. An appeal lies from the Court of Appeal to the House of Lords, which appeal is by way of petition praying for a review of the order or judgment appealed from. Appellate Jurisdiction Act of 1876, §§ 3, 4.

[2] Part of the opinion of the court is omitted.

a motion for a new trial was overruled, and judgment entered for the plaintiff upon the verdict. On April 19th, an appeal was prayed for and allowed. The case was argued upon the merits on October 5, 1893, without any objection being raised as to the jurisdiction of this court to hear the case. It was afterwards discovered by the court that no writ of error had ever been prayed for or issued, and, the attention of counsel being called to the fact, argument was had and briefs were filed on the question whether or not this court could take jurisdiction of the case by consent, without a writ of error ever having been issued. If it could, then the objection on this ground must be considered as waived by the parties having argued and submitted the case upon the merits without objection.

We are of opinion that this court has not obtained jurisdiction of the case, and that the appeal must be dismissed. The appropriate and only mode of bringing cases of law for review before this court is a writ of error. An appeal is applicable only in chancery cases. The distinction is obvious, and has been steadily observed and maintained by the United States Supreme Court for a century. Equity cases must be brought up by appeal, which brings up the entire record upon the facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for the correction of errors of law; that is to say, a writ of error carries up nothing but questions of law, and these questions are to be determined according to the facts found in the record. An appeal carries up everything. It substitutes the higher court in place of the lower, and all questions, whether of fact or of law, depending upon evidence or law, may be re-examined by the appellate court, just as they were originally examined by the lower court having original jurisdiction. This was the practice in England at the time of the adoption of our constitution, and had been for a long time; but by some oversight or omission in the original judiciary act of September 24, 1789 (1 Stat. ch. 20), this distinction was not preserved, and that statute (section 22) provided generally for the review of cases going up from the circuit court, whether legal or equitable, by writ of error; so that in all cases, whether at law or in equity or admiralty, a writ of error was the proper proceeding to obtain a review in the Supreme Court. After this law had remained in force about fourteen years, from September, 1789, to March, 1803, this distinction, which had always existed in the English practice, was found so important that congress changed the law, by act of March 3, 1803 (2 Stat. ch. 40), by providing that, in cases of equity and admiralty and maritime jurisdiction, and of prize and no prize, an appeal should be allowed to the Supreme Court. The effect of this provision was to repeal, by implication, the law of 1789, so far as that allowed a writ of error in a case in equity or admiralty, and to harmonize the system of appellate jurisdiction, and make it conform to the ancient and well-established principles of judicial proceedings. The writ of error, in cases at common law, remains in force, and submits to the revision of the Supreme Court only the law. The remedy by appeal is confined to

equity and admiralty cases, and brings before the appellate court the facts as well as the law. These remedies could never in the United States courts be used interchangeably. *The San Pedro,* 2 Wheat. (U. S.) 132.

There can be no doubt that the law of 1891 (chapter 517, section 6),[3] providing that the circuit court of appeals shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decrees and judgments of the district and circuit courts in certain defined cases, preserves the same distinction which has hitherto so long existed, and that the proper proceeding in cases in equity is an appeal, and in cases at law a writ of error. If the language of this provision were to be construed literally, either an appeal or writ of error might be resorted to for the purpose of taking cases either at law or in equity to this court. But the provision should be construed with reference to the hitherto existing law and practice in these cases. There can be no presumption that Congress intended to change the practice unless that intention is plainly manifested by the language of the act.

The Supreme Court has uniformly held that it can obtain appellate jurisdiction in a case at law only by the issuing by the proper authority of a writ of error, and by filing the same in the court which rendered the judgment. *Brooks* v. *Norris,* 11 How. (U. S.) 204. Consent will not give jurisdiction; and if, at any time, the record does not show the necessary facts to give the court jurisdiction, the court will dismiss the case. The jurisdiction of all the United States courts is special. The Supreme Court and the circuit court of appeals possess no appellate power in any case unless conferred upon them by act of congress; nor can such jurisdiction, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes. *Barry* v. *Mercien,* 5 How. (U. S.) 103; *United States* v. *Curry,* 6 How. (U. S.) 106. In *McCollum* v. *Eager,* 2 How. (U. S.) 61, it was decided by the Supreme Court that a decree in chancery can not be brought up for review by a writ of error. In *Sarchet* v. *United States,* 12 Pet. (U. S.) 143, which was an action at law upon a bond (opinion by Chief Justice Taney), it was held that the case could not be brought to the Supreme Court by an appeal, but must come up on writ of error, to give the court jurisdiction; and the court say in that case it had been so repeatedly held by that court. In *Ballance* v. *Forsyth,* 21 How. (U. S.) 389 (opinion by Chief Justice Taney), the same doctrine was reaffirmed; and it was held further, that where an appeal had been taken and dismissed, and a motion made to reinstate the case, and a stipulation to that effect signed and filed by the parties, that consent could not give jurisdiction where the law did not.

In the case at bar no writ of error has ever been issued, and the time for issuing one has expired a month prior to the hearing. The result is, the appeal must be dismissed.[4]

---

[3] Supplied by Federal Judicial Code of 1911, § 128; U. S. Comp. Stats. (1913), § 1120.

[4] In *Wiscart* v. *Dauchy,* 3 Dall. (U. S.) 321, 1 L. ed. 619 (1796), it is said by Ellsworth, C. J.: "The judicial statute of the United States speaks of an

RAND *v.* KING

SUPREME COURT OF PENNSYLVANIA, 1890

134 *Pa. St.* 641[5]

WILLIAMS, J.: The contents of the paper books, and the character of the oral suggestions made in this case, and some others at the present term, lead us to believe that it is desirable to call attention once more to the difference between the several modes of review in use in this state. Prior to the act of May 9, 1889,[6] there were three of these in common use, and the peculiar characteristics of each were well understood by the profession. That most generally employed was the writ of error, which lay against any final judgment in any court of record, and against such interlocutory and

---

appeal and of a writ of error but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to control, modify, or change, the fixed and technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely; subjecting the facts as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." *Jennings* v. *The Perseverance,* 3 Dall. (U. S.) 336, 1 L. ed. 625 (1897); *Blaine* v. *The Carter,* 4 Dall. (U. S.) 22, 1 L. ed. 724 (1800); *United States* v. *Wonson,* 1 Gall. (U. S.) 5, Fed. Cas. No. 16750 (1812); *United States* v. *Goodwin,* 7 Cranch. (U. S.) 107 (1812); *Loveless* v. *Ransom,* 109 Fed. 391 (1901); *Evansville R. Co.* v. *Terre Haute,* 161 Ind. 26, 67 N. E. 686 (1903); *Wingfield* v. *Neall,* 60 W. Va. 106, 54 S. E. 47 (1907).

Nelson v. *Lowndes County,* United States Circuit Court of Appeals, Fifth Circuit (1899), 93 Fed. 538. Bill in equity in the circuit court for an injunction to restrain a trustee, under a deed of trust to secure notes, from selling the land. An injunction was granted but afterward a decree for its dissolution was entered unless the principal and interest due on the notes was paid within a given time. The defendants objected to the refusal of the court to allow counsel fees and trustee's compensation and obtained a writ of error to remove the case to the circuit court of appeals. *Held,* The writ of error must be dismissed. An appeal is the only mode by which a decree in chancery or in admiralty, can be brought from an inferior federal court to this court, bringing up the whole case for re-examination on the merits, whether of law or fact. On writ of error the merits are not under consideration, but only such errors as the court can from the record see that the inferior court committed. Accord: *Marin* v. *Lalley,* 17 Wall. (U. S.) 14, 21 L. ed. 596 (1872); *Murdock* v. *Memphis,* 20 Wall. (U. S.) 590, 22 L. ed. 429 (1874); *Hayes* v. *Fischer,* 102 U. S. 121, 26 L. ed. 95 (1880); *Idaho & O. L. Imp. Co.* v. *Bradbury,* 132 U. S. 509, 33 L. ed. 433 (1889); *Fleitas* v. *Richardson,* 147 U. S. 538, 37 L. ed. 272 (1892); *Culberhouse* v. *Hawthorne,* 107 Ark. 462, 156 S. W. 421 (1913).

The only mode in which the Supreme Court of the United States may review a final judgment or decree of a state court is by writ of error. Federal Judicial Code of 1911, § 237; U. S. Comp. Stat. (1913), § 1214.

A writ of error lies only upon a judgment or award in the nature of a judgment, hence it was formerly held that the writ could not be brought before judgment was formally given, and although by later practice the writ was permitted to be tested before judgment entered, still an actual entry was essential to the validity of the writ before its return. *Tomlinson* v. *Armour,* 75 N. J. L. 748, 70 Atl. 314 (1907).

[5] Extract from opinion of the court.

[6] 1 P. & L. Dig. (2d ed.) 303.

auxiliary orders as have been made reviewable upon it by statute. On this writ the judgment is reviewed with reference to alleged errors which are pointed out by exceptions taken to the action of the trial court at the time when the rulings are made, and as a general rule the power of the Supreme Court is limited to the questions so raised. *Warsaw Tp. Poor D. v. Knox Tp. Poor D.*, 107 Pa. 301. In all equity cases, and those following the equity forms, an appeal from the decree complained of is the proper mode of review. It brings up the pleadings and the evidence on which the decree rests, and makes it necessary for the appellate court to examine, and see whether the decision is just and conscionable on the case that was presented to the chancellor who made it. The remaining method was by writ of certiorari. This writ brought up the record in any given case for review and correction, but it brought the record only. *Carlson License*, 127 Pa. 330; *Holland* v. *White*, 120 Pa. 228. The errors to be corrected must appear on the face of the record. *Chase* v. *Miller*, 41 Pa. 403; and the merits can not be inquired into upon this writ, but are left to the judgment of the court below. *Election Cases*, 65 Pa. 20. Neither the opinion of the court, nor the evidence forms any part of the record proper, and for that reason they will not be examined on certiorari. *Holland* v. *White*, 120 Pa. 228. The character of the proceedings to be reviewed, suggested, therefore, the method to be adopted, and the limits within which the practitioner should direct his preparation.

Since the Act of 1889, these modes remain applicable in the same cases, within the same limits, and with the same effect as before, the only difference being that now they are all called by the same name.[7] That act provides "that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari shall hereafter be taken in a proceeding to be called an appeal." It will be noticed that this act does not profess to extend the right of review, to change its extent in cases already provided for, or to modify in any manner its exercise. It simply provides that dissimilar proceedings shall be called by the same name. An appeal in name may therefore be a writ of error or a certiorari in legal effect, and it is necessary, in every case, to look into the record and determine at the outset of our examination whether what is "called an appeal" is such in fact, or is a writ of error or a certiorari.[8]

---

[7]Accord: *Gates* v. *Penna. R. Co.*, 154 Pa. St. 566, 26 Atl. 598 (1893); *Laird's Appeal*, 2 Pa. Super. Ct. 300 (1896); *Hapgood S. Co.* v. *Saupp*, 7 Pa. Super. Ct. 480 (1898); *In re Diamond Street*, 196 Pa. 254, 46 Atl. 428 (1900); *Commonwealth* v. *Carlucci*, 48 Pa. Super. Ct. 72 (1911).

[8]The statutory appeal differs so greatly in the various jurisdictions that it is almost impossible to lay down rules that will precisely indicate its effect. In some states the distinction between appeals in equity and writ of error are strictly adhered to; in others the appeal has some of the characteristics of both. See *People ex rel. Figaniere* v. *Justices of New York Marine Court*, 2 Abb. Pr. (N. Y.) 126 (1855); *Gormly* v. *McIntosh*, 22 Barb. (N. Y.) 271 (1856); N. Y. Code Civ. Proc., § 1293, et seq.; *Sale* v. *Pratt*, 36 Mass. (19 Pick.) 191 (1837); *Monk* v. *Guild*, 44 Mass. (3 Metc.) 372 (1841); *Kingsbury* v. *Sperry*, 119 Ill. 279, 10 N. E. 8 (1887); *Mason* v. *Alexander*, 44 Ohio St.

ANONYMOUS

Y. B. Hilary Term, 21 Edw. III, 9 pl. 25 (1347)

Note that Thorpe came to the bar and said how that A had brought a writ of account against one B and was awarded an account, and he said that a capias ad computandem issued against him and then he said that B sued a writ to have the record come into the King's Bench, alleging that he would have error for the sake of disturbing the account; and he prayed that the record might not be removed until an account was had. Stanford. No more shall it; for the plea is not ended until he has accounted; et ea de causa the court granted him that the record should not be removed.[9] Quod nota.

DITSON CO. *v.* TESTA

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1912

213 *Mass.* 109

RUGG, C. J.: This is an appeal from an order of the superior court overruling a plea in abatement. There has been no trial on the merits and no judgment. Hence the case is not properly here. It has been decided many times that this court has no jurisdiction to consider an appeal from any interlocutory decision until after judgment unless the judge reports the question. *Cotter* v. *Nathan & Hurst Co.*, 211 Mass. 31, and cases cited; *Cummings* v. *Ayer*, 188 Mass. 292; *Fay* v. *Upton*, 153 Mass. 6; *Shawmut Commercial Paper Co.* v. *Cram*, 212 Mass. 108.[10]

Appeal dismissed.

---

318 (1886); *White* v. *Howd*, 66 Conn. 264, 33 Atl. 915 (1895); *Bumbalek* v. *Peehl*, 95 Wis. 127, 70 N. W. 71 (1897); *Neb. Trust Co.* v. *Lincoln R. Co.*, 53 Nebr. 246, 73 N. W. 546 (1897); *Baker* v. *Belvin*, 122 N. Car. 191, 30 S. E. 337 (1898); *Lippitt* v. *Bidwell*, 87 Conn. 608, 89 Atl. 347 (1914); *Elbert* v. *Scott*, 90 Atl. (Del.) 587 (1914); *In re Hanbury*, 160 App. Div. 662, 146 N. Y. S. 44 (1914).

[9] Accord: *Wood* v. *Medcalf*, 1 Rolle 85 (1614); *Metcalfe's Case*, 11 Coke 38 (1614); *Beitler* v. *Zeigler*, 1 Pen. & W. (Pa.) 135 (1829).

Countess of Warwick v. *The Lord Berkeley*, Cro. Eliz. 644 (1598). In a writ of partition, judgment was quod partitio fiat. Whereupon, before the second judgment, Lork Berkeley brought a writ of error. But all the court held, that until the second judgment given, quod partitio stabilis fit, the record is not full, nor the judgment perfect; and therefore the record should not be removed.

[10] Accord: *Painter* v. *Lebanon Land Co.*, 178 Mich. 47, 144 N. W. 483 (1913). At law, the judgment or decree complained of must be final. *Fitzwilliams* v. *Copley*, Dyer 290 b (1569); *Russell* v. *Prat*, 1 Leon. 193 (1589); *Metcalfe's Case*, 11 Coke 38 (1614); *Dominus Rex.* v. *Decant, Dean &c. of Dublin*, 1 Str. 536 (1722); *Samuel* v. *Judin*, 6 East, 333 (1805); *Pentecost* v. *Magahee*, 5 Ill. (4 Scam.) 326 (1843); *Hayes* v. *Caldwell*, 10 Ill. (5 Gill.) 33 (1848);

BOZSON *v.* ALTRINCHAM URBAN DISTRICT COUNCIL

IN THE COURT OF APPEAL, 1903

L. R. (1903), 1 *K. B.* 547

Appeal by the plaintiff from an order of Wills, J.:

The action was brought to recover damages for breach of contract. An order in the following terms was made in chambers: "It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to official referee." The case came on before Wills, J., at Manchester, on March 6, 1902. The learned judge held that there was no binding contract between the parties, and made an order dismissing the action, upon which order judgment was subsequently entered for the defendants. The plaintiff appealed from the order of Wills, J. Notice of appeal was given on May 3, 1902.

Pickford, K. C. (Langton with him), for the defendants. There is a preliminary objection to the hearing of this appeal. It is an appeal from an interlocutory order, and the appeal is therefore out of time. The test for ascertaining whether an order is final or interlocutory, as laid down by the court of appeal in *Salaman* v. *Warner*, L. R. (1891), 1 Q. B. 734, is that an order is not a final

---

People v. *Thurston*, 5 Cal. 517 (1855); *Riley* v. *Farnsworth*, 116 Mass. 223 (1874); *Mackaness* v. *Long*, 85 Pa. St. 158 (1877); *Morse* v. *Rankin*, 51 Conn. 326 (1883); *Cooper* v. *Vanderveer*, 47 N. J. L. 178 (1885); *Comins* v. *Turner's Falls Co*, 140 Mass. 146, 3 N. E. 304 (1885); *Bender* v. *Penna. Co.*, 148 U. S. 502, 13 S. Ct. 640, 37 L. ed. 537 (1892); *Parker* v. *Harden*, 122 N. Car. 111, 28 S. E. 962 (1898); *Dorscheimer's Estate*, 9 Pa. Super. Ct. 422 (1899); *Tompkins* v. *Bowen*, 123 Mich. 377, 82 N. W. 51 (1900); *Noojin* v. *U. S.*, 164 Fed. 692 (1908); *Fox* v. *Fox*, 128 App. Div. 876, 113 N. Y. S. 121 (1908); *Hilliard* v. *Sterlingworth Co.*, 224 Pa. 132, 73 Atl. 191 (1909); *Miller* v. *Fitz*, 41 Pa. Super. Ct. 582 (1910); *Blanton* v. *West Coast R. Co.*, 58 Fla. 169, 50 So. 945 (1909); *Kirk* v. *Railway Co.*, 66 W. Va. 486, 66 S. E. 683 (1909); *Smith* v. *Dellitt*, 244 Ill. 75, 91 N. E. 94 (1910); *Finkelstein* v. *Lyon*, 159 Ill. App. 13 (1910); *Denver* v. *Brown*, 47 Colo. 513, 108 Pac. 971 (1910); *State ex rel Iba* v. *Mosman*, 231 Mo. 474, 133 S. W. 38 (1910); *Brooks* v. *Hargrave*, 162 Mich. 599, 127 N. W. 689 (1910); *Griffiths* v. *R. Co.*, 232 Pa. 639, 81 Atl. 713, Ann. Cas. 1912D, 13n (1911); *Allgair* v. *Hickman*, 82 N. J. L. 369, 81 Atl. 752 (1911); *Landmesser* v. *Hayward*, 157 App. Div. 74, 141 N. Y. S. 730 (1913); *Bonner* v. *Schmeltz*, 242 Pa. 481, 89 Atl. 579 (1913); *Zuccaro* v. *Nazzaro*, 216 Mass. 289, 103 N. E. 907 (1913).

In equity the English chancery practice permitted appeals from interlocutory decrees of the chancellor. In the United States this practice has not been adopted except in a few instances, usually provided by statute. *Forgay* v. *Conrad*, 6 How. (U. S.) 201, 12 L. ed. 404 (1848). As to when a decree in equity is final, see *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73 (1882); *McGourkey* v. *Toledo R. Co.*, 146 U. S. 536, 36 L. ed. 1079 (1892); *Mills* v. *Hoag*, 7 Paige (N. Y.) 18, 31 Am. Dec. 271 (1837); *Morgan* v. *Rose*, 22 N. J. Eq. 583 (1871); *Farmers Market Co.* v. *P. & R. Terminal R. Co.*, 142 Pa. St. 580 (1891); *Humphreys* v. *Stafford*, 71 Miss. 135, 13 So. 865 (1893); *Ex parte Elyton Land Co.*, 104 Ala. 88, 15 So. 939 (1893); *Palethorp* v. *Palethorp*, 168 Pa. St. 102, 31 Atl. 917 (1895); *Repass* v. *Moore*, 96 Va. 147, 30 S. E. 458 (1898); *Morton* v. *Beach*, 56 N. J. Eq. 791, 41 Atl. 214 (1898).

order unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. In the present case the decision of Wills, J., as given did in fact put an end to the litigation, but it would have been otherwise if the decision had been in favor of the plaintiff, because then the case would have had to go before the official referee. The order of Wills, J., was therefore, according to the rule enunciated in *Salaman* v. *Warner,* an interlocutory order. The principle of that case was affirmed in *In re Herbert Reeves & Co.,* L. R. (1902), 1 Ch. 29, but there is an earlier decision of the court of appeals, *Shubrook* v. *Tufnell,* L. R. 9, Q. B. Div. 621, which was not cited in *Salaman* v. *Warner,* and which appears to be in conflict with it.

Montague Lush, K. C. and M. Macnaghten, for the plaintiff, were not called upon.

The Earl of Halsbury, L. C.: The learned counsel for the defendants has very properly called our attention to the fact that the authorities on this point are not in harmony. I prefer to follow the earlier decision. I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time.

Lord Alverstone, C. J.: I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

Sir F. H. Jeune, P., concurred.

Objection overruled.[11]

---

[11]In *Bostwick* v. *Brinkerhoff,* 106 U. S. 3, 27 L. ed. 73 (1882), it is said by Waite, C. J.: "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." Compare *Chappell* v. *Funk,* 57 Md. 465 (1881); *Ex parte Norton,* 108 U. S. 237, 27 L. ed. 709 (1883); *Mower* v. *Fletcher,* 114 U. S. 127, 29 L. ed. 117 (1885); *Ex parte Spencer,* 95 N. Car. 271 (1886); *Connecticut Fire Ins. Co.* v. *Manning,* 177 Fed. 893 (1910); *Woglom* v. *Perth Amboy,* 80 N. J. L. 469, 75 Atl. 190 (1910); *Norton* v. *Shore Line,* 84 Conn. 24, 78 Atl. 587 (1911); *County Court of Denver* v. *Eagle Rock Gold Mining & Reduction Co.,* 50 Colo. 365, 115 Pac. 706 (1911); *Hynes* v. *Jennings,* 262 Ill. 268, 104 N. E. 697 (1914); *Jones* v. *Buckingham S. Co.,* 116 Va. 120, 81 S. E. 28 (1914); *Zappettini* v. *Buckles,* 167 Cal. 27, 138 Pac. 696 (1914), with *Penna. Steel Co.'s Appeal,* 161 Pa. St. 571, 29 Atl. 294 (1894); *People* v. *American Trust Co.,* 150 N. Y. 117, 44 N. E. 949 (1896); *North Point Co.* v. *Canal Co.,* 14 Utah 155, 46 Pac. 824 (1896); *Stegmaier* v. *Keystone Coal Co.,* 232 Pa. 140, 81 Atl. 187 (1911); *McMullen* v. *Kingsley,* 82 N. J. L. 258, 82 Atl. 46 (1912); *Commonwealth* v. *Bonner,* 238 Pa. 339, 86 Atl. 198 (1913); *Roth* v. *Mercantile Bank,* 41 App. (D. C.) 293 (1914); *Farris* v. *St. Paul's Baptist Church,* 216 Mass. 570, 104 N. E. 639 (1914); *Williams* v. *Huey,* 263 Ill. 275, 104 N. E. 1008 (1914); *Gouge* v. *Bennett,* 166 N. Car. 238, 81 S. E. 1065 (1914).

To entitle a judgment to review it should be formally entered as a record of the court below. *People* v. *McCutcheon,* 40 Mich. 244 (1879);

TOWNSEND *v.* MASTERSON, SMITH & SINCLAIR STONE DRESSING CO.

COURT OF APPEALS OF NEW YORK 1857

15 *N. Y.* 587

Motion by the defendants to dismiss an appeal taken by the plaintiff, on the ground that the parties had, intermediate the judgment of the special term and the hearing of the appeal at the general term, stipulated that no appeal should be brought to this court.

The action was brought in the superior court to compel the trustee for the Masterson Company to cancel a mortgage which the plaintiff had executed. The defendant set up, by way of counterclaim, that the plaintiff was indebted to it, and that the mortgage was held as security for that indebtedness. The case was tried before a referee who reported that there was due the Masterson Company $3,647.20 and judgment was entered in accordance with the report at the special term, both parties excepting to certain decisions against them. Subsequently, the attorneys for the parties, the plaintiff's attorney acting by his direction, signed the following agreement: "It is hereby mutually stipulated that the appeal in this case from the referee's report be brought to a hearing before the general term of this court as soon as practicable, and that no appeal shall be taken from the decision of the general term to the court of appeals." On the hearing at the general term the stipulation was incorporated in the record. The judgment of the general term affirmed the previous judgment with modifications.[12]

DENIO, C. J.: The suggestion made on the argument by the plaintiff's counsel, that the stipulation had relation only to the appeal on his part, seems not to be well founded. When the stipulation was signed, neither party had served any notice of appeal to the general term. Both parties had, however, taken exceptions to decisions of the referee, and it is clear from the stipulation in regard to time for making a case, and from the terms of the other stipulation upon which the motion is founded, that both parties contemplated appealing to the general term. That stipulation was mutual, therefore, in its terms and effect. Both parties concurred that they had reason for complaining of the repart of the referee, and they deliberately agreed that each should be content with what

Kilmer v. *Bradley*, 80 N. Y. 630 (1880); *Derleth* v. *De Graff*, 104 N. Y. 661, 10 N. E. 351, 1 Silvernail Ct. App. 327 (1887); *Gilpatrick* v. *Glidden*, 82 Maine 201, 19 Atl. 166 (1889); *Morgan* v. *Flexner*, 105 Ala. 356, 16 So. 716 (1894); *In re Pearsons*, 119 Cal. 27, 50 Pac. 929 (1897); *Wolff* v. *Wilson*, 25 Pa. Super. Ct. 266 (1904); *Griffiths* v. *Monongahela R. Co.*, 232 Pa. 639, 81 Atl. 713, Ann. Cas. 1912D, 13n (1911); *Franklin Co.* v. *Blake*, 257 Ill. 354, 100 N. E. 929 (1913); *Brown* v. *Cray*, 88 Conn. 141, 89 Atl. 1123 (1914). But compare *New Orleans R. Co.* v. *Morgan*, 77 U. S. 256, 19 L. ed. 892 (1869); *Spehn* v. *Huebschen*, 83 Wis. 313, 53 N. W. 550 (1892); *Nelson Theater Co.* v. *Nelson*, 216 Mass. 30, 102 N. E. 926 (1913).

[12]The statement of facts is abridged.

the general term should decide, and that they would not protract the litigation by an appeal to this court.

It is insisted by the defendants' counsel that the jurisdiction of this court is limited to hearing appeals upon their merits, and it can not enforce stipulations made by the parties in the subordinate courts. But certainly, the duty of hearing appeals involves the jurisdiction of determining whether a particular case is properly before us on appeal. It is perfectly competent for the parties to determine in the preliminary steps of the litigation, whether they will place the question in dispute in a condition to be reviewed here. They may omit to except to the decision of the court before whom the primary decision is made, or after excepting they may waive or abandon the exception absolutely or to a modified extent. There is no reason, therefore, why they may not mutually agree that exceptions which have been taken shall only be effectual to sustain an appeal to the general term of the same court. This is what has been done in effect in this case. We should not regard any less authentic evidence of such an arrangement than a plain stipulation in writing; but when we are furnished with such evidence, and especially where the court from which the appeal is taken has sanctioned the agreement by making it a part of the record, we ought to enforce it by refusing to pass upon the questions which have thus formally been waived.

The appeal must be dismissed with costs, to be paid by the appellant.[13]

Appeal dismissed.

---

[13]Accord: *Camden* v. *Edie*, 1 H. Bl. 21 (1788); *Galbreath* v. *Colt*, 4 Yeates (Pa.) 551 (1808); *Cuncle* v. *Dripps*, 3 P. & W. (Pa.) 291, 23 Am. Dec. 84 (1831); *Pritchard* v. *Denton*, 8 Watts (Pa.) 371 (1839); *Commonwealth* v. *Johnson*, 6 Pa. St. 136 (1874); *Gumm* v. *Fowler*, 2 El. & El. 890 (1860); *Cole* v. *Thayer*, 25 Mich. 212 (1872); *Jones* v. *Victoria Grading Dock Co.*, 36 L. T. (N. S.) 347 (1877); *Carroll* v. *Locke*, 58 N. H. 163 (1877); *New* v. *Fisher*, 11 Daly (N. Y.) 308 (1882); *Oliver* v. *Blair*, 66 Cal. XVIII, 5 Pac. 917 (1885); *Saling* v. *German Savings Bank*, 15 Daly (N. Y.) 527, 8 N. Y. S. 469, 28 N. Y. St. 880 (1890); *Rovno* v. *Lorentz*, 32 Pa. Super. Ct. 162 (1906); *Jones* v. *Spokane Land Co.*, 44 Wash. 146, 87 Pac. 65 (1906); *U. S. Consol. Raisin Co.* v. *Chaddock*, 173 Fed. 577 (1909); *Cramp & Co.* v. *Boyertown Burial Casket Co.*, 241 Pa 15, 88 Atl. 69 (1913); *Palmer* v. *Lavers*, 218 Mass. 286, 105 N. E. 1000 (1914). Contra: *Sanders* v. *White*, 22 Ga. 103 (1857); *State* v. *Judge of Fifth Dist. Ct.*, 14 La. Ann. 323 (1859); *Falkner* v. *Hunt*, 68 N. Car. 475 (1873); *Fahs* v. *Darling*, 82 Ill. 142 (1876); *Brown* v. *Galesburg Pressed Brick &c. Co.*, 132 Ill. 648, 24 N. E. 522 (1890). A release of errors, or agreement not to take an appeal given for value, after judgment will be enforced. Co. Litt. 289; *Van Houten* v. *Ellison*, 2 N. J. L. 235 (1807); *Cotton* v. *Wilson*, Minor (Ala.) 118 (1823); *Millar* v. *Farrar*, 2 Blackf. (Ind.) 219 (1829); *March* v. *Talbott*, 1 Dana (Ky.) 443 (1833); *Barnes* v. *Moody*, 6 Miss. (5 How.) 636, 37 Am. Dec. 172 (1841); *Wood* v. *Goss*, 21 Ill. 604 (1859); *Martin* v. *Hawkins*, 20 Ark. 150 (1859); *Ulshafer* v. *Stewart*, 71 Pa. St. 170 (1872); *Ogdensburg R. Co.* v. *Vermont R. Co.*, 63 N. Y. 176 (1875); *In re Hull Bank*, 13 Ch. Div. 261 (1879); *Mackey* v. *Daniel*, 59 Md. 484 (1882); *Powell* v. *Turner*, 139 Mass. 97, 28 N. E. 453 (1885); *Elwell* v. *Fosdick*, 134 U. S. 500, 33 L. ed. 998 (1890); *Johnson* v. *Halley*, 8 Tex. Civ. App. 137, 27 S. W. 750 (1894); *Southern R. Co.* v. *Glenn*, 98 Va. 309, 36 S. E. 395 (1900); *Keoughan* v. *Equitable Oil Co.*, 116 La. 773, 41 So. 88 (1906).

RICHESON *v.* RYAN

SUPREME COURT OF ILLINOIS, 1852

14 *Ill.* 74

Richeson brought this cause to this court by writ of error. Ryan filed his plea of release of errors, stating that Richeson had voluntarily paid the judgment against him, to which plea a demurrer was interposed.

TREAT, C. J.: Ryan recovered a judgment against Richeson. The latter paid the judgment before an execution issued, and then sued out a writ of error to reverse it. Did the payment operate as a release of errors? If the judgment had been collected by execution, there would not be a doubt of the right of Richeson to prosecute the writ of error.[14] A payment made under such circumstances would be compulsory, and would not preclude him from afterwards reversing the judgment, if erroneous, and then maintaining an action to recover back the amount paid. The payment in question must equally be considered as made under legal compulsion. The judgment fixed the liability of Richeson, and he could only avoid payment by procuring its reversal. He was not bound to wait until payment should be demanded by the sheriff. He was at liberty to pay off the judgment at once, and thereby prevent the accumulation of interest and costs. By so doing, he did not waive his right to remove the record into this court, for the purpose of having the validity of the proceedings tested and determined. The pleas are bad, and the demurrer must be sustained.[15]

Demurrer sustained.

---

[14]Accord: *Grim* v. *Semple*, 39 Iowa 570 (1874); *Meade* v. *Kansas City St. J. R. Co.*, 45 Iowa 699 (1877); *Verges* v. *Gonzales*, 33 La. 410 (1881); *Hixon* v. *Oneida Co.*, 82 Wis. 515, 52 N. W. 445 (1892); *Kenney* v. *Parks*, 120 Cal. 22, 52 Pac. 40 (1898); *Armstrong* v. *Douglas Park Building Assn.*, 176 Ill. 298, 52 N. E. 886 (1898); *Empire H. Co.* v. *Young*, 27 Misc. 226, 57 N. Y. S. 753 (1899); *Union Tr. Co.* v. *Bell*, 164 Ind. 701, 73 N. E. 1134 (1905); *Dodds* v. *Gregson*, 35 Wash. 402, 77 Pac. 791 (1904); *Feight* v. *Wyandt*, 79 Kans. 309, 99 Pac. 611 (1909); *Buckeye Refining Co.* v. *Kelly*, 163 Cal. 8, 124 Pac. 536 (1912); *Lott* v. *Davis*, 262 Ill. 148, 104 N. E. 199 (1914). So "Payment under a judgment which is made without the knowledge or approval of the party condemned is not an acquiescence by him in such judgment." *Anderson* v. *New Orleans Ry. & Light Co.*, 133 La. 896, 63 So. 395 (1913).

[15]Accord: *Dyett* v. *Pendleton*, 8 Cow. (N. Y.) 326 (1826); *Gordon* v. *Gibbs*, 11 Miss. (3 Sm. & M.) 473 (1844); *Erwin* v. *Lowry*, 7 How. (U. S.) 172, 12 L. ed. 655 (1849); *Peer* v. *Cookerow*, 14 N. J. Eq. 361 (1862); *Hill* v. *Starkweather*, 30 Ind. 434 (1868); *Belton* v. *Smith*, 45 Ind. 291 (1873); *Watson* v. *Kane*, 31 Mich. 61 (1875); *Jersey City* v. *Riker*, 38 N. J. L. 225, 20 Am. Rep. 386 (1876); *Hatch* v. *Jacobson*, 94 Ill. 584 (1880); *Page* v. *People*, 99 Ill. 418 (1881); *Hayes* v. *Nourse*, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. 891 (1887); *Burrows* v. *Mickler*, 22 Fla. 572, 1 Am. St. 217 (1886); *Chapman* v. *Sutton*, 68 Wis. 657, 32 N. W. 683 (1887); *Ferguson* v. *Millender*, 32 W. Va. 30, 9 S. E. 38 (1889); *Richmond & D. R Co.* v. *Buice*, 88 Ga. 180, 14 S. E. 205

SECTION 2. PARTIES

BLACK *v.* KIRGAN

SUPREME COURT OF NEW JERSEY, 1835

15 *N. J. L.* 45

A writ of error had been issued in this case, directed to the common pleas of the county of Burlington. On the return of the writ, H. W. Green, for the defendant in error, moved to quash the writ.

I—Because the writ is defective. It says, "to the great damage of John Whitaker," without showing in what right or character, he makes himself plaintiff in error.

II—Because admitting Whitaker to be a judgment creditor of Black, the defendant below (as by his assignment of errors he represents himself to be), yet he is not, as such, entitled to sue out this writ.

FORD, J.: This writ of error, on a judgment of David Kirgan against John Black does not conclude to the damage of John Black, nor is it sued by him, but to the great damage of John Whitaker.

No person can have a writ of error, on a judgment, unless, according to the common law, "he be a party or privy to the record, or be injured by the judgment." *Bac. Ab. Error, B.* The statute, which is merely an affirmance of the common law, is to the same

---

(1891); *Pittsburgh F. W. Ry. Co.* v. *Martin*, 53 Ohio St. 386, 41 N. E. 690 (1895); *Springer* v. *Merchants National Bank*, 67 Ill. App. 317 (1896); *MacEvitt* v. *Maass*, 64 App. Div. 382, 72 N. Y. S. 158 (1901); *Eastland* v. *Armstrong*, 117 Wis. 394, 94 N. W. 301 (1903); *Ogden* v. *Chehalis Co.*, 41 Wash. 45, 82 Pac. 1095 (1905); *Nashville C. & St. L. R. Co.* v. *Bean*, 33 Ky. L. R. 114, 109 S. W. 323 (1908); *Lindenborn* v. *Vogel*, 131 App. Div. 75, 115 N. Y. S. 962 (1909); *Eilers Piano House* v. *Pick*, 58 Ore. 54, 113 Pac. 54 (1911); *Patterson* v. *Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232n (1913); *Hoogendorn* v. *Daniel*, 202 Fed. 431 (1913); *Round* v. *Land & P. Co.*, 92 Kans. 894, 142 Pac. 292 (1914). Contra: *David* v. *East Baton Rouge*, 27 La. Ann. 230 (1875); *Powell* v. *Hernsheim*, 37 La. Ann. 581 (1885); *Sager* v. *Moy*, 15 R. I. 528, 9 Atl. 847 (1887); *Aldred* v. *Romero*, 5 N. Mex. 522, 25 Pac. 788 (1891); *Hintrager* v. *Mahoney*, 78 Iowa 537, 43 N. W. 522, 6 L. R. A. 50 (1889); *Drew* v. *His Creditors*, 49 La. Ann. 1641, 22 So. 956 (1897); *York* v. *Barnes*, 58 Kans. 478, 49 Pac. 596 (1897); *Rolette* v. *Pierce Co.*, 8 N. Dak. 613, 80 N. W. 804 (1899); *In re Black's Estate*, 32 Mont. 51, 79 Pac. 554 (1905); *Signor* v. *Clark*, 13 N. Dak. 35, 99 N. W. 68 (1904).

"When it is shown that the litigation or controversy has been ended or settled, or in some manner disposed of so far as the parties are concerned, or has ceased to be between parties having adverse interests, the appeal will be dismissed as presenting only a moot question." *Princeton Coal Co.* v. *Gilmore*, 170 Ind. 366, 83 N. E. 500 (1907). Accord: *Stone* v. *Davis*, 14 Mass. 360 (1817); *Garner* v. *Prewitt*, 32 Ala. 13 (1858); *Allegheny Bank's Appeal*, 48 Pa. St. 328 (1864); *Little* v. *Bowers*, 134 U. S. 547, 33 L. ed. 1016 (1889); *Cock* v. *Palmer*, 19 Abb. Pr. (N. Y.) 372, 24 N. Y. Super. Ct. 658 (1863); *Plogstart* v. *Rothenbucher*, 37 Mo. 452 (1866); *Bank of Martinez* v. *Jahn*, 104 Cal. 238, 38 Pac. 41 (1894); *Jouda* v. *Kaplan*, 84 N. Y. Supp. 863 (1903); *Shannon* v. *Mower*, 186 Ala. 472, 65 So. 338 (1914).

effect: "any party, or his legal representative, or other person who may be damnified or injured by a judgment, may sue forth a writ of error." Rev. Laws, 400, section 2. Mr. Whitaker does not pretend that he is a party or the legal representative of one, or a privy to the record, but says he is injured, damnified and aggrieved by the judgment, as a creditor of John Black. How he is such creditor, is not stated in the body of this writ, but it is shown collaterally; he has an execution levied on the property of John Black; but David Kirgan has a previous one, which Mr. Whitaker wishes to reverse and remove out of the way, so as to gain a preference for his own, and he alleges that the prior judgment injures and damnifies him.

Now this judgment can be no injury, in the legal sense of the word, to Mr. Whitaker, whether it be just, fraudulent or irregular.

If a just judgment, obtained bona fide by one creditor, could be a legal injury to another, no creditor could ever have a just judgment, for it would be an injury to somebody. If Kirgan's be an injury to Whitaker, then Whitaker's must be an injury to those creditors who are subsequent to him, and it would follow that no creditor could have a just judgment, without committing an injury in law. The proposition is therefore utterly fallacious.

If it be a fraudulent judgment, it is void as against creditors by the statute of frauds, and a judgment already void, can be no injury to them. But it can not be avoided on a writ of error, where the court must judge by the record alone, and can not look at anything behind it. This is not the mode of resisting a fraudulent judgment. The merits must be brought before the court, by affidavits, on a motion to set it aside, as in the case of *Barrows* v. *Bispham*, 6 Hals. (N. J.) 110; or *Reed* v. *Bainbridge*, 1 South. (N. J.) 351; or *Matthews* v. *Warne*, 6 Hals. (N. J.) 295, or by treating it as a nullity. Fraud can not be alleged in a writ of error, unless it appear on the face of the record itself. But supposing it to be fraudulent, as against creditors, it is a nullity, and can do them no harm.

So an irregular judgment against Black, can be no injury or damage to Whitaker, who is a third person. Suppose that there has been some omission, misprision, mistake or slip of the pen, in the form of entering it up, they do not affect the merits and justice of the judgment; therefore, they can not injure or damnify Mr. Whitaker. An amendment or release would cure them all. They might be to the injury of Black the defendant; but exactly the contrary as respects Mr. Whitaker. If he could take advantage of them, so as to put Kirgan's judgment aside, and gain a preference for his own, these irregularities would be to Mr. Whitaker's benefit instead of injury; the conclusion in the writ, that they are to his damage, would be an untruth, on the face of it.

The statute has made no change in the common law respecting who may have a writ of error. There is privity of person between a deceased party and his legal representative. So an heir, remainderman, reversioner, and in some cases, terre-tenants, are privies in estate; the execution may go against their lands, and damnify them; therefore they may have a writ of error; but Kirgan, by virtue of his judgment, can not have an execution against Whitaker or his

property. All he fears is, that it may prevent his getting Black's property. The injury is not to his person or his estate. It is only to his hopes. If this were allowable, then children might have a writ of error to reverse a judgment against their father; the township to reverse one against a pauper; a sheriff to reverse a judgment, after he had been amerced for neglecting to bring the money into court, on an execution; or bail, after they had been fixed, to reverse the judgment against their principal. If one creditor might bring a writ of error to reverse the judgment of another, so might every one, and there might be as many writs of error as there were creditors. But a man who is neither party nor privy in person or estate, can not be damnified by the judgment, and therefore shall not have a writ of error. This is the settled rule as stated in Com. Dig. Pleader, 3 B. 9, and therefore, this writ of error must be quashed.

HORNBLOWER, C. J.:[16] Sergeant Williams, in 2 Saund. 46, n. 6, says: "No person can bring a writ of error, unless he is a party or privy to the record, or is prejudiced by the judgment, the rule being, that a writ of error can only be brought by him who would have had the thing, if the erroneous judgment had not been given." The expression used by Sergeant Williams, and indeed to be found in all books—"or persons prejudiced by the judgment," is as comprehensive as the terms, "or other person damnified or aggrieved by the judgment," used in our statute. Yet, by the "person prejudiced by the judgment," is not intended any person who may happen incidentally to be prejudiced by it; but the person who would have had the thing, but for the erroneous judgment. Now what was the thing in dispute in the action between Kirgan and Black? Not the lands nor the goods and chattels of Black. They are the things which Whitaker is pursuing; but the judgment did not decide the title to them. The thing in question, was a certain debt due from Black to Kirgan. Now if Whitaker would have had that debt, but for this judgment, then he may have error.

It is unnecessary, however, to pursue this subject, for the plaintiff's counsel admits, that if our statute has not introduced a new rule, as to writs of error, he must fail; and I am clearly of opinion that it has not. In principle and practice, the doctrine contended for, would be extremely iniquitous. An erroneous and even a fraudulent judgment creditor, might defeat an honest plaintiff, who had established his debt, at the end of a tedious and expensive law suit.

I will only add, that no writ of error can in any case be sued by a third person, while the original parties to the record are alive, except such writ is expressly given by statute; as in the case of a reversioner or remainderman, after a recovery against the tenant for life, by force of 9 R. 2 ch. 3, 2 Saund. 46, n. 6. *Marquis of Winchester's Case*, 3 Coke 4 a.; 5 Mod. 397.

Where the writ of error is not prosecuted by the party on the record, but by the heir or other representative, or person entitled to it, by privity of estate or interest, the character in which he sues,

[16] A portion of the opinion is omitted.

must appear on the writ. So are the precedents, and such is the reason of the thing. Though, if heir, he need not in all cases, show, how he is heir. *William* v. *Gwyn*, 2 Saund. 46, and in n. 6.

Ryerson, J., concurred.

Writ quashed.[17]

MASTERSON *v.* HERNDON

SUPREME COURT OF UNITED STATES, 1870

77 U. S. 416

Appeal from the Circuit Court for the Western District of Texas, the case being thus:

Howard and others filed in the court below a bill of peace and for conveyance of pretended title to a tract of land described, against S. A. Maverick and J. H. Herndon, and on that bill the court decreed that the complainant "have and recover of the said S. A. Maverick and the said J. H. Herndon the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

---

[17]Accord: *Marquis of Winchester's Case*, 3 Coke 1 (1582); *William* v. *Gwyn*, 2 Saunders 46, note 6 (1681); *Anonymous*, 5 Mod. 397 (1699); *Richardson* v. *Richardson*, 2 Root (Conn.) 219 (1795); *Shirley* v. *Lunenburgh*, 11 Mass. 379 (1814); *Swan* v. *Picquet*, 3 Pick. (Mass.) 443 (1826); *Bryant* v. *Allen*, 6 N. H. 116 (1833); *Steel* v. *Bridenbach*, 7 Watts & S. (Pa.) 150 (1844); *Elcan* v. *Lancasterian School*, 2 P. & H. (Va.) 53 (1856); *Morris* v. *Garrison*, 27 Pa. St. 226 (1856); *Swackhamer* v. *Kline*, 25 N. J. Eq. 503 (1874); *Raleigh* v. *Rogers*, 25 N. J. Eq. 506 (1874); *Lawless* v. *Reagan*, 128 Mass. 592 (1880); *In re Madras Irrigation & Canal Co.*, L. R. 23 Ch. Div. 248 (1883); *In re Young*, L. R. 30 Ch. Div. 421 (1885); *United Tel. Co.* v. *Bassano*, L. R. 31 Ch. Div. 630 (1886); *In re Securities Ins. Co.*, L. R. (1894) 2 Ch. 410; *Poundstone* v. *Baldwin*, 145 Ind. 139, 44 N. E. 191 (1896); *Winne* v. *People*, 177 Ill. 268, 52 N. E. 377 (1898); *Gates Land Co.* v. *Olds*, 112 Wis. 268, 87 N. W. 1088 (1901); *Weise* v. *Chicago*, 200 Ill. 339, 65 N. E. 648 (1902); *The Milwall*, L. R. (1905) P. 155; *People ex rel.* v. *O'Connell*, 252 Ill. 304, 96 N. E. 1008 (1911); *Wick's Estate*, 50 Pa. Super. Ct. 614 (1912); *People ex rel.* v. *Lower*, 254 Ill. 306, 98 N. E. 557 (1912); *Altoona City* v. *Silverman*, 52 Pa. Super. Ct. 373 (1913); *Hadfield* v. *Cushing*, 35 R. I. 306, 86 Atl. 897 (1913); *Swan* v. *Tapley*, 216 Mass. 61, 102 N. E. 916 (1913); *Pake* v. *Leinkauf B. Co.*, 186 Ala. 307, 65 So. 139 (1914).

A successful party can not appeal from a judgment or decree wholly in his favor. *Bacon's Abridgment Error* (K. 4); *Holton* v. *Ruggles*, 1 Root (Conn.) 318 (1791); *Raymond* v. *Barker*, 2 Root (Conn.) 370 (1796); *Laughlin* v. *Peebles*, 1 P. & W. (Pa.) 114 (1829); *Watkins* v. *Martin*, 24 Ark. 14, 81 Am. Dec. 59 (1862); *Hayden* v. *Stone*, 112 Mass. 346 (1873); *Green* v. *Blackwell*, 32 N. J. Eq. 768 (1880); *Hooper* v. *Beecher*, 109 N. Y. 609, 15 N. E. 742, 2 Silvernail Ct. App. 1 (1888); *Northrop* v. *Jennison*, 12 Colo. App. 523, 56 Pac. 187 (1899); *Sadlier* v. *New York*, 185 N. Y. 408, 78 N. E. 272 (1906); *Rogers* v. *Penobscot Mining Co.*, 154 Fed. 606 (1907); *Midland V. R. Co.* v. *Fulgham*, 181 Fed. 91 (1910). Otherwise where he does not get all the relief sought. *Ingalls* v. *Lord*, 1 Cow. (N. Y.) 240 (1823); *Parker* v. *Newland*, 1 Hill (N. Y.) 87 (1841); *Seymour* v. *Belden*, 28 Conn. 443 (1859); *Hartman* v. *Belleville & O. R. Co.*, 64 Ill. 24 (1872); *Kingsley* v. *Delano*, 172 Mass. 37, 51 N. E. 186 (1898); *Blanchard* v. *Neill*, 83 N. J. Eq. 446, 91 Atl. 811 (1914).

From this decree Herndon appealed. In regard to Maverick, the petition, which was signed by counsel only, and was not sworn to, was this:

"Your petitioner says that his co-defendant, Maverick, refuses to prosecute this appeal with him."

Mr. P. Phillips, for the appellees, now objected that there was no valid appeal in the case, because the decree being a joint decree against Herndon and Maverick, Herndon alone had asked for an appeal.

Mr. W. W. Boyce, contra.

Mr. Justice Miller, after stating that a careful examination of the record satisfied the court that the decree was a joint decree, and that the appeal was clearly taken by Herndon alone, delivered its opinion as follows:

It is the established doctrine of this court that in cases of law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record.[18]

In the case of *Williams* v. *Bank of the United States*,[19] the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd* v. *Daniel*,[20] it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, and we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature.[21]

---

[18] Citing *Williams* v. *Bank of United States*, 11 Wheat. (U. S.) 414 (1826); *Owings* v. *Kincannon*, 7 Pet. (U. S.) 399, 8 L. ed. 727 (1833); *Wilson* v. *The Life & Fire Ins. Co. of N. Y.*, 12 Pet. (U. S.) 140 (1838).

[19] 11 Wheat. (U. S.) 414.

[20] *James Todd, Thomas Warren, et al.* v. *Chas. Daniel*, 16 Pet. (U. S.) 521 (1842).

[21] Citing Brooke's Abridgment 238, tit. "Summons and Severance"; 2 Rolle's Abridgment, same title 488; Archbold's Civil Pleadings 54; Tidd's

This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the circuit court for an appeal, that Maverick refused to prosecute the appeal with him.

We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join.[22] But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it

---

Practice 129, 1136, 1169 See note to *Detroit* v. *Guaranty Trust Co. of New York*, 93 C. C. A. 604, 168 Fed. 608 (1909).

Cannon v. *Abbot*, 1 Lev. 210 (1667), trespass against three. One pleads not guilty and thereupon issue and verdict for the defendant. Against the other two judgment by default and a writ of inquiry of damages. The two bring a writ of error. And although the writ of error be brought by two without the third, 'twas argued to be good because he can not be joined, for he being acquitted, and the judgment for him, he can not say that the judgment is to his damage; and so held the whole court, except Twysden, who held, that the writ of error ought to have been brought by all three. Accord: *Parker* v. *Lawrence*, Hob. 70 (1613); *Coe* v. *Turner*, 5 Conn. 86 (1823); *Shaw* v. *Blair*, 58 Mass. (4 Cush.) 97 (1849); *Jaqueth* v. *Jackson*, 17 Wend. (N. Y.) 434 (1837); *Outcalt* v. *Collier*, 8 Okla. 473, 58 Pac. 642 (1899); *Hubbard* v. *Burnet L. L. Co.*, 51 Ind. App. 97, 98 N. E. 1011 (1912). Contra: *Barnwell* v. *Graunt*, Style 190 (1649). See where judgment was against all, *Walter* v. *Stokoe*, 1 Ld. Raym. 71 (1694); *Fotterall* v. *Floyd*, 6 Serg. & R. (Pa.) 315 (1825).

[22] In *Doty* v. *Strong*, 1 Pinn. (Wis.) 165 (1842), it is said: "The more easy and legitimate practice would be to enter a rule against those persons named in the writ of error as plaintiffs and not appearing, either to appear and assign error or submit to be severed." Accord: *Fotterall* v. *Floyd*, 6 Serg. & R. (Pa.) 315 (1820); *Sheppard* v. *Fenton*, 9 N. J. L. 8 (1827); *Fagan* v. *Long*, 30 Mo. 222 (1860). And see *Cambria Trust Co.* v. *Union Trust Co.*, 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41 (1899); *Engleken* v. *Webber*, 47 Iowa 558 (1877); *Thompson* v. *Valarino*, 2 How. Pr. (N. Y.) 259 (1846); *Gertz* v. *Milwaukee R. Co.*, 153 Wis. 475, 140 N. W. 312 (1913). In *Pharo* v. *Parker*, 21 N. J. L. 332 (1848), where one of two joint debtors was summoned and appeared and made defense for both, he was permitted to appeal for both, it not appearing that his co-defendant refused to join in the appeal.

has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with the less regret, as there is still time to obtain another on proceedings not liable to the objection taken in this.[28]

Appeal dismissed.

FRENCH *v.* PETERS

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1901

177 Mass. 568[34]

This suit in equity was begun on June 12, 1895, by a writ in which Harriet C. Patch was joined as defendant with Peters, administrator of the estate of Peaslee, and with the Second National Bank of Haverhill. The relief sought was in substance to compel

---

[28]Accord: *Ruddock's Case,* 6 Coke 25 (1598); *Andrews* v. *Lord Cromwell,* Cro. Eliz. 891 (1600); *Hacket* v. *Herne,* 3 Mod. 134, Carth. 7 (1684); *Walter* v. *Stokoe,* 1 Ld. Raym. 71 (1694); *Ginger* v. *Cowper,* 2 Ld. Raym. 1403 (1724); *Brewer* v. *Turner,* 1 Strange 233 (1720); *Vavasor* v. *Faux,* 1 Wils. 88 (1745); *Andrews* v. *Bosworth,* 3 Mass. 223 (1807); *Phelps* v. *Ellsworth,* 3 Day (Conn.) 144 (1808); *Bradshaw* v. *Callaghan,* 8 Johns. (N. Y.) 558 (1811); *Gallagher* v. *Jackson,* 1 Serg. & R. (Pa.) 492 (1815); *Shirley* v. *Lunenburgh,* 11 Mass. 379 (1814); *Fotterall* v. *Floyd,* 6 Serg. & R. (Pa.) 315 (1820); *Caller* v. *Brittain,* Minor (Ala.) 27 (1821); *Emerick* v. *Armstrong,* 1 Ohio 513 (1824); *Sheppard* v. *Fenton,* 9 N. J. L. 8 (1827); *Johnson* v. *Johnson,* 1 Dana (Ky.) 364 (1833); *Gay* v. *Richardson,* 35 Mass. 417 (1836); *Whitaker* v. *Parker,* 2 Harr. (Del.) 413 (1838); *Doty* v. *Strong,* 1 Pinn. (Wis.) 165 (1842); *Miller* v. *Heard,* 6 Ark. 73 (1845); *Savage* v. *Walsh,* 24 Ala. 293 (1854); *Moore* v. *McGuire,* 26 Ala. 461 (1855); *Smetters* v. *Rainey,* 14 Ohio St. 287 (1863); *Cumberland Coal & Iron Co.* v. *Jeffries,* 21 Md. 375 (1863); *Van Buskirk* v. *Hoboken & N. Y. R. Co.,* 31 N. J. L. 367 (1865); *Saunders* v. *Saunders,* 49 Miss. 327 (1873); *Knight* v. *Weistsopf,* 20 Fla. 140 (1883); *McIntyre* v. *Sholty,* 139 Ill. 171, 29 N. E. 43 (1891); *Hardee* v. *Wilson,* 146 U. S. 179, 36 L. ed. 933 (1892); *Sipperley* v. *Smith,* 155 U. S. 86, 39 L. ed. 79 (1894); *Beardsley* v. *Arkansas R. Co.,* 158 U. S. 123, 39 L. ed. 919 (1895); *Richardson* v. *Greenwood Twp.,* 6 Kans. App. 521, 50 Pac. 941 (1897); *Gencarelle* v. *New York, N. H. & H. R. Co.,* 21 R. I. 216, 44 Atl. 174 (1899); *Slater* v. *Hamacher,* 15 App. D. C. 294 (1899); *McCallum* v. *Culpepper,* 41 Fla. 107, 26 So. 187 (1899); *Sellers* v. *Smith,* 143 Ala. 566, 39 So. 356 (1904); *Touhey* v. *McCagg,* 134 Ill. App. 56 (1907); *Taylor* v. *Lessnitzer,* 31 App. D. C. 92 (1908); *Provident Life & Trust Co.* v. *Camden R. Co.,* 177 Fed. 854 (1910); *Mills* v. *Teel,* 244 Ill. 39, 91 N. E. 83 (1910); *P. W. & B. R. Co.* v. *Stumpo,* 112 Md. 571, 77 Atl. 266 (1910); *Ibbs* v. *Archer,* 185 Fed. 37 (1911); *Burns* v. *Toney,* 27 Okla. 728, 117 Pac. 209 (1911); *Continental Ins. Co.* v. *Gue,* 51 Ind. App. 232, 98 N. E. 147 (1912); *Appleby* v. *Dowden,* 35 Okla. 707, 132 Pac. 349 (1913); *Continental Savings Bank* v. *Corey Bros. Const. Co.,* 205 Fed. 282 (1913); *West* v. *Johnson,* 66 Fla. 4, 62 So. 913 (1913). Contra: *Mattison* v. *Jones,* 9 How. Pr. (N. Y.) 152 (1854); *Giraud* v. *Beach,* 4 E. D. Smith (N. Y.) 337 (1855); *Home Savings Bank* v. *Traube,* 6 Mo. App. 221 (1878); *Turner* v. *Newell,* 129 Ga. 89, 58 S. E. 657 (1907); *Spokane Ranch & Water Co.* v. *Beatty,* 37 Mont. 342, 96 Pac. 727 (1908); *Cummings* v. *Reins Copper Co.,* 40 Mont. 599, 107 Pac. 904 (1910); *Dickens* v. *Dickens,* 174 Ala. 305, 56 So. 806 (1911); *Electrical Accessories Co.* v. *Mittenthal,* 146 App. Div. 647, 131 N. Y. S. 433 (1911).

[34]The reporter's statement of facts is omitted and the facts as given are taken from the opinion of the court, part of which is omitted. The decree appealed from was affirmed.

the payment to the plaintiff of a non-negotiable promissory note given by the defendant Patch to the intestate Peaslee in 1889, and also of a deposit of his in the defendant bank, both the note and the deposit book having been delivered to the plaintiff by Peaslee in his lifetime in consideration of services rendered to him and in pursuance of a contract made by him. The suit was brought in equity because both the note and the deposit were transferred to the plaintiff by one act of Peaslee and the plaintiff's right was denied by Peaslee's administrator as well as by the defendant Patch and by the bank.

The case was referred to a master and while the hearings were proceeding Harriet C. Patch died and Arthur D. Patch and George D. Whitten were appointed administrators of her estate, and were such administrators when the counsel who had filed her answer appeared at the hearing before the master and represented her estate as counsel for her administrators.

The master found and reported that the deposit and the note were the property of the plaintiff, that the note was a valid and subsisting obligation against the estate of Harriet C. Patch, that the complainant was entitled to a decree, that the defendant Peters as administrator of Peaslee's estate should assign the deposit and the note to the plaintiff, and that the bank should pay to the plaintiff the amount of the deposit, and that Harriet C. Patch should pay to the plaintiff the amount of the note.

The defendant Peters alone filed objections and exceptions to the master's report. These exceptions not being insisted upon the master's report was confirmed by the court and a decree entered in favor of the plaintiff, which decree among other things not now material required Peters as administrator of the estate of Peaslee to assign the note of Patch to the plaintiff and required "the defendants, Arthur D. Patch and George W. Whitten, administrators of the estate of the defendant, Harriet C. Patch" to pay to the plaintiff the amount of that note and interest.

The decree was entered on March 9, 1900. On March 13, 1900, Whitten as administrator of Patch moved the court to vacate the decree. On April 6, 1900, he filed in the cause, in his own name as administrator, an appeal to this court from the decree of March 9, 1900. On May 10, 1900, Arthur D. Patch as one of the administrators of Harriet C. Patch filed his written objection to the further prosecution of the appeal of Whitten, alleging that he was a coadministrator with Whitten and that the appeal was taken without Patch's knowledge or consent. On the same day the plaintiff moved that Whitten's appeal be dismissed because he had no right to appeal, because he did not file objections or exceptions to the master's report, and because Arthur D. Patch was coadministrator with Whitten and did not join in or authorize the appeal.

BARKER, J.: The right of appeal to the full court is given by our statutes to "any party aggrieved." Pub. Stat. ch. 151, par. 13, St. 1883, ch. 223, par. 2. The fact that such a party has filed no exceptions to the master's report, while it may preclude him from raising certain questions in the appellate court, is not a reason for dismissing

his appeal from a final decree. Upon such an appeal the question is open to him whether upon the facts found by the master the decree is justified by the bill and the record.

It is said to be the general rule that the appeal of a party aggrieved may be dismissed because other parties with whom he is joined as defendant have not appealed also. *Owings* v. *Kincannon*, 7 Pet. (U. S.) 399; *Lovejoy* v. *Irelan*, 17 Md. 525; *Masterson* v. *Herndon*, 10 Wall. (U. S.) 416. See also *Clifton* v. *Sheldon*, 23 How. (U. S.) 481, and 2 Encyc. of Pl. & Pr. 182, et seq. But it is otherwise when the codefendants have separate interests. *Todd* v. *Daniel*, 16 Pet. (U. S.) 521; *Brewster* v. *Wakefield*, 22 How. (U. S.) 118; *Day* v. *Washburn*, 23 How. (U. S.) 309.[25] Under our own practice, from a very early time, independent parties joined in an action have had the right without joining their codefendants to have reversed so much of an erroneous judgment as affected themselves. *Whiting* v. *Cochran*, 9 Mass. 532; *Shirley* v. *Lunenburg*, 11 Mass. 379, 384. The plaintiff in the present case does not contend that Whitten's appeal must be dismissed because the bank and Peaslee's administrator have not joined in the appeal. The only ground of dismissal urged is the nonjoinder of Patch who is Whitten's coadministrator.

The doctrine of the common law is that a suit in favor of the estate of a person deceased must be brought in the name of all living

---

[25] *Lancaster* v. *Keyleigh*, Cro. Car. 300 (1633). Though bail may have a writ of error, yet one writ of error lyeth not jointly for the principal and the bail, because there are several judgments given against them; and the damages against one is not against the other; wherefore they may not join in a writ of error no more than tenant for life and he in reversion; or the tenant and vouchee may join. Accord: *Bushell* v. *Yaller*, Cro. Car. 408 (1635); *Smith* v. *James*, Cro. Car. 575 (1639); *Sandelow* v. *Deverton*, Cro. Jac. 384 (1615); *Stubbs* v. *Flower*, 1 Bulst. 125 (1609); *Anon.*, Litt. 93 (1628); *Atherton* v. *Hole*, Lev. 137 (1664). See *Henry* v. *Whitehurst*, 66 Fla. 567, 64 So. 233 (1914). It has been held that separate claimants to a fund can not prosecute a joint appeal. *White's Appeal*, 15 W. N. Cas. (Pa.) 313 (1884); *Adamson's Appeal*, 110 Pa. St. 459, 1 Atl. 327 (1885); *Reynolds* v. *Reynolds Lumber Co.*, 175 Pa. St. 437, 34 Atl. 791 (1896); *Samson's Estate*, 22 Pa. Super. Ct. 93 (1903); *Commonwealth* v. *Union Surety &c. Co.*, 37 Pa. Super. Ct. 167 (1908). But contra: *In re California Mutual Life Ins. Co.*, 81 Cal. 364, 22 Pac. 869 (1889); *Kaehler* v. *Halpin*, 59 Wis. 40, 17 N. W. 868 (1883); *Frank* v. *Zeigler*, 46 W. Va. 614, 33 S. E. 761 (1899), holding that all parties against whom a decree or judgment is rendered who are interested in the main question decided and are aggrieved in the same way by the same decree may prosecute a joint appeal.

Generally, if the interests of the parties against whom a decree is made are separate and distinct or if there are separate judgments against them, separate appeals may be taken. *Holmes* v. *Henty*, 4 Cl. & F. 99 (1836) 148; *Todd* v. *Daniel*, 6 Pet. (U. S.) 521, 10 L. ed. 1054 (1842); *Forgay* v. *Conrad*, 6 How. (U. S.) 201, 12 L. ed. 404 (1848); *Farrell* v. *Patterson*, 43 Ill. 52 (1867); *Genet* v. *Davenport*, 60 N. Y. 194 (1875); *Milner* v. *Meek*, 95 U. S. 252, 24 L. ed. 444 (1877); *Williams* v. *Western Union Telegraph Co.*, 93 N. Y. 162 (1883); *Gilfillan* v. *McKee*, 159 U. S. 303, 40 L. ed. 161 (1895); *Hull* v. *Bell*, 54 Ohio St. 228, 43 N. E. 584 (1896); *Jacksonville R. Co.* v. *Broughton*, 38 Fla. 139, 20 So. 829 (1896); *South Portland Land Co.* v. *Munger*, 36 Ore. 457, 54 Pac. 815 (1900); *Winters* v. *United States*, 207 U. S. 564, 52 L. ed. 340 (1907); *St. John* v. *Andrews Inst.*, 192 N. Y. 382, 85 N. E. 143 (1908); *Copeland* v. *Dixie Lumber Co.*, 4 Ala. 230, 57 So. 124 (1911).

executors or administrators, and that if either of them is unwilling to have the suit prosecuted in his name, the one who has instituted it may, upon a summons, have a judgment of servance and continue the suit in his own name alone. *Hensole's Case,* 9 Coke 36, b; *Brooks* v. *Straod,* 1 Salk. 3; Com. Dig. Abatement, E. 13; Pleader 2 D. 1, 3, 10. But when executors or administrators are joined as defendants they may plead different pleas and that plea which is most for the advantage of the testator or the intestate shall be received. *Elwell* v. *Quash,* 1 Str. 20, citing *Baldwin* v. *Church,* 10 Mod. 323; *Foster* v. *Jackson,* Hob. 52 a, 61; *App.* v. *Dreisbach,* 2 Rawle, 287, 301; *Geddis* v. *Irvine,* 5 Pa. St. 508, 512.

In *Lyon* v. *Allison,* 1 Watts (Pa.) 161, the appeal of one of two coadministrators, his associate dissenting from the appeal, was quashed. The appellant had given no recognizance or bail as required by statute. The judgment appealed from relieved the estate and the administrators from all liability. The court in holding that the appeal was rightly quashed say that when executors sever in pleading the court will take that plea which is better for the estate and that it clearly was best for the estate to have the judgment stand.

When Harriet C. Patch, the original defendant, died her estate as such was not a party to the suit. When counsel representing that estate took part in the hearing of the cause before the master as counsel for the administrator, this taking part in the proceedings was enough to make both administrators of the estate parties defendant to the suit. Each administrator has since recognized that he was such a party, Whitten by moving to vacate the decree and by appealing from it, and Patch by moving that Whitten's appeal be dismissed. The appeal of one administrator and the attempt of the other to have the appeal dismissed was in effect a severance in pleading, that is, in the conduct of the defense, by coadministrators defendants in the same suit, and so allowable under the doctrine stated, unless as in *Lyon* v. *Allison* it is apparent that it is better for the estate to have the decree stand. But in the present case the decree is against estate while in *Lyon* v. *Allison* the decree freed the estate from all liability. Besides this the present decree orders both the coadministrators by name to pay the plaintiff the amount of the note and interest, thus imposing upon the appellant Whitten personally a liability to be proceeded against for contempt if he does not comply with the decree. We are therefore of opinion that the motion to dismiss the appeal should be overruled.[26]

---

[26] See also *Frescobaldi* v. *Kinaston,* 2 Str. 783 (1727); *Portis* v. *Creagh,* 4 Port. (Ala.) 332 (1837); *Smith* v. *Smith,* 11 N. H. 459 (1841); *Harrington* v. *Roberts,* 7 Ga. 510 (1849); *White* v. *Connecticut Gen. Life Ins. Co.,* 34 App. D. C. 460 (1910). In *State ex rel. Kelly* v. *Justices of Moore County,* 24 N. Car. 430 (1842), a mandamus issued against the justices of a county to compel the levying of a tax and a majority of them appealed. The court refused to dismiss the appeal because some refused to join in the appeal. The case, said the court, was not an action prosecuted against several persons, as individuals, but was against a body which acted only through the medium of a majority of its members.

KELLS *v.* NELSON-TENNY LUMBER CO.

SUPREME COURT OF MINNESOTA, 1898

74 Minn. 8

Lucas Kells, as assignee of N. P. Clarke & Company, insolvents, offered at public auction certain pine lands belonging to the insolvent estate. There being no bids received, he negotiated a sale thereof for $36,500 to the Brainard Lumber Company, subject to the approval of the court. Upon applying to the district court for Stearns county for an order confirming the sale, certain creditors of the insolvents filed a protest against the confirmation of such sale on the ground that another bidder had made an offer of $38,000, and asked for an order confirming a sale to the latter bidder. The court, Baxter, J., confirmed the sale to the Brainard Lumber Company. From the order of confirmation the Nelson-Tenney Lumber Company, a creditor of the insolvents, appealed. In the Supreme Court a motion was made to dismiss the appeal.

START, C. J.: The assignee herein entered into a written contract with the Brainard Company, whereby he sold to it, subject to confirmation by the court, certain pine land belonging to the trust estate. He made a written report thereof, to which was attached a copy of the contract, to the court, which made an order that creditors show cause why the sale should not be confirmed. The appellant appeared, and opposed the confirmation; but the court made its order confirming the sale, from which the appellant appealed, serving notice thereof on the assignee, but not upon the purchaser. This is a motion to dismiss the appeal, because the purchaser was not made a party to the appeal.

G. S. 1894, par. 6134, provides that an appeal shall be made by service of a notice in writing on the adverse party and the clerk of court. While an appeal is the continuation of the original action or proceedings in another jurisdiction, yet it is analogous in many respects to a writ of error, which is regarded as the beginning of a new action; and this court will consider only questions between the appellant and the parties upon whom the notice of appeal has been served.[27] Therefore the notice of appeal must be served on each adverse party as to whom it is sought to review, in this court, any

[27] The common-law practice is illustrated by *State Bank of Illinois* v. *Wilson*, 8 Ill. 89 (1846). Treat, J.: "This writ of error is prosecuted against three defendants, and the scire facias has been returned, served on one of them only, and non est inventus as to two others. The plaintiffs have obtained a rule on the defendant served to join in error, which rule he now asks to have vacated. Before the plaintiffs are entitled to a rule for joinder in error, they must bring all of the defendants into court, either by the service of a scire facias, or a publication against such as are nonresidents, or can not be found. The cause must be heard as between all of the parties to the writ of error. The motion must be granted, and the order entered for a joinder in error will be vacated." See also *Roberts* v. *Taylor*, 4 Port. (Ala.) 421 (1837)

order or judgment, although he did not appear in the proceeding or action in the district court. *Frost* v. *St. Paul B. & Inv. Co.*, 57 Minn. 325; *Oswald* v. *St. Paul G. Pub. Co.*, 60 Minn. 82; *Lambert* v. *Scandinavian-American Bank*, 66 Minn. 185. It necessarily follows that where the order appealed from is indivisible, and must be affirmed, reversed or modified as to all parties to the action or proceeding, the appeal must be dismissed if they are not all made parties to the appeal. The order in this case is such an order. It can not be reversed as to the assignee without reversing it as to the purchaser; and if the latter is an adverse party, within the meaning of the statute, the appeal must be dismissed.

The adverse party, within the intent of the statute, means the party whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of the order or judgment appealed from. *Thompson* v. *Ellsworth*, 1 Barb. Ch. (N. Y.) 624; *Senter* v. *Castro*, 38 Cal. 637; *Williams* v. *Santa Clara*, 66 Cal. 193. The subject matter of this appeal is the sale of the land to the purchaser, the Brainard Lumber Company. When the district court confirmed the sale, all of the conditions of the sale had been complied with, and it became absolute. The appellant, a creditor, seeks by this appeal a reversal of the order, whereby the sale would be set aside, and the purchaser lose his bargain. Its interest is in direct conflict with a reversal of the order, and therefore it is, as to the creditor, an adverse party. Indeed, the purchaser is practically the only adverse party, for the assignee represents all of the creditors, including the appellant. He does not represent the purchaser. Their relation is that of vendor and vendee, holding each other at arm's length.

It may be suggested that the purchaser is not a party of record. The parties to the record are not always necessary parties to the appeal, nor are those who were not parties to the record, as originally made, to be overlooked in prosecuting an appeal. Elliott App. Proc., section 153. It has accordingly been held that, on an appeal from an order confirming a sale or denying a resale, the purchaser is a necessary party. See *Barnes* v. *Stoughton*, 6 Hun (N. Y.) 254; *Sanders* v. *Wade* (Ky.), 30 S. W. 656; *Kitchell* v. *Irby*, 42 Ala. 447. The purchaser in this case was, however, a party to the proceeding in which the order of confirmation was made. By entering into the contract with the assignee for the purchase of the land subject to the approval of the court, it submitted its interests to the decision of the court, and became a party to the proceedings resulting in the order. The purchaser is a necessary adverse party to an appeal from such order.[28]

Appeal dismissed.

---

[28] All parties adverse to appellants in the court below who are affected by the judgment or decree must be made parties to the appeal. *Summerlin* v. *Reeves*, 20 Tex. 85 (1867); *Clark* v. *Knox*, 65 Ala. 401 (1880); *Hunderlock* v. *Dundee Mortgage & Trust Co.*, 88 Ind. 139 (1882); *Williams* v. *Santa Clara Mining Assn.*, 66 Cal. 193, 5 Pac. 85 (1884); *Cates* v. *Sparkman*, 66 Tex. 155, 18 S. W. 446 (1886); *Davis* v. *Mercantile Tr. Co.*, 152 U. S. 590, 38 L. ed. 563 (1894); *Bozeman* v. *Cale*, 139 Ind. 187, 35 N. E. 828 (1894); *Equitable*

SECTION 3. SUPERSEDEAS

KOUNTZE *v.* OMAHA HOTEL CO.

SUPREME COURT OF UNITED STATES, 1882

107 *U. S.* 378[a]

BRADLEY, J.: By the common law a writ of error, without any security, was of itself a supersedeas of execution from the time of its allowance or recognition by the court to which it was directed; and even before, if the defendant in error had notice of it; or, in the common pleas, from the time of its delivery to the clerk of the errors of that court, whose business it was, amongst other things, to prepare the returns. 1 Tidd's Pr. 530, 1145; Impey's Pr. C. P. 16; Petersd. Abr. tit. Error, I. (H. a.). The presentation of the writ issuing from the superior court stopped all further proceedings except such as were incidental to a compliance with its command to certify the record. But as writs of error came to be sued out for the purpose of delay, various acts of parliament were passed, requiring security in certain cases, in order that the writ might operate as a supersedeas. First, without referring to a statute in the time of Elizabeth, the statute of 3 James I., ch. 8, declared that no execution should be stayed or delayed, upon or by any writ of error, or supersedeas thereon, for the reversing of any judgment in debt upon a single bond, or a bond with condition for the payment of money only, or in debt for rent, or upon any contract, unless the plaintiff in error, with two sufficient sureties, should first be bound to the plaintiff in the judgment, "by recognizance, in double the sum recovered by the former judgment, to prosecute the writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error nonprossed, all and singular the debts, damages and costs, adjudged upon the former judgment; and all costs and damages to be awarded for the delaying of execution." This statute was specific as to the cases in which bail in error (as it was called) was required, and it was frequently held that it could not be required in any other cases. 2 Sellon's Pr. 367-374; 2 Tidd 1150. Subsequently by the statute of 13 Car. II, ch. 2, as enlarged by 16 and 17 Car. II, ch. 8, the same

---

Mtg. Co. v. *Lowe,* 53 Kans. 39, 35 Pac. 829 (1894); *Wilson* v. *Kiesel,* 164 U. S. 248, 41 L. ed. 422 (1896); *Sheridan* v. *Snider,* 4 Kans. App. 214, 45 Pac. 1007 (1896); *Vincent* v. *Collins,* 122 Cal. 387, 55 Pac. 129 (1898); *Richardson* v. *Thompson,* 59 Nebr. 299, 80 N. W. 909 (1899); *Kreuter* v. *English Lake & Land Co.,* 159 Ind. 372, 65 N. E. 4 (1902); *Kuhn* v. *American Mut. L. Ins. Co.,* 160 Ind. 356, 66 N. E. 890 (1902); *Williamson* v. *Grider,* 97 Ark. 588, 135 S. W. 361 (1911); *Teel* v. *Chesapeake & Ohio R. Co.,* 204 Fed. 914 (1913). Where the parties are very numerous see *Kidder* v. *Fidelity Ins. Trust Co.,* 105 Fed. 821, 44 C. C. A. 593 (1901); *Milner* v. *Meek,* 95 U. S. 252, 24 L. ed. 444 (1877); *Wangerien* v. *Aspell,* 47 Ohio St. 250 (1890).

[a] Extract from the opinion of the court.

recognizance was required to stay execution in all personal actions in which a judgment was rendered upon a verdict, and in most cases double costs were given in case the judgment was affirmed; and in writs of error upon judgment after verdict in dower, and ejectment it was provided that execution should not be stayed unless the plaintiff in error should be bound to the plaintiff, in such reasonable sum as the court below should think fit, with condition that if the judgment should be affirmed, or the writ of error discontinued, in default of the plaintiff in error, or he should be nonsuited therein, that then he should pay such costs, damages, and sum or sums of money as should be awarded upon or after such judgment affirmed, discontinuance or nonsuit; and to ascertain the sum and damages to be awarded, it was provided that the court should issue a writ of inquiry as well of the mesne profits as of the damages by any waste committed after the first judgment in dower or ejectment, and give judgment therefor and for costs.[80] This was the form in which the law stood for more than a century prior to our Revolution, and is believed to have generally prevailed in this country either by force of the English statutes, or similar statutes adopted by the Colonies themselves down to the time of the passage of the Judiciary Act by Congress in 1789. See 1 Rev. Laws of N. Y. (1813), p. 143, act of 1801; Acts of New Jersey, Feb. 1, 1799, and Feb. 28, 1820, Elmer's Dig. 159, 160; Acts of Maryland, 1713, ch. 4, 1 Kilty's Laws; and Alexander's British Statutes, in force in Maryland, 16 and 17 Car. II, ch. 8. In Virginia, by the act of 1788, it was provided that before granting an appeal from a county to a district court, or issuing any writ of error or supersedeas, the party praying the same should enter into bond with sufficient security, in the penalty to be fixed by the court or judge, with condition to pay the amount of the recovery, and all costs and damages awarded in case the judgment or sentence should be affirmed; and the damages were fixed at ten per cent. per annum upon the principal sum and costs recovered in the inferior court; and the same provisions were applied to appeals, and writs of error to the court of appeals. By the Act of 1794, on appeal from a decree in equity to the High Court of Chancery, the condition of the appeal bond required was, to satisfy and pay the amount recovered in the county court, and all costs, and to perform in all things the decree, if the same should be affirmed. Laws of Virginia, ed. 1814, pp. 87, 115, 448. In Massachusetts, as appears in an early case (1804), a supersedeas was granted upon the plaintiff in error giving bond to respond all damages and costs in case the judgment should be af-

[80]See Viner's Abridgment, *Supersedeas* (c); *Huddy* v. *Gifford*, 1 Comyn. 321 (1720). For the modern English practice see Rules of Supreme Court, Order LVIII, rule 16. Annual Practice, 1913, p. 1084. *Hamill* v. *Lilley*, L. R. 19 Q. B. Div. 83 (1887). *The Annot Lyle*, L. R. 11 Probate Div. 114 (1886); *Merry* v. *Nickalls*, L. R. 8 Ch. 205 (1873); *Morgan* v. *Elford* (L. R.), 4 Ch. Div. 352 (1876); *Attorney-Gen.* v. *Emerson*, L. R. 24 Q. B. Div. 56 (1889). Proceedings will not be stayed pending an appeal unless on special grounds. *Barker* v. *Lavery*, L. R. 14 Q. B. Div. 769 (1885); *Shaw* v. *Holland*, L. R. (1900) 2 Ch. 305.

firmed. *Bailey* v. *Baxter*, 1 Mass. 156.[31] In Pennsylvania, where the judgment was affirmed upon a writ of error, the execution included the interest from the date of the original judgment. *Respublica* v. *Nicholson*, 2 Dall. (U. S.) 256.[32]

It is thus seen that, in the case of money judgments, bail in error was required to secure: 1, the amount of the original judgment; 2, the costs and damages occasioned by the delay of execution. In the case of dower and ejectment, where the main thing in controversy was land, bail was required to secure only such costs, damages, and money as should be awarded after affirmance of judgment, for mesne profits and waste pending the appeal.

In relation to money judgments, a long train of decisions in England shows that the damages for delay for which the bail in error were to respond were the interest on the sum recovered below from the day of signing final judgment to the time of affirmance, and costs in the writ of error, and in some cases double costs. In the Exchequer Chamber, when double costs were recoverable, the court exercised its discretion whether to allow interest or not, it not being allowed as a matter of course; but interest was only allowed where the original demand was one that drew interest, and not in cases of mere tort or unliquidated damages. Tidd, 1182, 1183. In the House of Lords, they gave large or small costs in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below, Tidd, 1184.

We have no reason to believe that the rule of damages for delay on a recognizance, or bond in error, was materially different in this country, in 1789, from that which prevailed in England. The statutes being substantially the same, undoubtedly the same rule prevailed in administering them.

On appeals in chancery, the practice in England, in case of an appeal from the Master of the Rolls to the Lord Chancellor was for the party appealing to deposit £10, to be paid to the other party if the decree was not materially varied, and he was also required to pay the costs of the appeal; and on appeal from the Court of Chancery to the House of Lords, the appellant was obliged to make a deposit of £20, and give security by recognizance in the sum of £200 to pay such costs to the defendant in the appeal, as the court should appoint, in case the decree should be affirmed. Harrison's Pr. in Chancery, ed. Newland, pp. 342, 349.[33] In 1810 these amounts were doubled. Smith's Ch. Pr. 27, 44. If a party wished to file a bill

[31] *Tandy* v. *Rowell*, 54 N. H. 384 (1874).

[32] *Scheerer* v. *Grier*, 3 Wharton 14 (1837), 1 Tr. & H. Pr. (Wharton's ed.) 604-7.

[33] Formerly an appeal from the court of chancery to the House of Lords stayed the proceedings below, but the practice was afterward modified by permitting a stay by order of the house or the chancellor. 15 Ves. Jr. 184 (1808); *Way* v. *Foy*, 18 Ves. Jr. 452 (1812); *Hart & Hoyt* v. *Albany*, 3 Paige Ch. (N. Y.) 381 (1832); *Harris* v. *People*, 66 Ill. App. 306 (1896); *Penna. R. Co.* v. *National Docks R. Co.*, 54 N. J. Eq. 647, 35 Atl. 433 (1896); *Hovey* v. *McDonald*, 109 U. S. 150, 27 L. ed. 888 (1883); *Ashby* v. *Yetter*, 78 N. J. Eq. 173, 78 Atl. 799 (1910).

of review, the general rule was that he must perform the decree before filing his bill. Such being the rules prevailing on the subject when the Act of 1789[34] was passed, which required the plaintiff in error to give security "to prosecute the writ of error to effect, and to answer all damages and costs if he failed to make his plea good," the extremely general terms of the law are noticeable.[35]

CHARTER *v.* PEETER

COURT OF QUEEN'S BENCH, 1597

Cro. Eliz. 597.

Fieri facias was awarded upon a judgment given in this court, by force whereof the sheriff took the defendant's goods in execution; and before sale, the record was removed by a writ of error into the exchequer chamber, and a supersedeas awarded. And the sheriff returned upon the fieri facias a seizure of the goods, and that they remained in his hands pro defectu emptorum; and he also returned,

---

[34] Act of Congress, September 24, 1789, ch. 20, 1 Stat. at Large 84. See, in amended form, U. S. Comp. Stat. (1913), § 1660, and, as to supersedeas, U. S. Comp. Stat. (1913), § 1666. *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 188, 18 L. ed. 676 (1866); *Title Guaranty Co.* v. *General Electric Co.*, 222 U. S. 401, 56 L. ed. 248 (1912).

[35] At common law a writ of error operated as a supersedeas of its own force. *Bishop of Ossory's Case*, Cro. Jac. 534 (1620); *Bentley* v. *Fowler*, 8 Ark. 375 (1848); *Ambrose* v. *Weed*, 11 Ill. 488 (1850); *Pettyjohn* v. *Bloxom*, 1 Houst. (Del.) 594 (1858); *Hudson* v. *Smith*, 9 Wis. 122 (1859); *Central Branch Union Pacific R. Co.* v. *Andrews*, 34 Kans. 563, 9 Pac. 213 (1886); *First Nat. Bank* v. *McAndrews*, 7 Mont. 434, 17 Pac. 554 (1888); *State ex rel. Hogan* v. *District Court*, 25 Okla. 871, 108 Pac. 375 (1910). In the United States the subject is now generally regulated by statute, but the view that generally prevails is that a writ of error or appeal does not of itself act as a supersedeas, the statutory requirements must be fulfilled. *Railroad Co.* v. *Harris*, 74 U. S. 574, 19 L. ed. 100 (1868); *Boise Co.* v. *Gorman*, 86 U. S. 661, 21 L. ed. 226 (1873); *Eakle* v. *Smith*, 24 Md. 339 (1865); *Home Fire Ins. Co.* v. *Dutcher*, 48 Nebr. 755, 67 N. W. 766 (1896); *Allen* v. *Church*, 101 Iowa 116, 70 N. W. 127 (1897); *Lancaster* v. *Snow*, 184 Ill. 163, 56 N. E. 416 (1900); *Margo* v. *Penna. R. Co.*, 213 Pa. 468, 62 Atl. 1081, 110 Am. St. 559 (1906). See further Cal. Code Civ. Pro., §§ 942, 946; Mass. Rev. Laws (1902), p. 1679, § 6; N. Y. Code Civ. Pro., §§ 1310-14; N. J. Comp. Stats. (1910), p. 450, § 111, p. 2016, § 213a; Pa. Act of May 19, 1897, P. L. 67, §§ 6-15, 1 P. & L. Dig. (2d ed.) 308; *Hoon* v. *Miller*, 16 Pa. Dist. R. 703 (1906). A general requirement is that security be entered, *Lane* v. *Bacchus*, 2 T. R. 44 (1787); *Catlett* v. *Brodie*, 9 Wheat. (U. S.) 553, 6 L. ed. 158 (1824); *Ferris* v. *Douglas*, 20 Wend. (N. Y.) 626 (1839); *Branigan* v. *Rose*, 8 Ill. (3 Gilm.) 123 (1846); *Stafford* v. *Union Bank of Louisiana*, 58 U. S. 275, 15 L. ed. 505 (1854); *Ex parte Sweeny*, 131 Ind. 81, 30 N. E. 884 (1891); *Creighton* v. *Keith*, 50 Nebr. 810, 70 N. W. 406 (1897); *Harrison* v. *Stebbins*, 104 Iowa 462, 73 N. W. 1034 (1898); *Smead* v. *Stuart*, 194 Pa. St. 578, 45 Atl. 343 (1900); *Shock* v. *Solar Gas L. Co.*, 17 Pa. St. D. R. 561 (1908); *Hohenadel* v. *Steele*, 237 Ill. 229, 86 N. E. 717 (1908); *Thomas* v. *Lee*, 74 Wash. 286, 133 Pac. 446 (1913); *Mundy* v. *Irwin*, 19 N. Mex. 170, 141 Pac. 877 (1914).

that a supersedeas was awarded, etc. And hereupon it was prayed for the defendant, that he might have restitution of his goods. But all the court held, although this record be removed, and notwithstanding the supersedeas awarded, in regard it came not unto the sheriff until he had begun to make execution, as appears by his return, that a venditioni exponas shall be awarded to perfect it; and although the plea roll be removed, yet it shall be awarded upon the return of the fieri facias, which remains filed in the office. And so it was likewise done in the case of *Sir Miles Corbet* v. *Rookwood*, Trinity term, 39 Eliz. Roll 406, in this court; although the record was there removed by a writ of error.[36]

RANSOM *v.* PIERRE

CIRCUIT COURT OF APPEALS OF U. S., EIGHTH CIRCUIT, 1900

101 *Fed.* 665

On September 28, 1896, James J. Ransom began an action in the South Dakota Circuit Court by mandamus against the treasurer of the city of Pierre, to compel him to apply funds in his hands to the payment of coupons of certain bonds of the city. There was a trial; the court found that the coupons were illegal and entered judgment dismissing the proceedings. From this judgment Ran-

[36]Accord: *Milton* v. *Eldrington*, 1 Dyer 99 (1554); *Anon.*, Moore 542 (1597); *Tocock* v. *Honyman*, Yelv. 6 (1601); *Baker* v. *Bulstrode*, 1 Vent. (K. B.) 255 (1673); *Meriton* v. *Stevens*, Willes, 271 (1741); *Doe ex dem. Messiter* v. *Dyneley*, 4 Taunt. 289 (1812); *Blanchard* v. *Myers*, 9 Johns. (N. Y.) 66 (1812); *Kinnie* v. *Whitford*, 17 Johns. (N. Y.) 34 (1819); *Beatty* v. *Chapline*, 2 H. & J. (Md.) 7 (1806); *Blunt* v. *Greenwood*, 1 Cow. (N. Y.) 15 (1823); *Arnold* v. *Fuller*, 1 Ohio 458 (1824); *Boyle* v. *Zacharie*, 6 Pet. (U. S.) 648, 8 L. ed. 532 (1832); *Stewart* v. *Smith*, 1 Phila. (Pa.) 171 (1851); *Gilmour* v. *Hall*, 10 U. C. Q. B. 508 (1853); *Building Assn.* v. *Byrne*, 6 W. N. C. (Pa.) 254 (1878); *Neiier* v. *Scholken*, 5 Kulp (Pa.) 133 (1888); *Rand* v. *Long*, 6 Kulp (Pa.) 299 (1891); *Taylor* v. *Breisch*, 8 Pa. C. C. 286 (1889); *Peterson* v. *Wayne C. J.*, 108 Mich. 608, 66 N. W. 487 (1896); *Snyder* v. *Powell*, 133 Ill. App. 393 (1907). Otherwise where the appeal precedes the levy. *Bryan* v. *Comly*, 2 Miles (Pa.) 271 (1838); *Adams* v. *Hindman*, 2 Miles (Pa.) 464 (1842); *McDonald* v. *Gifford*, 1 Brewst. (Pa.) 278 (1866). It has, however, been frequently held that the court in its discretion, and in the exercise of its equitable control over its own process, may recall or stay the proceedings for a sale pending the appeal. *Stricker* v. *Wakeman*, 13 Abb. Pr. (N. Y.) 85 (1861); *Bailey* v. *Baxter*, 1 Mass. 156 (1804); *Sayre* v. *Reynolds*, 5 N. J. L. 564 (1819); *Bassett* v. *Daniels*, 10 Ohio St. 617 (1858); *Rucker* v. *Harrison*, 6 Munf. (Va.) 181 (1818); *Burr* v. *Burr*, 10 Paige (N. Y.) 166 (1843); *First Nat. Bank* v. *Rogers*, 13 Minn. (Gil. 376) 407, 97 Am. Dec. 239 (1868); *Cook* v. *Dickerson*, 1 Duer (N. Y.) 679 (1853); *Robertson* v. *Davidson*, 14 Minn. (Gil. 422) 554 (1869); *Burrall* v. *Vanderbilt*, 1 Bosw. 637, 14 N. Y. Super. Ct., 6 Abb. Prac. 70 (1858); *McCamy* v. *Lawson*, 40 Tenn. (3 Head.) 256 (1859); *Ewing* v. *Jacobs*, 49 Cal. 72 (1874); *Bentley* v. *Jones*, 8 Ore. 47 (1879); *Janesville* v. *Janesville Water Co.*, 89 Wis. 159, 61 N. W. 770 (1895); *Tilley* v. *Washburn*, 91 Wis. 105, 64 N. W. 312 (1895); *Parker* v. *Travers*, 69 Atl. (N. J.) 306 (1907); *Anderson* v. *Phegley*, 54 Ore. 102, 102 Pac. 603 (1909).

som, on June 29, 1897, appealed to the Supreme Court of South Dakota, giving a supersedeas bond. On February 23, 1898, while the appeal in the before-mentioned suit was pending and undetermined, Ransom brought this action against the city of Pierre in the Circuit Court of the United States. The city, among other defenses, pleaded the judgment in the mandamus proceeding in the state court as a bar to recovery. This defense was sustained and judgment rendered dismissing the complaint. The plaintiff then brought error. At the time of argument in the circuit court of appeals, the appeal to the Supreme Court of Dakota was undetermined, but on March 2, 1900, the judgment was reversed.[87]

THAYER, J.: On the argument of this cause it was urged on behalf of the plaintiff in error that the trial court erred in holding that the judgment in the mandamus proceeding was conclusive as respects the validity of the bonds in controversy; first, because section 5343 of the Compiled Laws of Dakota of 1887 declares that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied."

The first contention of the plaintiff in error, stated above, presents a question of difficulty. In many cases the question has been mooted whether, when a writ of error has been sued out, or when an appeal has been taken which operates essentially as a writ of error, to review a judgment at nisi prius, and a supersedeas bond has been given to stay the proceedings, such a judgment may be received in evidence in another suit between the same parties in support of the pleas of res judicata; and, while the decisions upon this question have not been uniform, yet, in our judgment, the weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal is not there tried de novo, but the record made below is simply reexamined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. A supersedeas bond merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment nor prevent either party thereto from invoking it as an estoppel.[88]

It is insisted, however, as before stated, that the statute of South Dakota quoted above was intended to prevent a judgment from being pleaded as an estoppel during the pendency of an ap-

[87]The facts are condensed and part of the opinion omitted.

[88]Citing *Railway Co.* v. *Twombly*, 100 U. S. 78, 25 L. ed. 550 (1879); *Willard* v. *Ostrander*, 51 Kans. 481, 32 Pac. 1092, 37 Am. St. 294 (1893); *Parkhurst* v. *Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. 384 (1888); *Scheible* v. *Slagle*, 89 Ind. 323 (1883); *Faber* v. *Hovey*, 117 Mass. 107, 19 Am. Rep. 398 (1875); *Thompson* v. *Griffin*, 69 Tex. 139, 6 S. W. 410 (1887); *Moore* v. *Williams*, 132 Ill. 589, 24 N. E. 619, 22 Am. St. 563 (1890); *Bank of N. America* v. *Wheeler*, 28 Conn. 433, 73 Am. Dec. 683 (1859); *Oregonian R. Co.* v. *Oregon R. & N. Co.*, 27 Fed. 277 (1886); *Cloud* v. *Wiley*, 29 Ark. 80 (1874); *Cain* v. *Williams*, 16 Nev. 429 (1882).

peal, and that view of the effect of the statute is supported by certain California decisions, in which state a similar statute has been enacted. *Naftzger* v. *Gregg*, 99 Cal. 83; *In re Blythe*, 99 Cal. 472; *Story* v. *Commercial Co.*, 100 Cal. 41. On the other hand, in the state of Oregon, where substantially the same statute is in force, it is held that the statute was not designed to prevent a judgment from being pleaded in bar of another suit on the same cause of action during the pendency of an appeal from the judgment. *Day* v. *Holland*, 15 Ore. 464. The statute now under consideration was enacted in the Dakotas before it was enacted in California, so that it can not be said that the California doctrine became the law of the territory of Dakota by adoption. The decisions in California and Oregon are merely persuasive authority. While the Supreme Court of the state of South Dakota has never as yet placed an authoritative construction upon the statute in case where a judgment that had been obtained in a civil action was pleaded in bar to another suit between the same parties during the pendency of an appeal from the judgment, yet it has held, notwithstanding the statute in question, that a judgment in a criminal case may be given in evidence in another case as conclusive evidence of a conviction for a crime, during the pendency of an appeal from the judgment. *In re Kirby*, 10 S. Dak. 322.

In this state of the authorities and upon an independent consideration of the question we have reached the conclusion that the Dakota statute to which the discussion relates was not intended to prevent a final judgment of one of its courts of superior jurisdiction from being pleaded in bar to another suit between the same parties and upon the same cause of action during the pendency of an appeal therefrom, but that its purpose was to affect purchasers of property which is in litigation with notice of the litigation until the litigation is ended. It is well known that courts have at times disagreed as to whether one who purchases property which is in litigation intermediate a judgment at nisi prius and the expiration of the time limited for suing out a writ of error or taking an appeal should be regarded as a bona fide purchaser, or as affected with notice by lis pendens if an appeal is subsequently taken. Some courts have answered this question in the affirmative, others in the negative.[39] We accordingly incline to the view that the statute was intended to settle this debatable point in South Dakota by saying, in effect, that one who purchases property after a judgment, but prior to the expiration of the time limited for an appeal, shall be deemed a purchaser pendente lite. In the absence of the statute aforesaid the suing out of a writ of error or the taking of an appeal might be regarded as the institution of a new suit, and as having

[39]Citing *Rector* v. *Fitzgerald*, 59 Fed. 808, 8 C. C. A. 277 (1894); *Taylor* v. *Boyd*, 3 Ohio 338 (1827); *Eldridge* v. *Walker*, 80 Ill. 270 (1876); *Macklin* v. *Allenberg*, 100 Mo. 337, 13 S. W. 350 (1889); *Pierce* v. *Stinde*, 11 Mo. App. 364 (1881); *McCormick* v. *McClure*, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441 (1842); *Debell* v. *Foxworthy*, 9 B. Mon. (Ky.) 228 (1849); *Harle* v. *Langdon Heirs*, 60 Tex. 555 (1883); *Marks* v. *Cowles*, 61 Ala. 299 (1878). See *Lentz* v. *Lamplugh*, 12 Pa. St. 344 (1849); *Leonard's Appeal*, 94 Pa. St. 180 (1880).

no effect on a title acquired before an appeal was taken. In our judgment, the statute was not designed to have any other force and effect than that last stated. It can hardly be supposed that it was intended to encourage litigants to bring repeated suits to settle the same controversy, and it ought not to be given an erroneous interpretation because by so doing the ends of justice would perhaps be subserved in the present instance.[40]

In view, however, of the recent decision by the Supreme Court of South Dakota, the substance of which has been heretofore stated, the question to be decided at this time is not in all respects the same as the one which was discussed on the trial below and at the hearing in this court. Assuming, in view of what has already been said, that the judgment in the mandamus suit was pleadable in bar, and determinative of the plaintiff's rights in the case now in hand so

---

[40]Accord: *Doe* v. *Wright*, 10 Ad. & El. 763 (1839); *Nill* v. *Comparet*, 16 Ind. 107, 79 Am. Dec. 411 (1861); *Merrells* v. *Phelps*, 34 Conn. 109 (1867); *Sage* v. *Hardpending*, 49 Barb. (N. Y.) 166, 34 How. Pr. (N. Y.) 1 (1867); *Cloud* v. *Wiley*, 29 Ark. 80 (1874), semble; *Woodward* v. *Carson*, 86 Pa. St. 176 (1878); *Buchanan* v. *Logansport, C. & S. W. R. Co.*, 71 Ind. 265 (1880); *Cain* v. *Williams*, 16 Nev. 426 (1882); *Scheible* v. *Slagle*, 89 Ind. 323 (1883); *Burgess* v. *Poole*, 45 Ark. 373 (1885); *Woodward* v. *Garey*, 42 L. I. (Pa.) 490 (1885); *Parkhurst* v. *Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. 384 (1888); *Day* v. *Holland*, 15 Ore. 464, 15 Pac. 855 (1887); *Small's Appeal*, 15 Atl. (Pa.) 807 (1888); *Moore* v. *Williams*, 132 Ill. 591, 24 N. E. 617 (1890); *Smith* v. *Schreiner*, 86 Wis. 19, 56 N. W. 160, 39 Am. St. 869 (1893); *Willard* v. *Ostrander*, 51 Kans. 481, 32 Pac. 1092, 37 Am. St. 294 (1893); *Watson* v. *Richardson*, 110 Iowa 698, 80 N. W. 416, 80 Am. St. 331 (1899); *People* v. *Rickert*, 159 Ill. 496, 42 N. E. 884 (1896); *Creighton* v. *Keith*, 50 Nebr. 810, 70 N. W. 406 (1897); *Sullivan* v. *Ringler*, 69 App. Div. 388, 74 N. Y. S. 978 (1902); *Reese* v. *Damato*, 44 Fla. 692, 33 So. 642 (1902); *United States ex rel. Coffman* v. *Norfolk & W. R. Co.*, 114 Fed. 682 (1902); *Messinger* v. *Anderson*, 171 Fed. 785 (1909). So, also, in the case of foreign judgments. *Bank of N. America* v. *Wheeler*, 28 Conn. 433, 73 Am. Dec. 683 (1859); *Suydam* v. *Hoyt*, 25 N. J. L. 230 (1855); *Merchants' Ins. Co.* v. *De Wolf*, 33 Pa. St. 45, 75 Am. Dec. 577 (1859); *Scott* v. *Pilkington*, 2 B. & S. 11 (1862); *Cherry* v. *Speight*, 28 Tex. 503 (1866); *Rogers* v. *Hatch*, 8 Nev. 35 (1872); *Faber* v. *Hovey*, 117 Mass. 107, 19 Am. Rep. 398 (1875); *Paine* v. *Schenectady Ins. Co.*, 11 R. I. 411 (1876). Otherwise where the record is removed from an inferior court for retrial. *Campbell* v. *Howard*, 5 Mass. 376 (1809); *Bottings* v. *Firby*, 9 B. & C. 762 (1829); *Boynton* v. *Dyer*, 18 Pick. (Mass.) 1 (1836); *Souter* v. *Baymore*, 7 Pa. St. 415, 47 Am. Dec. 518 (1847); *Small* v. *Haskins*, 26 Vt. 209 (1854); *O'Donnell* v. *Mullin*, 27 Pa. St. 199, 67 Am. Dec. 458 (1856); *De Camp* v. *Miller*, 44 N. J. L. 617 (1882); *Tommey* v. *Finney*, 45 Ga. 155 (1872); *Day* v. *De Yonge*, 66 Mich. 550, 33 N. W. 527 (1887); *Bryar* v. *Campbell*, 177 U. S. 649, 44 L. ed. 926 (1900); *Tyndale* v. *Stanwood*, 186 Mass. 59, 71 N. E. 83 (1904). Contra: *Stalbird* v. *Beattie*, 36 N. H. 455, 72 Am. Dec. 317 (1858); *Byrne* v. *Prather*, 14 La. Ann. 653 (1859); *Glenn* v. *Brush*, 3 Colo. 26 (1876); *Haynes* v. *Ordway*, 52 N. H. 284 (1870); *Ketchum* v. *Thatcher*, 12 Mo. App. 185 (1882); *Green* v. *U. S.*, 18 Ct. of Cl. (U. S.) 93 (1883); *Sharon* v. *Hill*, 26 Fed. 337 (1885); *Texas Trunk R. Co.* v. *Jackson*, 85 Tex. 605, 22 S. W. 1030 (1893)), overruling *Thompson* v. *Griffin*, 69 Tex. 139, 6 S. W. 410 (1807); *Cunningham* v. *Holt*, 12 Tex. Civ. App. 150, 33 S. W. 981 (1896); *Purser* v. *Cady*, 120 Cal. 214, 52 Pac. 489 (1898); *Hershey* v. *Meeker County Bank*, 71 Minn. 255, 73 N. W. 967 (1898), semble; *Southern R. Co.* v. *Brigman*, 95 Tenn. 624, 32 S. W. 762 (1895); *Delk* v. *Yelton*, 103 Tenn. 476, 53 S. W. 729 (1899); *Eastern Building & Loan Assn.* v. *Welling*, 103 Fed. 552 (1909 S. Car.); *Smith* v. *Smith*, 134 Cal. 117, 66 Pac. 81 (1901); *Boucher* v. *Barsalou*, 27 Mont. 99, 69 Pac. 555 (1902).

long as that judgment was unreversed we are nevertheless confronted with the inquiry whether it should be given that effect when it is shown by a duly certified copy of the opinion of the Supreme Court of South Dakota that the judgment in question has been vacated and annulled for error. As a general proposition, it is doubtless true that an appellate court is required to determine whether a judgment which is challenged by a writ of error is erroneous upon the facts disclosed by the record, and upon the facts as they existed when the judgment was rendered. But, inasmuch as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed when it is apparent that a strict adherence thereto will work an injustice. When an appellate court has the power to vacate a judgment rendered by a nisi prius court, over whose proceedings it exercises supervision and control, and its attention is called in an authentic manner to something that has transpired since the trial, which renders it inequitable to permit the judgment to be carried into effect, we think that it may lawfully exercise its power to annul the judgment and remit the record to the lower court for such further proceedings as may be necessary. It is essential, of course, that there should be a general observance of rules of procedure, but compliance with a particular rule ought not to be required when a literal compliance therewith would defeat, rather than promote, the real ends of justice. As a general proposition, the rights of the parties to a suit are to be determined upon the facts as they exist when the action is commenced, or at least when the issues have been formulated by pleadings. Nevertheless, the common law has always permitted a defendant to take advantage of a defense growing out of what subsequently transpires by a plea puis darrein continuance. Andrews, Steph. Pl. par. 77, Chit. Pl. (16th Am. Ed.), pp. 689, 690. In the state of New York, where the doctrine prevails that the taking of an appeal from a judgment does not prevent the judgment from being pleaded, in bar to another action between the same parties, it is held that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action may be set aside by the trial court for that reason, although no error was committed on the trial. *Parkhurst* v. *Berdell,* 110 N. Y. 386. In the case of *Humphreys* v. *Leggett,* 9 How. (U. S.) 297 (see also *Leggett* v. *Humphreys,* 21 How. (U. S.) 66), the facts appear to have been that, while a writ of error was pending in the Supreme Court of the United States to reverse a judgment in favor of a surety on a sheriff's bond, the whole penalty of the bond was collected of the surety under a judgment regularly obtained in a state court. The Supreme Court of the United States reversed the judgment in favor of the surety, and sent down its mandate directing the entry of a judgment against the surety for a specified sum. The surety thereupon pleaded puis darrein continuance the payment of the full penalty of the bond in obedience to the judgment of the state court, but the trial court disallowed the plea, and entered judgment according to the mandate.

The surety then filed a bill to restrain the enforcement of the latter judgment, and it was held that he was entitled to the relief prayed for, inasmuch as the surety had been guilty of no laches, and it would be inequitable to permit an amount in excess of the penalty of the bond to be collected from him. Under the doctrine enunciated in that case it would seem that, if this court should affirm the judgment below on the ground that it can not take cognizance of the recent decision of the Supreme Court of the state of South Dakota, equitable relief might be afforded against the judgment. But, even if such relief might be obtained, why should this court affirm the judgment, and compel the institution of a new suit, when it is advised in an authentic manner that the judgment which served to prevent the plaintiff from recovering below was an erroneous judgment, and that the same has been finally vacated and annulled? The trial court could have granted a new trial because of the reversal of the judgment, although its record disclosed no error, and it seems reasonable that this court should exercise a similar discretionary power so long as it retains control over the judgment, and a fact has been brought to its attention concerning which there can be no dispute. We can not say that the existing complications are due to any fault or laches of the plaintiff in error. When he brought the action he was doubtless advised by counsel that the judgment in the mandamus case could not be pleaded in bar, in view of the appeal therefrom and the provisions of the Dakota statute. The construction that had been placed on that statute by the courts of California give great weight to this view, and, while we are constrained to hold that the view was erroneous, yet we are not prepared to decide that the plaintiff should be compelled to sustain a great loss because he has been guilty of no other fault than the bringing of an action based upon a mistaken view of the law. The trial court might have continued the case in hand of its own motion until the mandamus case was decided, and we think that such action ought to have been taken. That course, however, was not pursued, and it is the duty of this court, which still retains control of the judgment to take such action as will shorten the litigation, preserve the rights of both parties, and best subserve the end of justice. In view of what has been said, we conclude that we have the power and that it is our duty to reverse the judgment below, and remand the cause for a new trial. The judgment in the mandamus case has been reversed, and the cause remanded for a new trial, and, if this court makes a similar order, it will be optional with the plaintiff to prosecute either one of the suits and dismiss the other, and by so doing avoid further complications growing out of the pendency of suits upon the same cause of action in two courts of coördinate jurisdiction. The judgment below is therefore reversed, and the cause remanded for a new trial.[41]

[41]At common law a writ of error was no bar to an action based on the judgment. Y. B. 4 Hen. VI 31; Y. B. 18 Edw. 14, 6; *Anon.*, Dyer, 32, pl. 5; *Adams* v. *Tomlinson*, 1 T. Raym. 100, 1 Sid. 236 (1676); *Dighton* v. *Granvil*, 4 Mod. 247 (1694); *Anonymous*, 11 Mod. 78 (1707); *Donford* v. *Ellys*, 12

SECTION 4. EXCEPTIONS AND RECORD

STAT. WESTM. II, CH. 31

13 *Edw. I* (1285)

When one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which if they will not follow, if he that alleged the exception do write the same exception, and require that the justices will put their seals for a witness, the justices shall so do; and if one will not, another of the company shall. And if the King, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written, with the seal of a justice put thereto, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal, and if the justice can not deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed.[42]

WRIGHT *v.* SHARP

COURT OF QUEEN'S BENCH, 1708

1 *Salk.* 288

A corporation book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given

---

Mod. 138 (1698). But it was sometimes allowed to be pleaded in abatement. *Rogers* v. *Mayhoe,* Carth. 1 (1687); *Aby* v. *Buxton,* Carth. 1 (1687); *Prinn* v. *Edwards,* 1 Ld. Raym. 47, 3 Salk. 145 (1696). Contra: *Rottenhoffer* v. *Lenthall,* Carth. 136 (1691); *Goodwin* v. *Goodwin,* 20 Viner's Abr. 69 (1712). And, by the later practice, the court under some circumstances stayed the second action until the writ of error was determined. *Taswell* v. *Stone,* 4 Burr. 2454 (1769); *Gribble* v. *Abbot,* 1 Cowp. 72 (1774); *Entwistle* v. *Shepherd,* 2 T. R. 78 (1787); *Pool* v. *Charnock,* 3 T. R. 79 (1789); *Smith* v. *Shepherd,* 5 T. R. 9 (1792;) *Bicknell* v. *Longstaffe,* 6 T. R. 455 (1795); *Abraham* v. *Pugh,* 5 B. & Ald. 903 (1822); *Jenkins* v. *Pepoom,* 2 Johns. Cas. (N. Y.) 312 (1801); *Planters' Bank* v. *Calvit,* 3 Sm. & M. (Miss.) 143, 41 Am. Dec. 616 (1844); *Hailman* v. *Buckmaster,* 8 Ill. 408 (1846); *Taylor* v. *Shew,* 39 Cal. 536, 2 Am. Rep. 478 (1870); *U. S. Fidelity &c. Co.* v. *Jones,* 33 Ky. L. 737, 111 S. W. 208 (1908); *First Nat. Bank of Frederick, Wis.,* v. *McIlvaine,* 32 S. Dak. 177, 142 N. W. 468 (1913). Compare: *Atkins* v. *Wyman,* 45 Maine 399 (1858).

[42] Bacon's Abridgment, "Bill of Exceptions"; 2 Co. Inst. 426; 3 Bl. Comm. 372; Buller's N. P. 316. Under the statute if the judge at the trial, mistake the law, the counsel on either side may require him to seal a bill of exceptions. It must, however, be upon some point of law, such as admitting or refusing evidence, or a challenge, or upon some question of law arising during a trial, in which either party is overruled by the court. Arch. Pr. (7th ed.) 311; Elliott's Appellate Procedure, § 797; 2 Tidd's Practice (9th ed.) 862.

for the plaintiff. Next term the court was moved for a bill of exceptions, and it was stirred and debated in court. It was urged, that the law requires quod proponat exceptionem suam, and no time is appointed for reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions. Vide 2 Inst. 437. N. B. 21, 540 b. Vet. Intr. 96, 136. Raymond 405. Brownl. Red. 433. 2 Lev. 236. Stat. Westm. II, ch. 31. On the other side it was said, that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides, the words of the act are in the present tense, and so is the writ formed on the act.

HOLT, C. J.: If this practice should prevail, the judge would be in a strange condition; he forgets the exception, and refuses to sign the bill, so an action must be brought; you should have insisted on your exception at the trial; you waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point; the statute indeed appoints no time, but the nature and reason of the things require the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence not that they need to be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record; so the motion was denied.[48]

---

[48]The exception must be asked for at the time the alleged erroneous ruling is made. *Guillou* v. *Redfield*, 205 Pa. 293, 54 Atl. 886 (1903); *Richards* v. *Appely*, 187 Mass. 521, 73 N. E. 555 (1905); *Graves* v. *Hicks*, 194 Mass. 524, 80 N. E. 605 (1907). The common law required, also, that the bill be presented signed and sealed at that time, but for the convenience of bench and bar, modern statutes and rules permit the bill to be formally drawn up and settled after the trial within a prescribed time. *Hake* v. *Strubel*, 121 Ill. 321, 12 N. E. 676 (1887); *Stewart* v. *Huntington Bank*, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628 (1824); *Ex parte Bradstreet*, 4 Pet. (U. S.) 102, 7 L. ed. 796 (1830); *Law* v. *Merrills*, 6 Wend. (N. Y.) 268 (1830); *Wilson* v. *Moore*, 19 N. J. L. 186 (1842); *Elwell* v. *Dizer*, 83 Mass. (1 Allen.) 484 (1861); *State* v. *Holmes*, 36 N. J. L. 62 (1892); *Ex parte Nelson*, 62 Ala. 376 (1878); *Haines* v. *Commonwealth*, 99 Pa. St. 410 (1882); *Martin* v. *Foulke*, 114 Ill. 206, 29 N. E. 683 (1885); *Che Gong* v. *Stearns*, 16 Ore. 219, 17 Pac. 871 (1888); *Commonwealth* v. *Arnold*, 161 Pa. St. 320, 29 Atl. 270 (1891); *Hancher* v. *Stephenson*, 147 Ind. 498, 46 N. E. 916 (1896); *Schlessinger* v. *Cook*, 8 Wyo. 484, 58 Pac. 757 (1899); *Trager* v. *Webster*, 174 Mass. 580, 55 N. E. 318 (1899); *Watson* v. *Milford*, 72 Conn. 561 (1900); *Gamache* v. *Budd*, 129 Cal. 554, 62 Pac. 105 (1900); *Enck* v. *Gerding*, 63 Ohio St. 175, 57 N. E. 1083 (1900); *Goff* v. *Britton*, 182 Mass. 293, 65 N. E. 379 (1902); *Gartman* v. *Union Tr. Co.*, 13 Pa. Dist. R. 210 (1904); *Jennings* v. *P. B. & W. R. Co.*, 218 U. S. 255, 54 L. ed. 1031 (1910); *Pace* v. *Volk*, 85 Ohio St. 413 (1912); *Dalton* v. *Dalton*, 146 Ky. 18, 141 S. W. 371 (1911); *Sieling* v. *Brunner*, 117 Md. 682, 83 Atl. 1032 (1912); *Alward* v. *Harper*, 253 Ill. 294, 97 N. E. 653 (1912); *Wyss-Thalman* v. *Maryland Casualty Co.*, 193 Fed. 53 (1911); *Lupton* v. *Underwood*, 26 Del. 519, 85 Atl. 965 (1912); *Moore* v. *Harrison*, 114 Va. 424, 76 S. E. 920 (1912); *Kramm* v. *Stockton E. R. Co.*, 22 Cal. App. 737, 136 Pac. 523 (1913); *Davis* v. *Cress*, 214 Mass. 379, 101 N. E. 1081 (1913);

LEES *v.* UNITED STATES

SUPREME COURT OF THE UNITED STATES, 1893

150 *U. S.* 476

On August 22, 1888, the United States commenced this action in the District Court of the United States for the Eastern District of Pennsylvania to recover of Joseph Lees and John S. Lees, the present plaintiffs in error, the sum of one thousand dollars, as a forfeit and penalty for a violation by them of the Act of Congress of February 26, 1885, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia." 23 Stat. 332, ch. 164. Proceedings were thereafter had in that suit which resulted in a judgment, on February 23, 1889, in favor of the United States, for the sum of one thousand dollars. This judgment was affirmed by the circuit court of that district, and has since, by writ of error, been brought to this court for review.[44]

BREWER, J.: A third allegation of error is that the court compelled one of the defendants to become a witness for the government, and furnish evidence against himself. The bill of exceptions reads as follows:

"John S. Lee sworn.

"Mr. Fenton: John S. Lee, the witness called, is one of the defendants. This is a proceeding in the nature of a criminal proceeding. I object to his being examined on behalf of the plaintiff, because he is protected by statute.

"(Objection overruled. Exception for defendant.)"

This, though an action civil in form is unquestionably criminal in its nature, and in such a case a defendant can not be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd* v. *United States,* 116 U. S. 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government.

Not questioning that such is the scope and effect of the decision in *Boyd* v. *United States,* counsel for the government insists that the objection is not properly preserved in the record, and, therefore, not open for our consideration. A single bill of exceptions was prepared to bring on to the record all the proceedings of the trial. It gives all the testimony, the various objections and rulings

---

Ottumwa Bridge Co. v. *Corrigan,* 251 Mo. 667, 158 S. W. 39 (1913); *Boyd* v. *Kellog,* 121 Md. 42, 88 Atl. 30 (1913); *State ex rel. Bisseberg* v. *Olson,* 124 Minn. 537, 144 N. W. 755 (1914); *Breen* v. *Kennedy,* 158 Wis. 48, 147 N. W. 996 (1914); *Robertson* v. *Cockrell,* 209 Fed. 843 (1914).

Where the trial is by the court, see *Hunt* v. *Bloomer,* 13 N. Y. 341, 12 How. Pr. (N. Y.) 567 (1856).

[44] The arguments of counsel and part of the opinion of the court are omitted.

during its admission, the instructions asked, the charge of the court, and the exceptions thereto, and closes with these words:

"And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record:

"The said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided this fourteenth day of May, 1889.

"(Signed) William Butler. (Seal)"

The objection is that it nowhere appears, by any direct certificate of the judge, by whom John S. Lees was called to testify, or on whose behalf, or that any objection was made and overruled, or any exception taken. Counsel says in his brief: "It is plainly evident that the bill of exceptions was designed, as it states, to introduce into this record only the charge and opinion of the court, and did not relate to any of the innumerable other matters, as to which it appears that the right to except was reserved at the time of their occurrence, and memoranda entries made at the time for future bills of exception, should they hereafter be deemed advisable. But the purpose to introduce these matters by such bills of exceptions seems to have been abandoned; at any rate, no such bills appear in this record, and these matters can not, therefore, be considered by the court."

There is some plausibility in this contention, inasmuch as the two sentences prior to the last, quoted above from the bill of exceptions, suggest, at least, that the purpose of counsel for defendants was simply to preserve exceptions to the charge, and that the authentication of the judge was requested for that alone. But whatever of force there is in this implication is overborne by the statement in the last sentence of what the judge did. By his signature and seal he authenticated the bill of exceptions, as prepared and presented to him. And all the facts and matters stated in that bill are by such authentication brought into the record for all purposes for which they may legitimately be used.

The bill is a single bill of exceptions, commencing with the opening of the trial and ending with the charge of the court, and as such it is authenticated. And that, by this bill errors other than those in the charge were sought to be preserved, is made clear by the fact that, in the assignments of error filed with the bill, there are separate allegations of error in respect to the rulings of the court in the admission of testimony. It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions. *Pomeroy* v. *Bank of Indiana,* 1 Wall. (U. S.) 592, 600, 601, in

which it was said: "Many exceptions may be inserted in one bill of exceptions, and, of course, it is sufficient if the bill of exceptions is sealed at the close. Accordingly, the practice, in the first and second circuits, is to put every exception taken at the trial into one bill of exceptions, which makes the records less voluminous."[45] See also *Chateaugay Iron Co., Petitioner*, 128 U. S. 544. It does not, however, follow that, because all rulings excepted to at the trial may be incorporated into one bill of exceptions, all the proceedings at the trial ought to be stated at length. On the contrary, we frequently find all the testimony set out in such a bill when it can serve no useful purpose, and simply encumbers the record. Only so much of the testimony, or the proceedings, as is necessary to present clearly the matters at law excepted to should be preserved in a bill of exceptions. If counsel would pay more attention to this, they would often save this court much unnecessary labor, and their clients much needless expense. Of course, in this case, as in all similar cases, there remains an inquiry as to the scope and sufficiency of any particular objection or exception disclosed by the bill. All that is meant by this ruling is that the objection or exception thus noted is before us for consideration for whatever it is worth. And, turning to the exception now under consideration, it is specific and direct to the one error of compelling the defendant to be a witness against himself. It is not like that in *Railroad Company* v. *Varnell*, 98 U. S. 479, where the exception ran a whole page of the court's charge, nor was it as in *Hanna* v. *Maas*, 122 U. S. 24, an objection without any exception to the court's ruling, but a distinct objection to a specific matter presented, considered, and overruled, and the ruling excepted to. It was, therefore, sufficient to bring to the consideration of this court the error alleged.[46]

Judgment reversed.

---

[45]Accord: *Stewart* v. *Huntington Bank*, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628 (1824); *Brewer* v. *Isisk*, 12 How. Pr. (N. Y.) 481 (1856); *Anderson* v. *Ames*, 6 Iowa 486 (1858); *Associates of Jersey Co.* v. *Davison*, 29 N. J. L. 415 (1860); *Norfolk & W. R. Co.* v. *Shott*, 92 Va. 34, 22 S. E. 811 (1895); *Rosenthal* v. *Ehrlicher*, 154 Pa. 396, 26 Atl. 435 (1893); *Connell* v. *O'Neill*, 154 Pa. St. 583, 26 Atl. 607 (1893); *Foley* v. *Phila. Rapid Transit Co.*, 240 Pa. 169, 87 Atl. 289 (1913); *First Nat. Bank* v. *Fox*, 40 App. (D. C.) 430 (1913). Contra: *Tall* v. *Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120 (1899); *Baltimore & Ohio R. Co* v. *Rueter*, 114 Md. 687, 80 Atl. 220 (1911); *Citizens Mut. Fire Ins. Co. of Cecil County* v. *Conowingo Bridge Co.*, 116 Md. 422, 82 Atl. 372 (1911); and see *Hainlin* v. *Budge*, 56 Fla. 342, 47 So. 825 (1908).

[46]Under the statute of Westminster II, a bill of exceptions is settled by stating in a condensed and narrative form such, and only such, material facts as are necessary for the determination of the point of law raised. *Ex parte Jones*, 8 Cow. (N. Y.) 123 (1828); *Thomas* v. *Wright*, 9 Serg. & R. (Pa.) 87 (1822); *Carey* v. *Giles*, 10 Ga. 1 (1851); *Karasich* v. *Hasbrouch*, 28 Wis. 569 (1871); *Hickman* v. *Jones*, 76 U. S. 197, 19 L. ed. 551 (1869); *Harvey* v. *Van DeMark*, 71 Ill. 117 (1873); *Hanna* v. *Maas*, 122 U. S. 24, 30 L. ed. 1117 (1886); *Alexander* v. *Williamson*, 86 Ga. 13, 12 S. E. 182 (1890); *Grisell* v. *Noel Bros.*, 9 Ind. App. 251, 36 N. E. 452 (1893); *Caldwell* v. *Parks*, 50 Cal. 502 (1875); *Baltimore R. Co.* v. *Fitzgerald*, 2 App. D. C. 501 (1894); *Ryder* v. *Jenkins*, 163 Mass. 536, 40 N. E. 848 (1895); *Whaley* v. *Vidal*, 26 S. Dak. 300, 128 N. W. 331 (1910); *In re Horan*, 207 Mass. 256, 93 N. E. 581 (1911); *Hahn* v. *Mackay*, 63 Ore. 100, 126 Pac. 12 (1912); *Doylestown Agriculture*

SIKES *v.* RANSOM

SUPREME COURT OF NEW YORK, 1810

6 Johns. (N. Y.) 279

This was an application to the court for a mandamus to the judges of the Ostego common pleas, to amend a bill of exceptions, according to the truth of the case.[47]

PER CURIAM. (KENT, C. J.): The application is entirely new; and it becomes a question whether this court can interfere when a court below refuses to seal a bill of exceptions. The books do not furnish much light on this subject. The practice, in England, under the Stat. of Westm. II (of which ours is a copy), seems to be, to apply to the court of chancery, for a writ grounded upon the statute. The form of the writ is to be found in the register; (182 a)[48] and Lord Redesdale, in the case of *Lessee of Lawlor* v. *Murray*, 1 Sch. and Lefroy 75, calls it a mandatory writ, "a sort of pre-rogative writ;" that the judges to whom it is directed, must obey the writ, by sealing the exceptions, or make a special return to the king in chancery.[49] The writ, after reciting the complaint, commands the judges si ita est, tunc sigilla vestra, etc., et hoc sub periculo quod incumbit nullatenus omittatis. What that peril is, within the purview of the writ, does not distinctly appear; though the books speak of an action on the statute, at the instance of the party aggrieved. (Show. P. G., 117.) In the *Rioter's Case*, 1 Vern. 175, a precedent was produced, where, in a like case, such a mandatory writ had issued out of chancery, to the judge of the sheriff's court in London. But, though no instance appears, of such a writ issuing out of the K. B. when an inferior court refused to seal a bill of exceptions, there is no case denying to that court the power to award the writ. It is, in effect, a writ of mandamus, and it is so termed in the books. (Bac. Abr. tit. Mandamus, E.) A mandamus is a prerogative writ. It ought to be used where the law has established no

---

Co. v. Brackett, 109 Maine 301, 84 Atl. 146 (1912); *Cornell-Andrews Smelting Co.* v. *Boston & P. R. Corp.*, 215 Mass. 381, 102 N. E. 625 (1913); *West* v. *McDonald*, 67 Ore. 551, 136 Pac. 650. A stenographer's transcript of the testimony is not a bill of exceptions. *Keady* v. *United Ry.*, 57 Ore. 325, 108 Pac. 197 (1910); *Cincinnati Tr. Co.* v. *Reebusch*, 192 Fed. 520 (1912). But may be incorporated in the bill of exceptions by the practice in some jurisdictions. *Wagoner* v. *Wilson*, 108 Ind. 210, 8 N. E. 925 (1886); *Big Creek Co.* v. *Wolf*, 138 Ind. 496, 38 N. E. 52 (1894); *Sanders* v. *Mississippi*, 74 Miss. 531, 21 So. 299 (1896); *Connell* v. *O'Neil*, 154 Pa. St. 582, 26 Atl. 607 (1893); *Yoast* v. *Beatty*, 12 Pa. Super. Ct. 219 (1899); *Foley* v. *Philadelphia Rapid Transit Co.*, 240 Pa. 169, 87 Atl. 289 (1913).

[47]Part of the opinion is omitted.

[48]See translation of writ in note to *Drexel* v. *Man*, 6 Watts & S. (Pa.) 386, 40 Am. Dec. 573 (1843).

[49]In *Drexel* v. *Mann*, 6 Watts & S. (Pa.) 386, 40 Am. Dec. 573 (1843), it is said by Gibson, C. J.: "Such a remedy certainly resembles an alternative mandamus, still it is not a prerogative writ, but specific, grounded on a statute." Accord: *Conrow* v. *Schloss*, 55 Pa. St. 28 (1867); and see *Haines* v. *Commonwealth*, 99 Pa. St. 410 (1882).

specific remedy; and where, in justice and good government, there ought to be one. Why can not the writ in question issue from this court? We have the general superintendence of all inferior courts; and are bound to enforce obedience to the statute, and to oblige subordinate courts and magistrates to do those legal acts which it is their duty to do. The mandamus, as was observed in the case of *The King* v. *Baker*, 3 Burr. 1265, has, within the last century, been liberally interposed, for the benefit of the subject, and the advancement of justice. There is no reason why the awarding of this particular writ does not fall within the jurisdiction of this court, or why it should be exclusively confined to the court of chancery. It would be equally in the alternative, quod si ita est, to seal the bill of exceptions; and if it be returned quod non ita est, the answer would be sufficient; and the party if aggrieved, would be put to his action for a false return. If complaint should be made against this court, or one of its judges, for refusing to seal a bill of exceptions, then the writ must, ex necessitate, come from chancery,[50] if anywhere; but in no other case can it be indispensable.

But, though the court are of opinion that they have jurisdiction in this case, yet there does not appear to be sufficient ground disclosed to justify their interference.[51]

Motion denied.

---

[50]But compare *The Rioters Case*, 1 Vern. 175 (1683). A motion was made that the Lord Keeper would grant a mandatory writ to the Chief Justice of the King's Bench to command him to sign a bill of exceptions. The Lord Keeper denied the motion: "for that the precedent they produced was to an inferior court, and he would not presume, but the Chief Justice of England would do what should be just in the case."

[51]Whatever the nature of the remedy, whether true mandamus or a statutory proceeding akin to mandamus, the appellate court has power to compel the trial court to settle a bill of exceptions. Y. B. 11 Hen. IV 52; Fitz. N. B. 21; 2 Co. Inst. 427; *Bridgman* v. *Holt*, Shower P. C. 111; *Lawlor* v. *Murray*, 1 Sch. & L. 75 (1803); *People* v. *Judges*, 1 Caine (N. Y.) 511 (1804); *Broussart* v. *Trahan*, 3 Martin (La.) 714 (1815); *Springer* v. *Peterson*, 1 Blackf. (Ind.) 188 (1822); *Delavan* v. *Boardman*, 5 Wend. (N. Y.) 132 (1830); *Ex parte Crane*, 5 Pet. (U. S.) 189, 8 L. ed. 92 (1831); *People* v. *Jameson*, 40 Ill. 93, 89 Am. Dec. 337 (1867); *Etheridge* v. *Hall*, 7 Port. (Ala.) 47 (1838); *People* v. *Pearson*, 3 Ill. (2 Scam.) 189, 33 Am. Dec. 445 (1839); *Drexel* v. *Man*, 6 Watts & S. (Pa.) 386, 40 Am. Dec. 573 (1843); *People* v. *Baker*, 35 Barb. (N. Y.) 105 (1861); *Conrow* v. *Schloss*, 55 Pa. St. 28 (1867); *Marsh* v. *Hand*, 35 Md. 123 (1871); *Douglass* v. *Loomis*, 5 W. Va. 542 (1871); *Jelley* v. *Roberts*, 50 Ind. 1 (1875); *Benedict* v. *Howell*, 39 N. J. L. 221 (1877); *Page* v. *Clopton*, 30 Grat. (Va.) 415 (1878); *Henry* v. *Davis*, 13 W. Va. 230 (1878); *People* v. *Van Buren*, 41 Mich. 725 49 N. W. 924 (1879); *State* v. *Weaver*, 11 Nebr. 163, 8 N. W. 385 (1881); *State* v. *Hawes*, 43 Ohio St. 16 (1885); *People* v. *Anthony*, 129 Ill. 218, 21 N. E. 780 (1889); *Swartz* v. *Nash*, 45 Kans. 341, 25 Pac. 873 (1891); *Collins* v. *Christian*, 92 Va. 731, 24 S. E. 472 (1896); *State* v. *Sneed*, 105 Tenn. 711, 58 S. W. 1070 (1900); *Houghton* v. *Superior Court*, 128 Cal. 352, 60 Pac. 972 (1900); *Taylor* v. *Reese*, 108 Ga. 379, 33 S. E. 917 (1899); *Sears* v. *Candler*, 112 Ga. 381, 37 S. E. 442 (1900); *State* v. *Gibson*, 187 Mo. 536, 86 S. W. 177 (1904); *Morgan* v. *Kent Circuit Judge*, 150 Mich. 64, 113 N. W. 583 (1907); *Harper* v. *Judge*, 155 Mich. 543, 119 N. W. 913 (1909); *Springfield* v. *Fulk*, 96 Ark. 316, 131 S. W. 694 (1910); *Brode* v. *Goslin*, 158 Cal. 699, 112 Pac. 280 (1910); *Beck* v. *Great Northern Ry. Co.*, 115 Minn. 259, 132 N. W. 1 (1911); *Davies* v. *Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180 (1913). But not to settle it in a particular manner when there is a dispute as to the incidents of the trial. The presid-

HUBBARD *v.* CHAPMAN

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1898

28 App. Div. (N. Y.) 577

Motion by the plaintiff to dismiss an appeal taken by the defendant.

HATCH, J.: The appellant made and served a case which he calls a "proposed case and exceptions." It is evident that by this proposed case the appellant only seeks to review certain rulings of the court in receiving certain testimony, offered by the respondent upon the trial, and for this purpose the case as proposed states that "evidence was offered by the plaintiff tending to prove," etc. Then follows a statement of the evidence, and the objection thereto, and the ruling of the court thereon.

We think that this is a case contemplated by section 997 of the Code of Civil Procedure, which provides:

"When a party intends to appeal from a judgment rendered after a trial of an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed by the judge . . . by or before whom the action was tried, as prescribed in the General Rules of Practice. . . . The case must contain so much of the evidence and other proceedings upon the trial as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case."

---

ing judge must say whether or not an exception was taken and his return controls; the suggested remedy being an action for a false return. *Tweed* v. *Davis*, 1 Hun. (N. Y.) 252, 47 How. Pr. (N. Y.) 162 (1874); *State* v. *Todd*, 4 Ohio 351 (1831); *Benedict* v. *Howell*, 4 Ohio 351 (1831); *State* v. *Small*, 47 Wis. 436, 2 N. W. 544 (1879); *Cummings* v. *Armstrong*, 34 W. Va. 1, 11 S. E. 742 (1890); *Sea Ins. Co.* v. *St. Louis Ry.*, 103 Ark. 503, 148 S. W. 251 (1912).

By statute in some states if the judge disallows or fails to sign exceptions duly tendered, the party aggrieved may establish his exceptions in the appellate court. *Bottum* v. *Fogle*, 105 Mass. 42 (1870); *Morse* v. *Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525 (1891); *Clemens Electrical Mfg. Co.* v. *Walton*, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820 (1898); *Crow* v. *Minor*, 85 Cal. 214, 24 Pac. 640 (1890); *Baird* v. *Gleckler*, 3 S. Dak. 300, 52 N. W. 1097 (1892); *Frank* v. *Mallett*, 92 Maine 77, 42 Atl. 238 (1898); *Whipple* v. *Preece*, 18 Utah 454, 56 Pac. 296 (1899); *Forrester* v. *Boston & C. M. Co.*, 23 Mont. 122, 58 Pac. 40 (1899); *Kendall* v. *Rossi* (R. I.), 85 Atl. 922 (1913). In other states, also by statute, a bill of exceptions may be signed by bystanders if the judge refuses to sign it. *Wright* v. *Nichols*, 1 Bibb (Ky.) 298 (1808); *Arnold* v. *Leathers*, 2 Dana (Ky.) 287 (1834); *Houston* v. *Jones*, 4 Tex. 170 (1849); *Simon* v. *Weigel*, 10 Iowa 505 (1860); *St. John* v. *Wallace*, 25 Iowa 21 (1868); *Hoyt* v. *Williams*, 41 Mo. 270 (1867); *Heidenheimer* v. *Thomas*, 63 Tex. 287 (1885); *Diamond Mining Co.* v. *Faulkner*, 17 Colo. 9, 28 Pac. 472 (1891); *Fordyce* v. *Jackson*, 56 Ark. 594, 20 S. W. 528, 597 (1892); *Williams* v. *Pitt*, 38 Fla. 162, 20 So. 936 (1896); *Ayer* v. *Greer*, 87 Ark. 543, 113 S. W. 209 (1908); *Cox* v. *Cooley*, 88 Ark. 350, 114 S. W. 929 (1908); *State* v. *Taylor*, 134 Mo. App. 430, 114 S. W. 1029 (1908); *Shook* v. *Shook* (Tex. Civ. App.), 145 S. W. 699 (1912).

By rule 34 of the General Rules of Practice it is provided that "A bill of exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken on the trial, and it shall be the duty of the judge, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted."

It thus appears that the code and the rules are in harmony with respect to what constitutes a case and exceptions. One refers to the other, and by the express terms of each it is only required that the case shall contain so much of the evidence and proceedings had upon the trial as is material to present the questions and exceptions which the appellant seeks to have reviewed. In this view it can make no practical difference whether the evidence in terms be set out, or a statement of its effect be made. The essential thing is to have the fact appear and when this is done every requirement is met, as the parties will then have everything which will protect their rights, and the court be informed of all that is needful to make a proper disposition of the case. While no mention is made of a bill of exceptions in the code, the same is not true of the rule. But it is quite evident from a reading of both that the proposed case for which provision is made in the code, embrace what was formerly known as a bill of exceptions.[52]

It has been the uniform desire of the court that where the appellant seeks only to have questions of law presented for review, the case should not contain the whole of the evidence, but only so much as will present the questions sought to be reviewed. Such is the recommendation of the court as expressed in the decisions.[53]

The code has in no respect changed this rule, but the practice in this regard remains the same as under the decisions we have cited, and such practice is expressly continued by the provisions of Supreme Court Rule 34, as it is therein made the duty of the judge to strike out, upon a settlement, all evidence and other matters not necessarily required to present the questions sought to be reviewed.

The defendant, in his proposed case and exceptions, complies with this rule, as he makes a clear statement of what the evidence

---

[52]Citing *Winter* v. *Crosstown Ry. Co.*, 8 Misc. 362, 28 N. Y. S. 695, 59 N. Y. St. 598 (1894). Accord: *Stiasny* v. *Metropolitan St. Ry. Co.*, 65 App. Div. 268, 72 N. Y. S. 747 (1901); and see 3 Encyc. Pl. & Pr. 881.

[53]Citing *Marckwald* v. *Navigation Co.*, 8 Hun (N. Y.) 547 (1876); *Price* v. *Powell*, 3 N. Y. 322 (1852); *Bissel* v. *Hamlin*, 20 N. Y. 519 (1859); *Jewell* v. *Van Steenburgh*, 58 N. Y. 85 (1874); *Tweed* v. *Davis*, 1 Hun (N. Y.) 252, 47 How. Pr. (N. Y.) 162 (1874). Accord: *Hoffman* v. *Aetna Fire Ins. Co.*, 19 Abb. Pr. (N. Y.) 325, 24 N. Y. Super. Ct. 501 (1863); *Silver Valley Min. Co.* v. *Smelting Co.*, 119 N. Car. 415, 26 S. E. 27 (1896); *Zuther* v. *Blumenthal*, 58 N. Y. S. 318 (1899); *Douglas* v. *Glazier*, 9 N. Dak. 615, 84 N. W. 552 (1900); *Wierichs* v. *Innis*, 32 Misc. 462, 66 N. Y. S. 553 (1900). Evidence should be incorporated in a condensed and narrative form. *Battersby* v. *Abbott*, 9 Cal. 565 (1858); *Barger* v. *Halford*, 10 Mont. 57, 24 Pac. 699 (1890); *Donai* v. *Lutjens*, 20 Misc. 221, 45 N. Y. S. 364 (1897); *State* v. *Otis*, 71 Minn. 511, 74 N. W. 283 (1898); *Watson* v. *Duncan*, 29 Misc. 447, 60 N. Y. S. 755 (1899); *Peoples* v. *Evans*, 50 Tex. Civ. App. 225, 111 S. W. 756 (1908); *Pulcino* v. *Long Island R. Co.*, 125 App. Div. 629, 109 N. Y. S. 1076 (1908); *Twiggs* v. *Williams*, 98 S. Car. 431, 82 S. E. 676 (1914); *Donahoe* v. *Adebar*, 34 S. Dak. 471, 149 N. W. 175 (1914).

tended to establish, followed by the objection, the ruling of the court thereon, and the exception to such ruling. So that in this respect the point sought to be raised is clearly intelligible, and gives notice to the respondent of the precise question which the appellant seeks to have reviewed.

The remedy of the respondent is clear. If the statement as thus made does not conform to the facts as they appeared on the trial, and upon which the ruling was based, he is authorized to propose, by way of amendment, such further statement, if any, as he claims the evidence established, in order that the statement may contain the precise facts upon which the ruling of the court was based.[54] This remedy protects every right of the respondent and enables him to have inserted all that is essential to show the correctness of the ruling, if the facts appearing upon the trial establish such result.

We think that the appellant in this case complied with the provisions of the code and the rules, and the settled practice thereunder, as adjudicated in the numerous decisions which have arisen upon the question.[55]

It follows that the motion should be denied, with ten dollars costs and disbursements, with leave to the respondent to serve such proposed amendments to the case as he shall be advised.

All concurred.

---

[54] *Stuart* v. *Binsse*, 3 Bosw. (N. Y. Super. Ct.) 657 (1859); *Tyng* v. *Marsh*, 51 How. Pr. (N. Y.) 465 (1876); *M. K. & T. R. Co.* v. *Roach*, 18 Kans. 592 (1877); *Renwick* v. *Elevated R. Co.*, 59 N. Y. Super. Ct. 96, 13 N. Y. S. 600 (1891); *Warburton* v. *Ralph*, 9 Wash. 537, 38 Pac. 140 (1894)

[55] See further *Jackson ex dem. Field* v. *Sinclair*, 4 Cow. (N. Y.) 43 (1825); *Jackson* v. *Harrington*, 4 Cow. (N. Y.) 537 (1825); *Green* v. *Russell*, 1 How. Pr. (N. Y.) 8 (1844); *Johnson* v. *Whitlock*, 13 N. Y. 344, 12 How. Pr. (N. Y.) 571 (1856); *Smith* v. *Grant*, 15 N. Y. 590 (1857); *Westcott* v. Thompson, 16 N. Y. 613 (1858); *Graham* v. *Stewart*, 68 Cal. 374, 9 Pac. 555 (1886); *Sullivan* v. *Thomas*, 3 S. Car. 531 (1872); *Tuxbury* v. *French*, 39 Mich. 190 (1878); *Mullaney* v. *Humes*, 47 Kans. 99, 27 Pac. 817 (1891); *People* v. *Featherly*, 131 N. Y. 597, 30 N. E. 48 (1892); *Delaney* v. *Valentine*, 11 App. Div. 316, 42 N. Y. S. 571 (1896); *Parrault* v. *Marsant*, 9 Kans. App. 419, 58 Pac. 1027 (1899); *Gregory* v. *Clark*, 53 App. Div. 74, 65 N. Y. S. 687 (1900); *Wierichs* v. *Innis*, 32 Misc. 462, 66 N. Y. S. 553, 8 N. Y. Ann. Cas. 122 (1900); *Harvin* v. *Blackman*, 108 La. 426, 32 So. 452 (1901); *Savage* v. *Potter*, 159 App. Div. 729, 145 N. Y. S. 78 (1913); *Jermyn* v. *Searing*, 160 App. Div. 832, 146 N. Y. S. 57 (1914); *Dunlap* v. *Rumph*, 43 Okla. 491, 143 Pac. 329 (1914).

In *Thompson* v. *Fulton*, 29 Okla. 700, 119 Pac. 244 (1911), it is said, per Williams, J.: "A case-made is solely a creature of the statute, and whilst more comprehensive than a bill of exceptions, is a substitute therefor. The office of a bill of exceptions and that of a case-made are very dissimilar. The former is generally to bring up the record to review a decision of the court upon a matter of law which the record would otherwise not show, in which case it must be reduced to writing, allowed, signed, and filed at the term that the decision complained of is made, except where the statute permits, on order of the court, the allowing, signing and filing same out of term time. Neither the pleadings nor the judgment nor orders of the court may properly be included in a bill of exceptions; nor are any of the parties entitled to notice of presentation for allowance. When filed, it becomes a part of the record, and is brought up by transcript, which must include the other parts of the record. As to the case-made, it may be settled, signed, and allowed

ATKINSON *v.* PEOPLE'S NAT. BANK OF WATERVILLE

SUPREME JUDICIAL COURT OF MAINE, 1893

85 *Maine* 368

This was a writ of error to reverse a judgment recovered in the Superior Court for Kennebec County, against the plaintiff in error by the defendant in error at the December term, 1882. The defendant pleaded in nullo est erratum, which was joined by the plaintiff.

The errors alleged are: First, the writ in said suit in which judgment was rendered was not signed by the clerk of the superior court and the proceedings are void, having no legal foundation whatever; second, the court rendering said judgment had no jurisdiction to render the same, the process upon which it was rendered being void for want of a legal writ, said writ not having been signed by the clerk of the court which rendered said judgment.

The original writ bears date January 5, 1882, and purported to be signed by W. M. Stratton, who, defendants admitted was not clerk at that time, and whose term of office had expired more than a year previously.[56]

EMERY, J.: At common law the usual writ of error (coram vobis) issued out of the writ office in chancery to the court whose record in the particular case was to be examined, and commanded that court to send the record and process in the case with all things touching them (and also to return the writ itself), into some other court, usually the king's bench, for examination and judgment. Thus the writ partook of a dual nature. It operated as a writ of certiorari to the inferior court to send up its record and proceedings in the case, and it also operated as a commission to the superior court to inquire into and determine the legality of such record and proceedings.

After the return of the writ with the record and proceedings of the inferior court, into the superior court, the latter court issued its own writ of scire facias to the defendant in error. Upon the return

---

beyond the trial term and in vacation, but it must be complete in itself; the pleadings, judgment, and orders of the court to be incorporated therein. It must contain the matters of record, as well as the proceedings not entered on the record. To present errors for review the case-made must embody a statement of so much of the issue, proceedings and evidence, or other matters in the action, as may be necessary to bring to the notice of the appellate court, from an examination of the paper settled and authenticated as a case-made, the errors complained of. The object of the case-made is to reduce the size of the record, eliminating all matters immaterial to the question sought to have reviewed."

On the settlement of a case on appeal there was a dispute between counsel as to whether a certain colloquy took place on the trial. The trial judge decided from his recollection that such a colloquy had occurred although it did not appear in the stenographer's minutes. The appellate court refused to interfere with such determination. *Burke* v. *Baker,* 104 App. Div. 26, 93 N. Y S. 215 (1905).

[56] Part of the statement of facts, the arguments of counsel and part of the opinion of the court are omitted.

of this writ of scire facias, the pleadings were made. The plaintiff assigned errors, and the defendant pleaded in nullo est erratum, or some other appropriate plea.

If the return made upon the original writ of error did not include the entire, completed record and proceedings in the case, the superior court, upon the suggestion of either party, would issue a special writ in the nature of a writ of certiorari to the inferior court to send up the omitted portions.[57] The superior court would also issue this special writ of its own motion in order to supply omissions and obtain enough to show a valid record. The pleadings did not properly begin until the entire, completed record had been obtained.

In this case the transcript is very fragmentary. The plaintiff offered only a transcript of an "abbreviated record," such as is named in section 11 of chapter 79, R. S., together with a copy of the original process and the officer's return thereon. The defendant offered only a copy of the docket entries and a copy of the pleas. We have repeatedly held that the court will not pronounce a judgment erroneous where only the abbreviated record permitted in section 11, chapter 79, R. S., is produced. *Tyler* v. *Erskine,* 78 Maine 91; *Lewiston Steam Mill Co.* v. *Merrill,* 78 Maine 107. That abbreviation may suffice as evidence of a judgment where it is only sought to prove its existence. Where, however, it is sought to reexamine the proceedings and reverse the judgment for error, there must be a full unabridged record made up so that all the proceedings may be seen. Such a record, according to Blackstone, comprises "the original writ, and summons, all the pleadings, the declaration, view or oyer prayed, the imparlances, plea, replication, re-

[57] "If the judges of the common pleas, or other judges, upon a writ of error, will not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record." Bacon's Abridgment, Error (e); Fitz. N. B. 25 a; *Yates* v. *Windham,* Cro. Eliz. 155 (1588); *Meredith* v. *Davies,* 1 Salk. 270 (1711); *Andrews* v. *Bosworth,* 3 Mass. 223 (1807); *Downing* v. *Baldwin,* 1 Serg. & R. (Pa.) 298 (1815); *Bassler* v. *Niesly,* 1 Serg. & R. (Pa.) 472 (1815); *Seagrave* v. *Lacy,* 28 Pa. Super. Ct. 586 (1905). The appellate court is, in the absence of a statute, without power to materially amend the record. *Hutchinson* v. *Crossen,* 10 Mass. 251 (1813); *Thatcher* v. *Miller,* 13 Mass. 270 (1816); *Wood* v. *Newkirk,* 15 Ohio St. 295 (1864); *Wells* v. *Smith,* 49 W. Va. 78, 38 S. E. 547 (1901); *Tighe* v. *Maryland C. Co.,* 216 Mass. 459, 103 N. E. 941 (1914); *Murphy* v. *Milford,* 210 Fed. 135 (1914). But may remand for correction. *Merriam* v. *Merriam,* 6 Cush. (Mass.) 91 (1850); *Stickle* v. *Haskins,* 54 Mich. 130, 19 N. W. 919 (1884); *Waln* v. *Beaver,* 161 Pa. St. 605, 29 Atl. 114 (1894); *Fitzsimmons* v. *Robb,* 173 Pa. St. 645, 34 Atl. 233 (1896); *Hobbs* v. *National Bank of Commerce of Kansas City,* 93 Fed. 615 (1899); *Witherbee* v. *Taft,* 47 App. Div. 627, 62 N. Y. S. 242 (1900). Or by certiorari require the return of a complete transcript. *Colden* v. *Knickerbacker,* 2 Cow. (N. Y.) 31 (1823); *Kanouse* v. *Martin,* 2 How. Pr. (N. Y.) 252 (1846); *Apgar* v. *Hiller,* 24 N. J. L. 808 (1854); *Robinson* v. *Varnell,* 16 Tex. 382 (1856); *Sweeny* v. *Lomme,* 22 Wall. (U. S.) 208, 22 L. ed. 727 (1874); *Flagg* v. *Searle,* 31 L. I. (Pa.) 101 (1874); *Rohrbaugh* v. *Bennett,* 30 W. Va. 186, 3 S. E. 593 (1887); *Mathews* v. *Booye,* 58 N. J. L. 593, 34 Atl. 754 (1896); *Allen* v. *McLendon,* 113 N. Car. 319, 18 S. E. 205 (1893); *Wyatt* v. *Crowder,* 112 Ga. 168, 37 S. E. 380 (1900); *Spedden* v. *Baltimore Refrigerating & Heating Co.,* 117 Md. 443, 84 Atl. 150 (1912).

joinder, continuances and whatever other proceedings have been had; all entered verbatim on the roll; also the issue or demurrer and joinder therein." 3 Bl. 317.

Either party can require the clerk of the court to extend the record without abbreviation, and give him a transcript of such complete record.

If such a record were made and presented by transcript in this case, it may appear that the matters specified as errors in the original process and the return thereon, were completely waived and cured by the defendant's appearance and pleading directly in bar to the declaration without interposing any plea in abatement or motion to dismiss. We think, therefore, we should not pronounce judgment upon the record until the complete unabbreviated record is brought before us.[58]

The plaintiff in error has, however, submitted his case upon the transcript and copies produced by him. These, as above explained, do not necessarily show any error; hence his writ of error should be dismissed.

Writ dismissed. Plaintiff nonsuit.

All concur.

---

[58]Unless otherwise provided by rule of court or statute the case must be presented to the appellate court on a transcript of the full, unabridged record. *Tyson* v. *Hylyard*, 2 Ld. Raym. 1122 (1704); *Curtis* v. *Petitpain*, 59 U. S. 109, 15 L. ed. 280 (1855); *Miller* v. *Thomas*, 78 Cal. 509, 21 Pac. 11 (1889); *Neiswender* v. *James*, 41 Kans. 463, 21 Pac. 573 (1889); *Litchford* v. *Day*, 87 Va. 71, 12 S. E. 107 (1890); *Lawson* v. *Mills*, 150 Mo. 428, 51 S. W. 678 (1899); *Metzger* v. *Woolridge*, 183 Ill. 174, 55 N. E. 694, 75 Am. St. 100 (1899). Statutes have provided for abbreviating the record under various names such as "abstract of the record," "case settled," "case made," etc. N. Y. Code Civ. Pro., §§ 997, 1339, 1353; *Bissel* v. *Hamlin*, 20 N. Y. 519 (1859); *Railway Co.* v. *Stewart*, 95 U. S. 279, 24 L. ed. 431 (1877); *Graham* v. *Stewart*, 68 Cal. 374, 9 Pac. 555 (1886); *Zucker* v. *Blumenthal*, 58 N. Y. S. 318 (1899); *Barton* v. *Twohy Mercantile Co.*, 104 Wis. 420, 80 N. W. 739 (1899); *Wierichs* v. *Innis*, 32 Misc. 462, 66 N. Y. S. 553, 8 N. Y. Ann. Cas. 122 (1900); *Atchison, T. & S. F. R. Co.* v. *Conlon*, 77 Kans. 324, 94 Pac. 148 (1908); *Electric Welding Co.* v. *Prince*, 200 Mass. 386, 86 N. E. 947 (1909). But while the details of the specific requirements are controlled by the local statutes and rules, it is a general principle that the record, transcript or case must be complete in itself, containing all matters necessary for an intelligent review by the appellate court of the errors alleged. *Darrow* v. *Langdon*, 20 Conn. 288 (1850); *Brindle* v. *Brindle*, 50 Pa. St. 387 (1865); *Glidden* v. *Packard*, 28 Cal. 649 (1865); *Ehrman* v. *Rothschild*, 23 Hun (N. Y.) 273 (1880); *Werlan* v. *Schollett*, 63 Tex. 227 (1885); *Raimond* v. *Terrebonne Parish*, 132 U. S. 192, 33 L. ed. 309 (1889); *Haynes* v. *Cape May*, 52 N. J. L. 180, 19 Atl. 176 (1889); *Perry's Estate*, 42 S. Car. 183, 20 S. E. 84 (1894); *Adams* v. *Bement*, 96 Ky. 334, 29 S. W. 22, 16 Ky. L. 676 (1894); *Cook* v. *Challis*, 55 Kans. 363, 40 Pac. 643 (1895); *Finch* v. *Comrade*, 154 Pa. St. 326, 26 Atl. 368 (1893); *Woodward* v. *Heist*, 180 Pa. St. 161, 36 Atl. 645 (1897); *White* v. *White*, 169 Mass. 52, 47 N. E. 499 (1897); *Inhabitants of New Barborough* v. *Brewer*, 170 Mass. 162 (1898); *McLaughlin* v. *Davis*, 64 N. J. L. 360, 45 Atl. 967 (1899); *Corsiglia* v. *Burnham*, 189 Mass. 347, 75 N. E. 253 (1905); *National Lumber Co.* v. *Mehaffey*, 30 Pa. Super. Ct. 544 (1906); *Doust* v. *Rocky Mountain Bell Telephone Co.*, 14 Idaho 677, 95 Pac. 209 (1908); *Caldwell* v. *Klyce*, 80 Wash. 469, 141 Pac. 1042 (1914).

For modern English practice see Rules of Supreme Court, Order LVIII, rule 11.

SECTION 5. ASSIGNMENTS OF ERROR

LAMY *v.* LAMY

SUPREME COURT OF NEW MEXICO, 1887

4 *N. Mex.* 43[*]

LONG, C. J.: This cause is here by writ of error under section 2194 of the Compiled Laws. Praecipe for writ was filed August 25, and it issued September 30, A. D. 1885. A transcript of the proceedings in the court below was filed with the clerk of this court, and the cause docketed December 23, 1885. The Supreme Court, at its last term, convened on the fourth day of January, A. D. 1886, and on the second day of that term the defendant in error appeared, and on the same day leave was asked by the plaintiff for time in which to file brief, and it was given. On the eighth day of January, within the time so extended, plaintiff filed his brief. To that date there was no assignment of error, and four days of the term had expired. The printed brief is in the usual form. Its title page contains the name of the court and the term wherein the cause is pending, and the words "Brief of Plaintiff in Error," with the signature of the solicitor who appeared for him. The brief contains subdivisions printed under prominent headlines as follows: "Statement of the Cause," "Assignment of Errors," "Points and Authorities." Following the first subdivision is a narration of the proceedings in the court below as shown by the records. Under the words "Assignment of Errors" is a statement that the court below erred in six particulars, which are named, and then follow the points and authorities relied upon, and the signature of the plaintiff's solicitor as such.

It is not contended by plaintiff that the cause was not returnable at the January term, A. D. 1886, but he claims that his brief is, in legal effect, an assignment of errors; and, although not filed until the fourth day of that term, the court should not for that reason disregard it. On the other hand, the defendant moves to dismiss the writ for the alleged reason that plaintiff did not assign error on or before the first day of the January term, A. D. 1886; and the question for the court now to determine is whether or not this motion shall be sustained.

It is clear that error was not assigned "on or before the first day of the term at which the cause is returnable." There is no claim or pretense of assignment within that time. Unless the contents of the brief can be regarded as an assignment of error, there is none at this time.

Can the brief be treated as such an assignment as the law requires? Bouvier defines a brief to be "an abridged statement of the party's case," "a summary of the points or questions in issue."

[*]Part of the opinion is omitted. A motion to reconsider was overruled *Territory* v. *Ashenfelter*, 4 N. Mex. 93, 12 Pac. 879.

"This statement should be perspicuous and concise." In general legal usage, a brief is in no sense a pleading. It contains a statement of the facts shown by the record, and the points, authorities, and arguments relied upon to sustain the contention presented for consideration. It is in the nature of an argument.

What is an assignment of error? "In practice, the statement of the case of the plaintiff, setting forth the errors complained of. It corresponds with the declaration in ordinary actions.[60] All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendants may plead to them." Bouv. 197. "An assignment in error is in the nature of a declaration, and is either of errors in fact, or errors of law." 2 Tidd Pr. 1168. "To an assignment of errors the defendant may plead or demur." 2 Tidd Pr. 1173. "Issue being joined in error, the proceedings are entered of record." 2 Tidd Pr. 1175, 1176. "In the house of lords, when the defendant hath joined in error, the cause is set down to be heard in turn."

The author of Powell on Appellate Proceedings, after discussing the manner in which cases may be carried into the appellate court, proceeds: "The next matter in the course of procedure is the pleadings of the parties preparatory to their coming to a hearing. These pleadings consist, on the part of the plaintiff, of his assignment of those errors of which he complains, and, on the part of the defendant, his pleas or answers thereto." "Assignment of error is as indispensable in these proceedings as a declaration and cause of action in the original cause." Powell, App. Proc. 277. To the errors so assigned the defendant must plead or demur within the time allowed by the rules of the court. Powell, App. Proc. 280.

In *Hinkle v. Shelley,* 100 Ind. 89, it is held: "In this court the assignment of error is the complaint of the appellants, and, like a complaint in the trial courts, it must be good as to all who join therein, or it will be good as to none." See also *Robbins* v. *Magee,* 96 Ind. 176, to the same point.

"An assignment of error is indispensable. It is a pleading upon which an issue is to be made by demurrer, joinder or plea." *Wells* v. *Martin,* 1 Ohio St. 388.

Authorities to the same effect could be multiplied. It is apparent that an assignment of error is in the nature of a pleading, and, while it might properly be copied into the brief as a part of the statement of the cause, it should be made in some more formal way. It may be much doubted whether it is good or permissible practice to omit a formal assignment, relying on the recitals of the brief to supply the omission.[61]

---

[60]Accord: *Williston* v. *Fisher,* 28 Ill. 43 (1862); *Kinnon* v. *Louisville & N. R. Co.,* 187 Ala. 480, 65 So. 397 (1914); *Live Stock I. Assn.* v. *Edgar* 56 Ind. App. 489, 105 N. E. 641 (1914).

[61]The brief or paper book is no part of the record, but a convenient mode of presenting the case for the consideration of the court. Errors assigned in the brief only will not be considered. *Armstrong's Appeal,* 68 Pa. St. 409 (1871) *Witherspoon* v. *Crawford* (Tex. Civ. App.), 153 S. W. 633 (1912). And generally the assignments of error must be incorporated in the record. *Gibbs*

It is not necessary to decide whether the plaintiff's brief constituted an assignment of errors, as that was not filed until the fifth day of the term. It is apparent, however, from the authorities cited, that the assignment of errors is in the nature of a pleading. It is the foundation of the plaintiff's cause in this court, and without it he can have no standing here. To this assignment the court must look for the questions to be determined. Upon it the issue is made. In this cause there is no record of any such pleading. There is no application to the court, showing an excuse for omitting to assign errors at an earlier day, for leave to now assign them.

It is, however, contended by plaintiff that the recital in the brief is at least evidence that an effort was made in good faith to comply with the statute, and therefore that good cause is shown for a failure to make a strict compliance therewith. If the defendant's motion were to dismiss because no assignment of error was made on the fifth day of the term, the argument might have some force. It is not, however, perceived how an effort to assign errors on the fifth day of the term can constitute any excuse for failure to do so on the first day. Ten days passed between the date when the transcript was filed and the commencement of the term, and no reason whatever is given for failure, within this period, to make the necessary assignment. In addition, four more days passed, and no leave was asked for time within which to assign errors, nor was any cause shown why they were not assigned before, nor cause given for delay. The interests of the bar and of litigants will be best subserved by holding a reasonably strict rule; otherwise, a lax, irregular practice will prevail, tending to confusion and delay. The requirements of the statutes are in such clear terms as to preclude misapprehension. The authorities define beyond doubt the character and office of an assignment of error. Under such conditions, the failure to comply with a clear and obvious requirement can not constitute such an excuse as to invoke the discretion of the court to relax the rule of the statutes. Discretion can not, or at least should not, be exercised so as to create delay, without facts upon which to predicate the excuse of discretion.

The motion of the defendant is sustained, the writ of error is dismissed, and the costs occasioned thereby taxed against the plaintiff.[62]

Brinker and Henderson, JJ., concur.

---

v. *Blackwell*, 40 Ill. 51 (1867); *Deputy* v. *Hill*, 85 Ind. 75 (1882); *Cameron* v. *Roemele*, 59 Tex. 238 (1883); *Moore* v. *Hammons*, 119 Ind. 510, 21 N. E. 1111 (1889); *Schmitz* v. *Heger*, 5 N. Dak. 165, 64 N. W. 943 (1895); *Martin* v. *Terry*, 6 N. Mex. 491, 30 Pac. 951 (1892). In some jurisdictions a statement of the errors in the brief is sufficient. *McReavy* v. *Eshleman*, 4 Wash. 757, 31 Pac. 35 (1892); *Haugh* v. *Tacoma*, 12 Wash. 386, 41 Pac. 173 (1895); *Donnell M. Co.* v. *Hart*, 40 Mo. App. 512 (1890); *Davis* v. *Barada-Ghio Real Estate Co.*, 163 Mo. App. 328, 143 S. W. 1108 (1911), semble.

[62]The general rule is that questions not presented by the assignments of error will not be considered. *Prescott* v. *Tarbell*, 1 Mass. 204 (1804); *Pembroke* v. *Abington*, 2 Mass. 142 (1806); *Moody* v. *Vreeland*, 7 Wend. (N. Y.) 55 (1831); *Tucker* v. *Ellis*, 1 Ark. 273 (1839); *Adams* v. *Munson*, 3 How. (Miss.) 77 (1838); *Martin* v. *Russell*, 4 Ill. (3 Scam.) 342 (1841);

CAYUGA BUILDING & LOAN ASSN. *v.* MacMULLEN

SUPERIOR COURT OF PENNSYLVANIA, 1911

46 Pa. Super. Ct. 94

RICE, P. J.: The single assignment of error is that the court erred in dismissing the appellant's exceptions to the auditor's findings of fact and conclusions of law. Nineteen exceptions were filed by the appellant, some to findings of fact, others to conclusions of law, and others to the refusal of certain findings and conclusions requested by him. It is contended in the appellee's paper book that the assignment should be disregarded because it is in violation of rule xiv of this court, which provides as follows: "Each error relied on must be assigned particularly, and by itself. If any assignment embrace more than one point, or refer to more than one bill of exceptions, or raise more than one distinct question, it shall be considered a waiver of all the errors so alleged." Notwithstanding this objection was thus brought to the notice of the appellant, no motion was made to remove it by amendment. The objection is substantial and not merely technical. The rule is an important one and has been enforced in numerous instances by this court, and a similar rule has been enforced many times by the Supreme Court. A

Wells v. *Martin*, 1 Ohio St. 386 (1853); *Hollingsworth* v. *State*, 8 Ind. 257 (1856); *Smith* v. *Williams*, 36 Miss. 545 (1858); *Ives* v. *Finch*, 28 Conn. 112 (1859); *Hutton* v. *Reed*, 25 Cal. 478 (1864); *Burnham* v. *Van Gelder*, 32 Mich. 490 (1875); *State* v. *Lewis*, 39 N. J. L. 501 (1877); *Weissman* v. *Russell*, 10 Ore. 73 (1882); *Williams* v. *Riley*, 88 Ind. 290 (1882); *Ditch* v. *Sennott*, 116 Ill. 288, 5 N. E. 395 (1886); *Wood* v. *Whitton*, 66 Iowa 295, 19 N. W. 907 (1885); *Freeman* v. *Rhodes*, 36 Minn. 297, 30 N. W. 891 (1886); *McNeill* v. *Kyle*, 86 Ala. 338, 5 So. 461 (1888); *Lang* v. *Max*, 50 Ill. App. 465 (1893); *Speers* v. *Knarr*, 4 Pa. Super. Ct. 80 (1897); *Grimm* v. *Washburn*, 100 Wis. 229, 79 N. W. 984 (1898); *Watson* v. *Le Grand Rink Co.*, 177 Ill. 203, 52 N. E. 317 (1898); *Collins* v. *Carr*, 111 Ga. 867, 36 S. E. 959 (1900); *Commonwealth* v. *Owen*, 32 Pa. Super. Ct. 420 (1907); *Axel* v. *Kraemer*, 75 N. J. L. 688, 70 Atl. 367 (1908); *Howard* v. *Swissvale Bor.*, 216 Pa. 388, 65 Atl. 814 (1907); *Jones* v. *Weir*, 217 Pa. 321, 66 Atl. 550 (1907); *Harper Machinery Co.* v. *Ryan Unmack Co.*, 85 Conn. 359, 82 Atl. 1027 (1912); *Wood* v. *Wilbert*, 226 U. S. 384, 57 L. ed. 264 (1912); *Benz* v. *Central R. R. of N. J.*, 82 N. J. L. 197, 82 Atl. 431 (1912); *Prosser* v. *Mauley*, 122 Minn. 448, 142 N. W. 876 (1913); *Burpee* v. *Burpee*, 109 Maine 379, 84 Atl. 648 (1912); *Nelson* v. *Timber Co.*, 66 Ore. 570, 133 Pac. 1167 (1913); *Cass* v. *Duncan*, 260 Ill. 228, 103 N. E. 280 (1913); *Malin* v. *James*, 244 Pa. 336, 90 Atl. 714 (1914). The appellate court may, nevertheless, notice plain errors apparent on the face of the record, although not assigned. *Castledine* v. *Mundy*, 4 B. & Ad. 90 (1832); *Crandall* v. *State*, 10 Conn. 339 (1834); *Gittings* v. *Baker*, 2 Ohio St. 21 (1853); *Arthurs* v. *Smathers*, 38 Pa. St. 40 (1860); *Louisiana* v. *Balize*, 38 La. Ann. 542 (1886); *Richardson* v. *Knox*, 14 Tex. Civ. App. 402, 37 S. W. 189 (1896); *Newell* v. *West*, 149 Mass. 520, 21 N. E. 954 (1889); *Huntsman* v. *Linville River Lumber Co.*, 122 N. Car. 583, 28 S. E. 838 (1898); *United States* v. *Pena*, 175 U. S. 500, 44 L. ed. 251 (1899); *The Myrtie M. Ross*, 160 Fed. 19 (1908); *Canole* v. *Allen*, 222 Pa. 156, 70 Atl. 1053 (1908); *White* v. *United States*, 202 Fed. 501 (1913). Compare *McGoldrick* v. *Slevin*, 43 Ind. 522 (1873); *Hughes* v. *Decker*, 38 Maine 153 (1854); *Lane* v. *Taylor*, 40 Ind. 495 (1872).

careful examination of the auditor's report and the evidence adduced before him leads us to the conclusion that no substantial wrong to the appellant will result if we enforce it in the present case, as we are dictinctly asked to do by appellee's counsel.

Appeal quashed.[63]

WALKER *v.* WATERBURY

SUPREME COURT OF ERRORS OF CONNECTICUT, 1908

81 *Conn.* 13

Action against the city of Waterbury and the Hellmann Brewing Company for the diversion by the city of a water-course, and by the company of another water-course, into a city sewer, whereby the plaintiff's cellar was flooded, brought to and tried by the Superior Court in New Haven County, Case, J., who gave judgment for the defendants.[64]

BALDWIN, C. J.: The reasons of appeal read as follows: 1. The court erred in rendering judgment for both defendants upon the pleadings and facts found. 2. The court erred in rendering judgment for defendant, the city of Waterbury, upon the pleadings and facts found. 3. The court erred in rendering judgment for defend-

---

[63]Accord: *Reimer* v. *Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744 (1853); *Good Intent Co.* v. *Hartzell*, 22 Pa. St. 277 (1853); *Chicago R. I. R. Co.* v. *Moffit*, 75 Ill. 524 (1874); *Union Central Life Ins. Co.* v. *Chowing*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504 (1894); *Saunders* v. *Montgomery*, 143 Ind. 185, 41 N. E. 453 (1895); *Norwalk* v. *Ireland*, 68 Conn. 1, 35 Atl. 804 (1896); *United States* v. *Indian Gove Drainage District*, 85 Fed. 928 (1898); *Chandler* v. *Pomeroy*, 96 Fed. 156 (1899); *Hammond* v. *Vetsburg*, 56 Fla. 369, 48 So. 419 (1908); *Ayers* v. *Hobbs*, 41 Ind. App. 576, 84 N. E. 554 (1907); *Decker* v. *Mann*, 80 Conn. 86, 66 Atl. 884 (1907); *The Myrtie M. Ross*, 160 Fed. 19 (1908); *Haley* v. *American A. C. Co.*, 224 Pa. 316, 73 Atl. 557 (1909); *Catlin* v. *Northern Coal & Iron Co.*, 225 Pa. 262, 74 Atl. 56 (1909); *Southern Hardware Co.* v. *Standard E. Co.*, 165 Ala. 582, 51 So. 789 (1910); *McMillan* v. *Warren*, 59 Fla. 578, 52 So. 825 (1910); *Williamson* v. *Powell* (Tex. Civ. App.), 140 S. W. 359 (1911); *Mulvey Mfg. Co.* v. *McKinney*, 161 Ill. App. 514 (1911); *Merritt* v. *Poli*, 236 Pa. 170, 84 Atl. 683 (1912); *West-Homestead* v. *Erbeck*, 239 Pa. 192, 86 Atl. 773 (1913). Compare *Central Trust Co.* v. *Continental Trust Co. of City of New York*, 86 Fed. 517 (1898).

At common law errors of fact and law can not be assigned together. *Jeffry* v. *Wood*, 1 Str. 463 (1720); *Fitch* v. *Lothrop*, 2 Root (Conn.) 524 (1797); *Brents* v. *Barnett*, 3 Bibb (Ky.) 251 (1813); *Freeborn* v. *Denman*, 7 N. J. L. 190 (1824); *Moody* v. *Vreeland*, 7 Wend. (N. Y.) 55 (1831); *McMurray* v. *Erie*, 59 Pa. St. 223 (1868). But this is permitted by statute in Maine. *Starbird* v. *Eaton*, 42 Maine 569 (1856), and by the practice of the courts in Massachusetts. *Eliot* v. *McCormick*, 141 Mass. 194, 6 N. E. 375 (1886); *Rothschild* v. *Knight*, 176 Mass. 48, 57 N. E. 337 (1900).

Errors in fact could not be assigned in the Exchequer Chamber and House of Lords. Archbold's Practice, 350; *Castledine* v. *Mundy*, 4 B. & Ad. 90, 97 (1832). And this practice has been followed in some jurisdictions. *Karnuff* v. *Kelch*, 71 N. J. L. 558, 60 Atl. 364 (1904); *Watson* v. *Mercer*, 17 Serg. & R. (Pa.) 343 (1828); *McMurray* v. *Erie*, 59 Pa. St. 223 (1868).

[64]Part of the opinion of the court is omitted.

ant, the Hellmann Brewing Company, upon the pleadings and facts found.

How the court erred in rendering its judgment is not pointed out. At most, nothing more is stated than that the judgment is not a proper conclusion from the pleadings and facts found. If not, why not? It was for the appellants to indicate the character of the error in such a way as to give to the appellees and to this court reasonable notice of the grounds of exception which it was intended to present. This duty exists in a case where the error claimed was first disclosed by the judgment, as well as when it arose in the course of the trial. It does not, as in *Atwood* v. *Welton*, 57 Conn. 514, 521, 524, 18 Atl. 322, necessarily appear on the face of the record by which of the several conclusions of law and fact reached by the trial court as the basis of its judgment, the plaintiffs claim to have been aggrieved. The first, second and third reasons of appeal are therefore insufficient.[65] General Statutes, section 802. There is no error.

In this opinion the other judges concurred.

---

[65] "To say *in omnibus erratum est*, is not good, because of the uncertainty." Fitzherbert's Natura Brevium 20; Y. B. 6 Edw. IV 6; Roll. Abr. 761.

The decisions lay down the broad rule that assignments of error must point out clearly and distinctly the error committed in the court below, but the limits of the rule depend largely on the statutes and rules of court in force in the respective jurisdictions. Among the many cases see *Donnelly* v. *State*, 26 N. J. L. 463 (1857); *Kimball* v. *Sloss*, 7 Ind. 589 (1856), where the error assigned was "that the judgment is for Sloss, when by law it should have been for Kimball"; *Harmon* v. *Chandler*, 3 Iowa 150 (1856); *Johnson* v. *Ballou*, 25 Mich. 460 (1872); *Landers* v. *Staten Island R. Co.*, 13 Abb. Pr. (N. S.) 338 (1872); *O'Reagan* v. *O'Sullivan*, 14 Bush. (Ky.) 184 (1878); *Baylis* v. *Stout*, 49 Mich. 215, 13 N. W. 521 (1882); *Cheatham* v. *Pearce*, 89 Tenn. 668, 15 S. W. 1080 (1890); *Van Stone* v. *Stillwell & B. Mfg. Co.*, 142 U. S. 128, 35 L. ed. 961 (1891); *Driscoll* v. *Carlin*, 50 N. J. L. 28, 11 Atl. 482 (1887); *National Fertilizer Co.* v. *Holland*, 107 Ala. 412, 18 So. 170, 54 Am. St. 101 (1894); *Mahler* v. *Merchant's Nat. Bank*, 65 Minn. 37, 67 N. W. 655 (1896); *Jackson Bridge Co.* v. *Lancashire Ins. Co.*, 122 Mich. 433, 81 N. W. 265 (1890); *Berry* v. *Chicago*, 192 Ill. 154, 61 N. E. 498 (1901); *O'Neil* v. *Newman*, 132 Mich. 489, 93 N. W. 1064 (1903); *State* v. *MacQueen*, 69 N. J. L. 476, 55 Atl. 45 (1903); *Lutlopp* v. *Heckman*, 70 N. J. L. 272, 57 Atl. 1046 (1903); *Chandler* v. *Mutual Life & Industrial Assn. of Georgia*, 131 Ga. 82, 61 S. E. 1036 (1908); *Cochran* v. *Bugg*, 131 Ga. 588, 62 S. E. 1048 (1908); *Chicago M. & St. P. Ry.* v. *Anderson*, 168 Fed. 901 (1909); *Stark* v. *Duhring*, 140 Wis. 521, 122 N. W. 1131 (1909); *Koutnik* v. *Cody*, 148 Ill. App. 313 (1909); *Williams* v. *Newton*, 86 S. Car. 248, 68 S. E. 693 (1910); *Reed* v. *Hearst's Chicago American*, 162 Ill. App. 287 (1911); *Donovan* v. *Davis*, 85 Conn. 394, 82 Atl. 1025 (1912); *Little* v. *Fearon*, 49 Pa. Super. Ct. 634 (1912); *Witmer* v. *Bessemer & L. R. Co.*, 241 Pa. 112, 88 Atl. 314 (1913); *Prenatt* v. *Messenger P. Co.*, 241 Pa. 267, 88 Atl. 439 (1913); *Simpson* v. *Cox*, 95 S. Car. 382, 79 S. E. 102 (1913); *Boeck* v. *Modern Woodmen*, 162 Iowa 159, 143 N. W. 999 (1913); *Lakeside I. Co.* v. *Buffington* (Tex. Civ. App.), 168 S. W. 21 (1914); *Kinnon* v. *Louisville & N. R. Co.*, 187 Ala. 480, 65 So. 397 (1914); *Porter* v. *American Cigarbox Lumber Co.*, 164 N. Car. 396, 80 S. E. 443 (1914). Compare *Sneer* v. *Stutz*, 93 Iowa 62, 61 N. W. 397 (1894); *Wolfe* v. *Stack*, 153 Mich. 445, 116 N. W. 1010 (1908). Assignments of error that are no more than abstract propositions of law are improper. *Davis* v. *Harper*, 14 App. D. C. 463 (1899).

An assignment must not contradict the record. Bacon's Abridgment, Error (k,3); Y. B. 9 Edw. IV 32b; *Cross* v. *Tyrer*, Cro. Eliz. 665 (1598);

2 TIDD'S PRACTICE, 1173

Ninth Ed. 1828

To an assignment of errors, the defendant may plead or demur. Pleas in error are common or special. The common plea, or joinder, as it is more frequently called, is in nullo est erratum, or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising therefrom, to the judgment of the court.[66]

If the plaintiff in error assigns an error in fact, and the defendant in error would put in issue the truth of it, he ought to traverse or deny the fact, and so join issue thereupon, and not say in nullo est erratum; for by so doing he would acknowledge the fact alleged to be true.[67] But when an error in fact is assigned, if the defendant would acknowledge the fact to be as alleged, and yet insist that by law it is not error, he ought to rejoin in nullo est erratum. Hence it appears, that if an error in fact be well assigned, in nullo est erratum is a confession of it;[68] for the defendant ought to have joined issue thereon, so as to have tried it by the country. But if an error in fact be assigned that is not assignable, or be ill assigned, in nullo est erratum is no confession of it, but shall be taken only for a demurrer.[69]

By pleading in nullo est erratum, the defendant in error admits the record to be perfect, the effect of his plea being that the record

---

Whistler v. *Lee*, Cro. Jac. 359 (1614); *Molins* v. *Werby*, 1 Lev. 76 (1662); *Lampton* v. *Collingwood*, 1 Salk. 262 (1694); *Helbut* v. *Held*, 1 Str. 685 (1726); *Moody* v. *Vreeland*, 9 Wend. (N. Y.) 125 (1832); *Riley* v. *Waugh*, 62 Mass. (8 Cush.) 220 (1851); *King* v. *Robinson*, 33 Maine 114, 54 Am. Dec. 614 (1851); *Hawk* v. *Jones*, 24 Pa. St. 127 (1854); *Claggett* v. *Simes*, 31 N. H. 22 (1855); *Collins* v. *Walker*, 55 N. H. 437 (1875); *Gray* v. *Cook*, 135 Mass. 189 (1883); *Waldez* v. *Archuleta*, 3 N. Mex. 195, 5 Pac. 327 (1885); *Cumnor* v. *Sedgwick*, 67 Conn. 66, 34 Atl. 763 (1895); *Doylestown Distilling Co.'s Application*, 9 Pa. Super. Ct. 96 (1898); *Quinn's License*, 11 Pa. Super. Ct. 554 (1899).

An assignment of error in the form of a question, whether in doing this or that the court erred, is improper. *McCaskey R. Co.* v. *Keena*, 81 Conn. 656, 71 Atl. 898 (1909).

[66] *Adams* v. *Beem*, 4 Blackf. (Ind.) 128 (1833); *Goodridge* v. *Ross*, 6 Metc. (Mass.) 487 (1843); *Booth* v. *Commonwealth*, 7 Metc. (Mass.) 285 (1843); *Acker* v. *Ledyard*, 1 Denio (N. Y.) 677 (1845); *David* v. *Ransom*, 1 G. Greene (Iowa) 383 (1848); *Rundles* v. *Jones*, 3 Ind. 35 (1851). See also *Delaware, L. & W. R. Co.* v. *Joseph English Co.*, 82 N. J. L. 113, 81 Atl. 436 (1911), as to demurring.

[67] *Haydon* v. *Mynn*, Cro. Jac. 521 (1618); *Riley* v. *Waugh*, 62 Mass. (8 Cush.) 220 (1851); *Benner* v. *Welt*, 45 Maine 483 (1858); *Kanawha Dispatch Co.* v. *Fish*, 219 Ill. 236, 76 N. E. 352 (1906).

[68] *Grell* v. *Richards*, 1 Lev. 294 (1670); *Okeover* v. *Overbury*, T. Raym. 231 (1673); *Bliss* v. *Rice*, 9 Johns. (N. Y.) 159 (1812); *Moore* v. *McEwen*, 5 Serg. & R. (Pa.) 373 (1819); *Goodwin* v. *Sanders*, 9 Yerg. (Tenn.) 91 (1836); *Rundles* v. *Jones*, 3 Ind. 35 (1851).

[69] *Lovett* v. *Pell*, 22 Wend. (N. Y.) 369 (1839); *Claggett* v. *Simes*, 31 N. H. 22 (1855); *Louisville R. Co.* v. *Smoot*, 135 Ind. 220, 33 N. E. 905, 34 N. E. 1002 (1893); *Karnuff* v. *Kelch*, 71 N. J. L. 558, 60 Atl. 364 (1904); *Perkins* v. *Bangs*, 206 Mass. 408, 92 N. E. 623 (1910).

in its present shape is without error; and therefore after in nullo est erratum pleaded, neither party can allege diminution, or pray a certiorari.[70] But though the parties are bound by their own admission, and that equally so as to every part of the record, yet no admission of the parties can or ought to restrain the courts from looking into the record before them. Hence it is a general rule, that at any time pending a writ of error, whether before or after errors assigned, or even after in nullo est erratum pleaded, the court, ex officio may award a certiorari, and they may do this to supply a defect in the body of the record, as well as in the out-branches.[71]

Special pleas to an assignment of errors contain matters in confession and avoidance, as a release of errors,[72] or the statute of limitations,[73] etc., to which the plaintiff in error may reply[74] or demur, and proceed to trial or argument.[75]

---

[70]Y. B. 9 Edw. IV 32; *Robert* v. *Andrews,* Cro. Eliz. 82 (1587); *Gilliland* v. *Rappleyea,* 15 N. J. L. 138 (1835); *Tomlinson* v. *Armour,* 75 N. J. L. 748, 70 Atl. 314 (1907).

[71]Viner's Abridgment, Error (m); *Winchomb* v. *Goddard,* Cro. Eliz. 836 (1600); *Meredith* v. *Davies,* 1 Salk. 270 (1711).

[72]Bacon's Abridgment, Error (l); Y. B. 9 Hen. VI 46; *Carleton* v. *Mortagh,* 2 Ld. Raym. 1005 (1703); *Davenant* v. *Raftor,* 2 Ld. Raym. 1046 (1704); *Adams* v. *Beem,* 4 Blackf. (Ind.) 128 (1835); *Newman* v. *Kiser,* 128 Ind. 258, 26 N. E. 1006 (1890); *Compher* v. *Browning,* 219 Ill. 429, 76 N. E. 678, 109 Am. St. 346 (1906); *Schaeffer* v. *Ardery,* 238 Ill. 557, 87 N. E. 343 (1909); *Cass* v. *Duncan,* 260 Ill. 228, 103 N. E. 280 (1913). So also, matters arising after the taking of the appeal may be specially pleaded. *Newman* v. *Kiser,* 128 Ind. 258, 26 N. E. 1006 (1890); *Lake Erie & W. R. Co.* v. *Huffman,* 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914C, 1272n (1912).

[73]*Bartholomew* v. *Belfield,* Cro. Jac. 332 (1613); *Street* v. *Hopkinson,* 2 Str. 1055 (1736); *Jacobs* v. *Graham,* 1 Blackf. (Ind.) 392 (1825); *Acker* v. *Ledyard,* 1 Denio (N. Y.) 677 (1845); *Duff* v. *Duff,* 103 Ky. 348, 45 S. W. 102, 20 Ky. L. 52 (1898); *Farmer* v. *Allen,* 85 Miss. 672, 38 So. 38 (1904); *George* v. *George,* 250 Ill. 251, 95 N. E. 167 (1911). In some jurisdictions the bar of the statute may be taken advantage of by motion to quash, or to dismiss the writ or appeal. *Brooks* v. *Norris,* 11 How. (U. S.) 204, 13 L. ed. 665 (1850); *Showers* v. *Showers,* 27 Pa. St. 485, 67 Am. Dec. 487 (1856); *Day* v. *Huntingdon,* 78 Ind. 280 (1881); *Lane* v. *Wheeler,* 101 N. Y. 17, 3 N. E. 796 (1885). The Pa. Act of May 19, 1897, P. L. 67, § 4, fixing a limitation for taking appeals, provides: "Appeals taken after the time herein provided for shall be quashed on motion." *McFadden* v. *McFadden,* 211 Pa. 599, 61 Atl. 75 (1905); *Farrel* v. *Scranton R. Co.,* 27 Pa. Super. Ct. 127 (1905).

[74]*Galusha* v. *Cobleigh,* 13 N. H. 79 (1842); *Trapp* v. *Off,* 194 Ill. 287, 62 N. E. 615 (1902).

[75]At common law where a scire facias ad audiendum errores was sued out and the defendant failed to appear and join in error the plaintiff in error could move to reverse judgment on entry of defendant's default. *Thatcher* v. *Stephenson,* 1 Str. 144 (1718); *Walmsley* v. *Roson,* 2 Str. 1210 (1744); Arch. Pr. (7th ed.) 387. And failure to plead has led to a reversal of judgment in some American courts. *Oppie* v. *Colegrove,* 19 Johns. (N. Y.) 124 (1821); *Higgins* v. *Crosby,* 40 Ill. 79 (1865), semble; *Murdock* v. *Townsend,* 1 Colo. 33 (1867), and see *Tufts* v. *Newton,* 119 Mass. 476 (1876). In other courts the practice is to proceed ex parte to examine the errors assigned. *March* v. *Howell,* 1 Mo. 138 (1821); *Mayson* v. *Lane,* 6 How. (Miss.) 11 (1840); Pa. Supreme Court Rule 16. In Alabama a formal joinder is held unnecessary where the record shows a joinder in the submission of the cause. *Maddox* v. *Chilton Warehouse Co.,* 171 Ala. 216, 55 So. 93 (1911). So in *Downs* v. *Chandler* (N. Mex.), 85 Pac. 392 (1906), it is held, under the statute, that unless exception is taken to the assignments of error the opposite party is deemed to have joined in error.

SECTION 6. BRIEFS AND ARGUMENT

BELL v. GERMAIN

DISTRICT COURT OF APPEAL OF CALIFORNIA, 1910

12 Cal. App. 375

TAGGART, J.: Action to quiet title. Decree quieting title of defendants and awarding them costs. Plaintiff appeals from judgment and order denying her motion for new trial.[76]

It is apparent that counsel for appellant has been somewhat misled in the preparation of his brief by the repeated requests of the Supreme Court and this court for brevity and succinctness in the presentation of cases. While "simplicity of statement" in the brief of counsel has met, and always will meet, with the approval of these courts, the effort in this direction should not go so far as to eliminate or exclude all specification or mention of the errors upon which an appellant relies for a reversal. The simplicity of presentation desired is that which avoids prolixity, verbosity and repetition; which omits theoretical disquisitions on abstract principles of law, needless presentation of questions of fact as to which the action of the trial court is final, the citation of innumerable authorities indicative of an examination of the subject which has never passed the digest stage, etc., etc. A brief is supposed to be the vehicle of counsel to convey to the court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court. When the brief is presented to an appellate court, it should point out to that court which of the many objections and exceptions usually found in the transcript it is the wish of appellant to have the court review. It must be assumed for this purpose that the knowledge of the court does not include the facts of the particular case, or the special errors of the trial court which appellant relies upon to overturn the judgment or order. These should be pointed out clearly, even at the hazard of encroaching upon the ideal simplicity of statement which the appellate courts have approved. Voluminous and unnecessarily padded briefs are discouraged by the courts in order that they may dispatch business. When briefs fail altogether to present the matters mentioned, the courts must elect between acting as counsel for the appellant, or passing upon only such questions as are sufficiently presented for consideration by the brief, and in accomplishing the purpose mentioned, to wit, the dispatch of business, the latter course has generally been adopted.[77]

Judgment and order affirmed.

---

[76]Only so much of the opinion as relates to the brief is printed.

[77]The brief must support the party's contention by reasoning and by authorities. *Brown* v. *Tolles*, 7 Cal. 398 (1857); *Chicago R. I. Co.* v *Moffitt*, 75 Ill. 524 (1874); *Stockdale* v. *Maginn*, 131 Pa. St. 507, 19 Atl. 297 (1890); *Chicago & Ind. R. Co.* v. *Hunter*, 128 Ind. 213, 27 N. E. 477 (1890); *Hatch*

MATTHEW'S APPEAL

SUPREME COURT OF PENNSYLVANIA, 1883

104 *Pa. St.* 444

Appeal from a decree of the Court of Common Pleas No. 2 of Allegheny County, dismissing exceptions to a master's report in equity.[78]

When the case was called for argument upon October 29, 1883, the appellees' counsel directed the attention of the court to the following language in the appellants' paper book used in reference to the master's report:

"Such a course of reasoning is contrary to common sense. Its fallacy is too plain to provoke criticism. It is kin to the utterings of a 'crank'. . . . But, the master bridged it over by saying that there was so little of the balance of purchase money left that the game would not be worth the candle. And therefore, excused the company from fault. Here, again, we have a ruling which more closely resembles the utterings of a 'crank' than it does the reasoning of a chancellor."

The court took the matter under consideration, and upon the opening of court upon the day following, Mercur, C. J., stated their opinion substantially as follows:

---

v. *Hanson*, 46 Mo. App. 323 (1891); *Gavin* v. *Gavin*, 92 Cal. 292, 28 Pac. 567 (1891); *Ashley* v. *Martin*, 50 Ala. 537 (1874); *Paine* v. *Webster*, 64 Vt. 105, 23 Atl. 615 (1891); *DuBois* v. *Perkins*, 23 Ore. 144, 31 Pac. 201 (1892); *Mason* v. *Partrick*, 100 Mich. 577, 59 N. W. 239 (1894); *Hough* v. *Tacoma*, 12 Wash. 386, 41 Pac. 173 (1895); *Patterson* v. *Patterson*, 3 Kans. App. 342, 45 Pac. 129 (1896); *Hoover* v. *Weesner*, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905 (1896); *Porter* v. *Parslow*, 39 Fla. 50, 21 So. 574 (1897); *Kerr* v. *Smiley*, 77 Ill. App. 88 (1898); *Bauer* v. *School Dist.*, 78 Mo. App. 442 (1898); *Missoula Mercantile Co.* v. *O'Donnell*, 24 Mont. 65, 60 Pac. 594, (1900); *Western Tube Co.* v. *Pederson*, 128 Ill. App. 637 (1906); *Barth* v. *Borden's Condensed Milk Co.*, 104 N. Y. S. 882 (1907); *Gray* v. *Walker*, 157 Cal. 381, 108 Pac. 278 (1910); *Seaboard Air Line* v. *Nims*, 61 Fla. 420, 54 So. 779 (1911); *Clark* v. *Kraig*, 21 Colo. App. 196, 120 Pac. 1044 (1912); *Title Guaranty Co.* v. *Slinker*, 35 Okla. 128, 128 Pac. 696 (1912); *Wellington* v. *Reynolds* 177 Ind. 49, 97 N. E. 155 (1912). Counsel in citing precedents should make first choice of those of the court where the case is on appeal. *Dugan* v. *Baltimore & O. R. Co.*, 159 Pa. St. 248, 28 Atl. 182, 186, 39 Am. St. 672 (1893); *Blizzard* v. *Brown*, 152 Wis. 160, 139 N. W. 737 (1913); *Francis* v. *First Nat. Bank of Eufaula*, 40 Okla. 267, 138 Pac. 140 (1914). In *Wilson* v. *National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269 (1911), it was held that the appellants were excused from giving authorities by a statement that they were unable to find any directly in point. So, a rule requiring briefs to contain authorities is not violated merely because the authorities cited are inapplicable. *Fishback* v. *Bramel*, 6 Wyo. 293, 44 Pac. 840 (1896). The form and contents of the brief or argument are, almost universally, regulated either by statutes or the rules of court. For example see Rules of Supreme Court of United States, Rule XXI. By the rules of practice in many jurisdictions errors raised for the first time in a reply brief will not be considered. *Kendrick* v. *Eggleston*, 56 Iowa 128, 8 N. W. 786, 41 Am. Rep. 90 (1881); *Vestal* v. *Norris*, 11 Wash. 451, 39 Pac. 960 (1895); *Malott* v. *State*, 158 Ind. 678, 64 N. E. 458 (1902); *Hawke* v. *Bumgardner*, 103 Va. 91, 48 S. E. 554 (1904); *Mesa De Mayo Land Co.* v.

"Our attention has been directed to some objectionable and improper language in the appellants' paper book. Objectionable words, hastily spoken in the warmth of oral argument, may often be excused. In printed arguments there is no excuse for language such as we find in this book. The motives of the master are impugned and he himself is spoken of contemptuously. Especially is this unjustifiable, where, as here, the master's report was confirmed by the court. The master is a part of the court. To say that his course of reasoning is contrary to common sense and kin to the utterings of a crank, is not criticism on his reasoning nor relevant to the questions at issue. A majority of this court has determined that this paper book be suppressed."

Counsel for appellant desired to be heard.

MERCUR, C. J.: We have read the language and decided on its impropriety. We can not hear argument as to the wisdom of our decision, but if you wish to make any apology we will hear you.

Counsel for appellant then stated that the argument was written in haste, and was not intended to reflect personally upon the master, between whom and the counsel friendly relations existed; and that the objectionable language would be expunged.

This was done, and the case was then, by the consent of appellees' counsel, heard by the court.[79]

LAMPSON v. ESTATE OF ADAM HOBART, JR.

SUPREME COURT OF VERMONT, 1856

27 Vt. 784

In this case, heard at the March term of the Supreme Court for the county of Orange, A. D. 1856, the plaintiff had two distinct claims which he was prosecuting against the estate of defendant. In the county court one was decided in his favor, and the other in

---

Hoyt, 24 Colo. App. 279, 133 Pac. 471 (1913); *Simmons* v. *Affolter*, 254 Mo. 163, 162 S. W. 168 (1914); *Waukegan* v. *Wetzel*, 261 Ill. 498, 104 N. E. 184 (1914); *Cribbs* v. *Stiver*, 181 Mich. 82, 147 N. W. 587 (1914). Compare *Pratt* v. *Trustees of Baptist Soc. of Elgin*, 93 Ill. 475, 34 Am. Rep. 187 (1879); *In re Adams*, 165 Miss. 497, 43 N. E. 682 (1896).

[78]Only so much of the case as relates to the paper book is printed.

[79]Abuse of court, counsel or parties, or statements as to conduct and motives not supported by the record are improper and will subject the offending party to the discipline of the appellate court. *San Diego Water Co.* v. *San Diego*, 117 Cal. 556, 49 Pac. 582 (1897); *Confrey* v. *Stark*, 73 Ill. 187 (1874); *Cassidy* v. *Palo Alto*, 58 Iowa 125, 12 N. W. 231 (1882); *Scroggins* v. *Brown*, 14 Ill. App. 338 (1883); *Paine* v. *Frost*, 67 Iowa 282, 25 N. W. 243 (1885); *Sax* v. *Drake*, 69 Iowa 760, 28 N. W. 423 (1886); *Eureka Steam Heating Co.* v. *Sloteman*, 69 Wis. 398, 34 N. W. 387 (1887); *Green* v. *Elbert*, 137 U. S. 615, 34 L. ed. 792 (1891); *Flannagan* v. *Elton*, 34 Nebr. 355, 51 N. W. 967 (1892); *Diamond T. Co.* v. *Faulkner*, 17 Colo. 9, 28 Pac. 472 (1891); *Tomlinson* v. *Territory*, 7 N. Mex. 195, 33 Pac. 950 (1893); *Taggart* v. *Bundick* (Kans.), 43 Pac. 243 (1896); *People* v. *Parks*, 26 Colo. 322, 57 Pac. 692 (1899); *State* v. *Kennedy*, 60 Nebr. 300, 83 N. W. 87 (1900); *Scott* v. *Brown* (Kans.), 63 Pac. 451 (1901).

favor of the estate. Both parties excepted to the decision, and the exceptions on both sides were prosecuted before this court. A question was made, in regard to which party should go forward in the argument.

By The Court: We think, in the state in which this case is presented, the plaintiff is entitled to open and close the argument. So far as the exceptions are concerned, the parties are equally entitled to open and close.[80] We must then fall back upon the general ground, that the plaintiff assumes the initiative in the proceedings.[81]

POWERS *v.* STURTEVANT

Supreme Judicial Court of Massachusetts, 1909

200 Mass. 519

Knowlton, C. J.: This is an appeal by the defendant from an order of the superior court that judgment be entered for the plaintiff. The appeal is founded upon the fact that an application for a rehearing, on account of a supposed error in law in the decision of the case by the full court, had been sent to the chief justice, and the receipt of it had been acknowledged, with a statement that it would be considered by the justices at their next meeting for consultation. The application was sent in July, and the next meeting of the justices was to be on the first Tuesday of September.

The defendant seemingly misapprehends the standing of a case after a final decision of it by the full court upon questions of law. On this subject Chief Justice Gray said, in the opinion in *Winchester* v. *Winchester*, 121 Mass. 127, 129, "The practice of that court (the English Court of Chancery)[82] affords no rule to govern a court of last appeal, whose judgments have the strongest presumption in their favor, and can not be freely reconsidered without unreasonably protracting litigation and disregarding the claims of other suitors to the attention of the court." He supports his statements as to the practice in England and in the Supreme Court of the United States by numerous citations.[83] A similar practice prevails generally in the

---

[80] The appellant has the right to begin and conclude the argument. *Deering* v. *Adams*, 34 Maine 41 (1852); Arch. Pr. (7th ed.), p. 375; Tidd's Pr. (9th ed.) 1177.

[81] Accord: *Sellew's Appeal*, 36 Conn. 186 (1869); *Shand* v. *Central Nat. Bank* (S. Car.), 11 S. E. 389 (1890). But see *Peters* v. *Farnsworth*, 15 Vt. 786 (1843); *McFarland* v. *Stone*, 16 Vt. 145 (1844).

Where both parties bring error the appeals should be heard at the same time. *In re Saier's Estate*, 158 Mich. 170, 122 N. W. 563 (1909); *Hawkes* v. *Warren*, 133 App. Div. 863, 117 N. Y. S. 1097 (1909).

[82] See *Fox* v. *Mackreth*, 2 Cox's Ch. 158 (1789), but the practice is otherwise under the Judicature Act of 1873. *In re St. Nazaire Co.*, 12 Ch. Div. 88 (1879); *Bright* v. *Sellar*, L. R. (1904) 1 K. B. 6.

[83] Per Gray, C. J.: "After final judgment in the House of Lords or in the Judicial Committee of the Privy Council, no rehearing is allowed, unless for the purpose of correcting mistakes in the form of the decree. *Broughton*

courts of last resort in the states of this country, although there are two or three, and possibly more, in which applications for a rehearing of questions of law are entertained and arguments heard upon them. The application in *Winchester* v. *Winchester,* ubi supra, was on the ground that a decree had been entered erroneously as by consent of the parties, when in fact there was no consent. The court received the application without hearing the argument upon it, and announced a decision refusing a rehearing. In cases of applications for a rehearing on the ground of a supposed error of the full court, it has been the practice for many years, not to treat them as having any standing as a part of the legal procedure in the case. They are not recognized by our statutes. They can not be made as a matter of right, and they are not entered upon the records of the court unless the justices, in their discretion, think they ought to be.

Of course there is a possibility of error in a decision by the most learned and painstaking court in the world. The justices of the Supreme Court of the United States, and of other distinguished

---

v. *Delves,* 1 Ridg. P. C. 513, 514; *Stewart* v. *Agnew,* 1 Shaw App. Cas. 413; *Tommey* v. *White,* 3 H. L. Cas. 49, 4 H. L. Cas. 313; *Rajundernarain* v. *Bijai Govind Sing,* 1 Moore's P. C. 117; *The Singapore,* L. R. 1 P. C. 378, 388. In *Stewart* v. *Agnew,* Lord Eldon quoted from an opinion delivered in the Irish House of Lords in 1787, while that house was an independent and supreme judicature, the following quaint but forcible statement: 'If causes were to be reheard, there would be no end of decisions. This house would then be a house of *plusieurs resorts* and not of *dernier resort*—a house of many applications, and not of final judgment; and the celebrated Latin epigram upon the tediousness and uncertainty of the Aulic Council at Spires might then be wrote over the front of this house, *Lites ibi spirant, sed nunquam expirant.*' In the Supreme Court of the United States, no rehearing of a case once decided is granted, nor even an argument permitted upon the question whether a rehearing should be had, unless the court, upon inspection of the petition for a rehearing, sees fit so to order. *Washington Bridge* v. *Stewart,* 3 How. (U. S.) 413, 11 L. ed. 658; *Brown* v. *Aspden,* 14 How. (U. S.) 25, 14 L. ed. 311; *United States* v. *Knight,* 1 Black (U. S.) 488, 17 L. ed. 76; *Public Schools* v. *Walker,* 9 Wall. (U. S.) 603; *Ambler* v. *Whipple,* 23 Wall. (U. S.) 278, 23 L. ed. 127." Accord: *Johns* v. *Johns,* 20 Md. 58 (1862); *Wilson* v. *Williams,* 106 Md. 657, 68 Atl. 297 (1907). See also, *Derby* v. *Gallup,* 5 Minn. (Gil. 85) 119 (1860); *Fosdick* v. *Hempstead,* 126 N. Y. 651, 27 N. E. 382 (1891); *Land* v. *Wickham,* 1 Paige Ch. (N. Y.) 256 (1828); *Russell* v. *Dyer,* 43 N. H. 396 (1861); *Mount* v. *Mitchell,* 32 N. Y. 702 (1865); *Woodbury* v. *Dorman,* 15 Minn. (Gil.) 341 (1870); *Marine Nat. Bank* v. *City Bank,* 59 N. Y. 67, 17 Am. Rep. 305 (1874); *Butler* v. *Walker,* 80 Ill. 345 (1875); *Gregory* v. *Pike,* 67 Fed. 837 (1895); *People* v. *District Court,* 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850 (1899); *Newton* v. *Woodley,* 55 S. Car. 132, 32 S. E. 531, 33 S. E. 1 (1898); *In re Lefevre's Estate,* 193 Pa. St. 225, 44 Atl. 272 (1899); *Weathers* v. *Borders,* 124 N. Car. 610, 32 S. E. 881 (1899); *Hodgin* v. *People's Nat. Bank,* 125 N. Car. 503, 34 S. E. 709, 712 (1899); *Suwannee R. Co.* v. *West Coast R. Co.,* 50 Fla. 612, 39 So. 538 (1905); *Van Dyke* v. *Cole,* 81 Vt. 379, 70 Atl. 1103 (1908); *Welch* v. *Highwood,* 150 Ill. App. 397 (1909); *Rosenstern & Co.* v. *United States,* 171 Fed. 71 (1909); *Cunningham* v. *Blanchard,* 85 Vt. 494, 83 Atl. 469 (1912); *Flores* v. *Stone,* 21 Cal. 105, 131 Pac. 348, 351, 352 (1913); *Ex parte Banco De Portugal,* 14 Ch. Div. 1, 42 L. T. 210 (1880); *Preston Banking Co.* v. *Allsup,* L. R. 1 Ch. Div. 141 (1895); *Gamble* v. *Hackett,* 35 Nev. 319, 133 Pac. 936 (1912); *Chapman &c. Lumber Co.* v. *St. Francis Levee Dist.,* 234 U. S. 667, 58 L. ed. 1526 (1914).

tribunals, are often nearly evenly divided in opinion upon a difficult question of law. But when a decision is made, after a court's best efforts to reach a correct conclusion, it ought not to be open to revision merely because it seems to the defeated party to be wrong. On the other hand, if by any accident, oversight or inadvertence a wrong conclusion should be reached in any case, the judges who made the decision presumably would be more desirous than any one else to correct the error. Accordingly, in such a case they would welcome a suggestion in the interest of justice, from anybody, at any time while they have the power to revise the decision. The practice of the court in reference to such suggestions from a party is stated in *Wall* v. *Old Colony Trust Co.*, 187 Mass. 275, 278, as follows: "Such an application has no standing under our laws as a recognized part of our procedure, but is received only as friendly information to the justices of an oversight or manifest error, which in the opinion of the justices should call for correction or re-argument. Argument is not heard upon such an application, nor should the application itself contain any argument, but it should suggest the error relied on." If such a suggestion indicates an error, the court, of its own motion, will do anything in its power to accomplish justice and protect the rights of the parties. But happily there is seldom occasion to do anything of this kind, and it would be likely to work injustice rather than justice, to permit a party, by presenting such an application, to postpone as of right the entry of final judgment, after a case has been through all the earlier stages of litigation, and has been finally decided with due deliberation by the court of last resort. If the justices, after receiving such an application, do not recall the rescript, or otherwise suggest a postponement of action by the lower court, the action of that court should be governed by the rule stated in *Shannon* v. *Shannon*, 10 Allen (Mass.) 249, in these words: "The application to the court holden by a single judge, to postpone entering a judgment, for the purpose of affording the party an opportunity for a re-argument upon a case already decided by the full court, was a matter within the discretion of the judge, and his ruling refusing such application does not furnish any ground for a bill of exceptions." On the face of the record the case was ripe for judgment, and there was no error of law in making the order.

Judgment affirmed.

SECTION 7. REVIEW BY THE COURT

STORM v. UNITED STATES

SUPREME COURT OF THE UNITED STATES, 1876

94 *U. S.* 76

Error to the Circuit Court of the United States for the District of California. Action on a bond given by Storm and Shroder, contractors, and their sureties, to the United States, in the sum of $12,000, conditioned to perform the covenants of an agreement to furnish oats, hay, etc., made with the assistant quartermaster of the army. There was a verdict and judgment for the plaintiff for $2,615.40 and the defendants brought error.[84]

CLIFFORD, J.: Errors of the circuit court resting in parol can not be reëxamined in this court by writ of error. Instead of that, the writ of error addresses itself to the record; and the rule is, that, whenever the error is apparent in the record, whether it be made to appear by bill of exceptions, an agreed statement of facts, or by demurrer, the error is open to reëxamination and correction.

Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment, or execution of the suit, may be reëxamined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions. *Suydam* v. *Williamson,* 20 How. (U. S.) 433. . . .

The action is an action of debt founded on the bond given by the defendants to secure the faithful performance of covenants contained in their previously described written agreement. Reference has already been made to all the exceptions taken by the defendants to the rulings of the court during the trial before the jury; but it is also objected in argument here that the bond described in the complaint was not produced at the trial, and that no copy of it was ever filed in the case. Such an objection, if it had been made in the court below, might have been available for the defendants, unless the plaintiffs had overcome it by producing the instrument, or by showing its loss and due search for it without success, and had offered secondary proof of its contents. Parol proof of the contents of a lost instrument of the kind is admissible, provided it appear that proper search has been made for it without success.

Had the defendants intended to insist that the bond should be given in evidence, they should have made that intention known at the trial; and, if not given in evidence, they might have requested the court to direct a verdict in their favor, and, in case their request had been refused, they would have had the right to except to the ruling of the court in refusing their request for instruction. Nothing of the kind was done; and, for aught that appears in the record, it

[84] The facts, as briefly indicated, are from the opinion of the court; only so much of which as relates to exceptions is printed.

may be that the bond was given in evidence, or, if not, that the defendants waived the right to require its production.

Errors apparent in the record, though not presented by a bill of exceptions, may be reëxamined by writ of error in an appellate tribunal; but alleged errors, not presented by a bill of exceptions, nor apparent on the face of the record, are not the proper subjects of reëxamination by writ of error in this court.

Parties dissatisfied with the ruling of a subordinate court, and intending to seek a revision of the same in the appellate court, must take care to raise the questions to be reëxamined, and must see to it that the questions are made to appear in the record; for nothing is error in law except what is apparent on the face of the record by bill of exceptions, or an agreed statement of facts, or in some one of the methods known to the practice of courts of error for the accomplishment of that object. *Suydam* v. *Williamson*, 20 How. (U. S.) 433; *Garland* v. *Davis*, 4 How. (U. S.) 131; Steph. on Plead. 121; *Slacum* v. *Pomeroy*, 6 Cr. (U. S.) 221; *Strother* v. *Hutchinson*, 4 Bing. N. C. 83.[85]

Affirmed.

---

[85]Accord: *Van Gorden* v. *Jackson ex dem. Bogardus*, 5 Johns. (N. Y.) 440, 467 (1809); *Frier* v. *Jackson*, 8 Johns. (N. Y.) 495 (1811); *Traube* v. *Coleman*, 1 A. K. Mar. (Ky.) 233 (1818); *Coburn* v. *Murray*, 2 Maine 336 (1823); *Colley* v. *Merrill*, 6 Maine 50 (1829); *Powell* v. *Sedgwick*, 5 Whart. (Pa.) 336 (1839); *Keefer* v. *Mattingly*, 1 Gill. (Md.) 182 (1843); *Ward* v. *Ward*, 22 N. J. L. 699 (1850); *Gordon* v. *McLeod*, 20 Ala. 242 (1852); *Hendricks County Seminary* v. *Matlock*, 9 Ind. 114 (1857); *Miller* v. *Hershey*, 59 Pa. St. 64 (1868); *Train* v. *Gridley*, 36 Ind. 241 (1871); *Russell* v. *Dennison*, 45 Cal. 337 (1873); *Templeton* v. *Kraner*, 24 Ohio St. 554 (1874); *Neely* v. *Wright*, 72 Ill. 292 (1874); *Cogan* v. *Cook*, 22 Minn. 137 (1875); *Standard Oil Co.* v. *Amazon Gas Co.*, 79 N. Y. 506 (1880); *Standish* v. *Old Colony R. Co.*, 129 Mass. 158 (1880); *Martin* v. *Foulke*, 114 Ill. 206, 29 N. E. 683 (1885); *Tasker* v. *Sheldon*, 115 Pa. St. 107, 7 Atl. 762 (1887); *Duryea* v. *Vosburgh*, 121 N. Y. 57, 24 N. E. 308 (1890); *Wicks* v. *Thompson*, 129 N. Y. 634, 29 N. E. 301 (1891); *Payne* v. *Dicus*, 88 Iowa 423, 55 N. W. 483 (1893); *Finch* v. *Conrade*, 154 Pa. St. 326, 26 Atl. 368 (1893); *Potts* v. *Evans*, 58 N. J. L. 384, 34 Atl. 4 (1895); *Meader* v. *Cornell*, 58 N. J. L. 375, 33 Atl. 960 (1895); *Jung* v. *Keuffel*, 144 N. Y. 381, 39 N. E. 340 (1895); *Wilson* v. *Wilson*, 93 Va. 546, 25 S. E. 596 (1896); *La Grange Bank* v. *Cotter*, 101 Ga. 134, 28 S. E. 644 (1897); *N. Y. Life Ins. Co.* v. *Macomber*, 169 Mass. 580, 48 N. E. 776 (1897); *Phillips* v. *Shackford*, 21 R. I. 422, 44 Atl. 306 (1899); *Post* v. *Hartford S. Ry.*, 72 Conn. 362, 44 Atl. 547 (1899); *Marshall* v. *John Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. 807, 75 Am. St. 181 (1900); *Netherlands S. S. Co.* v. *Diamond*, 128 Fed. 570 (1904); *McDowell* v. *Kent*, 153 N. Car. 555, 69 S. E. 626 (1910); *Kunkel* v. *Chicago Consolidated Tr. Co.*, 156 Ill. App. 393 (1910); *Fry* v. *Keiter*, 45 Pa. Super. Ct. 538 (1911); *Donovan* v. *Davis*, 85 Conn. 394, 82 Atl. 1025 (1912); *Skeele Coal Co.* v. *Arnold*, 200 Fed. 393 (1912); *Cressey* v. *Cressey*, 213 Mass. 191, 99 N. E. 972 (1912); *Mower* v. *Beard*, 213 Mass. 198, 99 N. E. 971 (1912); *Given* v. *Johnson*, 213 Mass. 251, 100 N. E. 369 (1913); *Benz* v. *Central R. Co.*, 82 N. J. L. 197, 82 Atl. 431 (1912); *People* v. *Board of Review*, 263 Ill. 326, 105 N. E. 128 (1914); *Britt* v. *East Side H. Co.*, 25 Cal. 231, 143 Pac. 244 (1914); *Payne* v. *State*, 10 Ala. App. 85, 65 So. 262 (1914); *Norton* v. *Pacific P. & L. Co.*, 79 Wash. 625, 140 Pac. 905 (1914); *Alwart Bros. Coal Co.* v. *Royal Colliery Co.*, 211 Fed. 313 (1914); *Tyler* v. *Woerner*, 158 Ky. 710, 166 S. W. 178 (1914). An exception is as necessary when the question comes up on case-made as on bill of exceptions and writ of error. *Turner* v. *Grand Rapids*, 20 Mich. 390 (1870).

NALLE v. OYSTER

SUPREME COURT OF THE UNITED STATES, 1913

230 *U. S.* 165

Writ of error to review a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court of the district in favor of the defendant in an action for libel. The first count of the declaration averred that the defendants, members of the board of education, had published a false and defamatory libel concerning the plaintiff, a teacher. To the first count the defendants demurred and the demurrer was sustained. The court of appeals affirmed judgment for the defendants, ignoring the first count because no exception was taken by plaintiff to the ruling of the court sustaining the demurrer.[86]

PITNEY, J.: Respecting the necessity for an exception to the court's ruling in sustaining the demurrer to the first count, counsel for defendants in error have not attempted to uphold the position taken by the court of appeals. The court cited no statute, rule or other authority for its position, and we have been unable to find any.

The practice of bills of exceptions is statutory. By the ancient common law, a writ of error lay only for an error in law apparent upon the judgment roll—what is now called the "strict record"—or for an error in fact, such as the death of a party before judgment. (See *Green* v. *Watkins,* 6 Wheat. (U. S.) 260-263.) For an erroneous decision that did not appear upon the record there was no redress by writ of error. To relieve this, the Stat. Westm. II, 13 Edw. I, ch. 31 (1 Eng. Stat. at L. 99; Bac. Abr., title "Bill of Exceptions"), was enacted more than six hundred years ago, providing that one who alleged an exception should write it out and require the justices to put their seals to it, and that if upon review "the exception be not found in the roll, and the plaintiff show the exception written, with the seal of the justice put to, the justice shall be commanded that he appear, etc., and if he can not deny his seal they shall proceed to judgment according to the exception," etc. Under this act, and state statutes modeled after it, it has always been held the error appearing upon the face of the record may be assigned as ground for reversal, although no exception be taken.[87] And, on

[86]The statement of facts is abridged from the opinion of the court and only so much of the case given as relates to writs of error. On the merits of the question raised by the defendant's demurrer to the first count it was held that the court erred in sustaining the demurrer and judgment was reversed.

[87]Citing *Slacum* v. *Pomery,* 6 Cranch. (U. S.) 221, 3 L. ed. 204 (1810); *Macker's Heirs* v. *Thomas,* 7 Wheat. (U. S.) 530, 5 L. ed. 515 (1822); *Woodward* v. *Brown,* 13 Pet. (U. S.) 1, 10 L. ed. 31 (1839); *Bennett* v. *Butterworth,* 11 How. (U. S.) 669, 13 L. ed. 859 (1850); *Suydam* v. *Williamson,* 20 How. (U. S.) 427, 15 L. ed. 978 (1857); *New Orleans Insurance Co.* v. *Piaggio,* 16 Wall. (U. S.) 378, 21 L. ed. 358 (1872); *Balt. & Potomac R. Co.* v. *Trustees of Sixth Presbyterian Church,* 91 U. S. 127, 23 L. ed. 260

the other hand, the function of an exception is not confined to rulings made upon the trial of the action. As pointed out by Lord Coke (2 Inst. 427): "This (i. e., an exception taken under the Stat. Westm. II) extendeth not only to all pleas dilatory and peremptory, etc., and (as hath been said) to prayers to be received, oyer of any record or deed, and the like; but also to all challenges of any jurors, and any material evidence given to any jury, which by the court is overruled." And see *Defiance Fruit Co.* v. *Fox*, 76 N. J. L. 482, 489.

Except as modified by statute, the practice of the courts of the District of Columbia is modeled upon that which obtained in the courts of Maryland at the time of the cession. Act of February 27, 1801, section 1, 2 Stat. 103, chapter 15. By act of March 2, 1889, 25 Stat. 872, chapter 392, Congress provided for the making and publishing of a compilation of the laws then in force in the district, to be made by commissioners appointed by the Supreme Court of the district. The result was the Abert & Lovejoy Compilation, and in it (p. 442, section 5) the Stat. Westm. II (13 Edw. I, chapter 31, section 1) is included. Under the settled practice in Maryland (as elsewhere) under that statute, a bill of exceptions is unnecessary and inappropriate for bringing under review a ruling of the court upon a demurrer to the pleadings, since the pleadings form a part of the record and show upon their face the facts upon which the question of law is raised.[88]

(1875). Accord: *Hamlin* v. *Reynolds*, 22 Ill. 207 (1859) *Coffman* v. *Wilson*, 2 Metc. (Ky.) 542 (1859); *Mix* v. *Nettleton*, 29 Ill. 245 (1862); *Wiggins Ferry Co.* v. *People*, 101 Ill. 446 (1882); *Barnes* v. *Scott*, 29 Fla. 285, 11 So. 48 (1892); *Nylan* v. *Renhard*, 10 Colo. App. 46, 49 Pac. 266 (1897); *Garfield Co.* v. *Leonard*, 26 Colo. 145, 57 Pac. 693 (1899); *Murray* v. *Southerland*, 125 N. Car. 175, 34 S. E. 270 (1899); *Dow* v. *Deissner*, 105 Wis. 385, 80 N. W. 940, 81 N. W. 671 (1900); *Merker* v. *Belleville Distillery Co.*, 122 Ill. App. 326 (1905); *Hanson* v. *Neal*, 215 Mo. 256, 114 S. W. 1073 (1908); *Hartford Fire Ins. Co.* v. *Hollis*, 58 Fla. 268, 50 So. 985 (1909); *Platteter* v. *Paulson-Ellingson Lumber Co.*, 149 Wis. 186, 135 N. W. 535 (1912). Contra: *Hews* v. *Stonebraker*, 132 Iowa 608, 109 N. W. 1092 (1906); *Guthrie* v. *Fisher*, 2 Idaho 102, 6 Pac. 111 (1885); *Cowan* v. *Huffman*, 130 Ind. 600, 28 N. E. 619 (1892); *Petersborough Bank* v. *Des Moines Sav. Bank*, 110 Iowa 519, 81 N. W. 786 (1900); *Gleason* v. *McGinnis*, 30 Ind. App. 4, 65 N. E. 191 (1902); so also where judgment for want of a sufficient affidavit of defense is refused. *Titusville B. & L. Assn.* v. *McComb*, 92 Pa. St. 364 (1879); *Security S. Co.* v. *Anderson*, 172 Pa. St. 305, 34 Atl. 44 (1896). And see *Norton* v. *Lilley*, 210 Mass. 214, 96 N. E. 351 (1911). Generally, an error apparent on the face of the record may be reviewed by the appellate court although no exception was taken thereto. *Rathbone* v. *Rathbone*, 4 Pick. (Mass.) 89 (1826); *Hoffer* v. *Wightman*, 5 Watts (Pa.) 205 (1836); *Sandford* v. *Granger*, 12 Barb. (N. Y.) 392 (1852); *Mills* v. *Thursby*, 12 How. Pr. (N. Y.) 385, 2 Abb. Pr. 432 (1856); *In re Frankstown Turnpike Road*, 26 Pa. St. 472 (1856); *Territory* v. *Virginia R. Co.*, 2 Mont. 96 (1874); *Wiggins Ferry Co.* v. *People*, 101 Ill. 446 (1882); *Morgan* v. *Botsford*, 82 Mich. 153, 46 N. W. 230 (1890); *Cullop* v. *Leonard*, 97 Va. 256, 33 S. E. 611 (1899); *Griffith* v. *Richmond*, 126 N. Car. 377, 35 S. E. 620 (1900); *In re Middletown Road*, 15 Pa. Super. Ct. 167 (1900); *Grissom* v. *Beidleman*, 35 Okla. 343, 129 Pac. 853 (1912); *Fisher* v. *Leader Pub. Co.*, 239 Pa. 200, 86 Atl. 776 (1913); *Hynds* v. *Hynds*, 253 Mo. 20, 161 S. W. 812 (1913).

[88] *Blake* v. *Pitcher*, 46 Md. 453 (1877); *Wilson* v. *Merryman*, 48 Md. 328 (1877); *Lee* v. *Rutledge*, 51 Md. 311 (1878); *Davis* v. *Carroll*, 71 Md. 568, 18 Atl. 965 (1889).

By the "Act to establish a code of law for the District of Columbia," approved March 3, 1901, 31 Stat. 1189, ch. 854, Congress enacted that the common law, and all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, should remain in force, except so far as inconsistent with or replaced by, some provision of the code. We find nothing in the code or in the rules of practice established under it, to require an exception in order that an error apparent upon the record may be reviewed.

SIBLEY v. LEEK

SUPREME COURT OF ARKANSAS, 1885

45 *Ark.* 346

Appeal from Pulaski Circuit Court.

SMITH, J.: The cause of action was the killing of live stock by the train of a railroad operated by a receiver. The action was begun before a justice of the peace, and damages were laid at $130. The question of jurisdiction has not been raised, but can not be overlooked. As the damages claimed exceeded $100, and arose out of an injury to personal property, the justice had no jurisdiction over the subject matter of the controversy. Constitution of 1874, article 7, section 40; *Little Rock, &c., R. Co.* v. *Manees*, 44 Ark. 100.[88a]

The judgment of the Pulaski Circuit Court is vacated and the cause dismissed.

[88a] That the court below was without jurisdiction of the subject matter of the action or proceeding may be first raised on appeal or the appellate court may on its own motion notice such want of jurisdiction. *Mansfield Cold. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462 (1883); *Morris* v. *Gilmer*, 129 U. S. 315, 32 L. ed. 690 (1889); *Wyatt* v. *Judge*, 7 Port. (Ala.) 37 (1838); *Gifford* v. *Thorn*, 7 N. J. Eq. 90 (1848); *Green* v. *Creighton*, 18 Miss. (10 Sm. & M.) 159, 48 Am. Dec. 742 (1848); *Gilland* v. *Sellers*, 2 Ohio St. 223 (1853); *Wildman* v. *Rider*, 23 Conn. 172 (1854); *Steamboat Buell* v. *Long*, 18 Ohio St. 521 (1867); *Riley* v. *Lowell*, 117 Mass. 76 (1875); *Graham* v. *Ringo*, 67 Mo. 324 (1878); *Groves* v. *Richmond*, 53 Iowa 570, 5 N. W. 763 (1880); *Schiff* v. *Solomon*, 57 Md. 572 (1882); *Fiester* v. *Shephard*, 92 N. Y. 251 (1883); *Fowler* v. *Eddy*, 110 Pa. St. 117, 1 Atl. 789 (1885); *Smaw* v. *Cohen*, 95 N. Car. 85 (1886); *Plano Manufacturing Co.* v. *Racey*, 69 Wis. 246, 34 N. W. 85 (1887); *Buffalo* v. *Pocahontas*, 85 Va. 222, 7 S. E. 238 (1888). Objection to the jurisdiction of the person must be made below. *Bradstreet* v. *Thomas*, 12 Pet. (U. S.) 59, 9 L. ed. 999 (1838); *Rhode Island* v. *Massachusetts*, 12 Pet. (U. S.) 657, 9 L. ed. 1233 (1838); *Davis* v. *McEnaney*, 150 Mass. 451, 23 N. E. 221 (1890); *Perkins* v. *Hayward*, 132 Md. 95, 31 N. E. 670 (1892); *Wells* v. *Patton*, 50 Kans. 732, 33 Pac. 15 (1893); *In re Thompson*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98 (1894); *North Hudson Co. Ry.* v. *Flannagan*, 57 N. J. L. 696, 32 Atl. 216 (1895); *Adams* v. *Crown Coal Co.*, 198 Ill. 445, 65 N. E. 97 (1902); *Singleary* v. *Boerner-Morris Candy Co.*, 129 Ky. 556, 112 S. W. 637 (1908); *McCullough* v. *Railway Mail Assn.*, 225 Pa. 118, 73 Atl. 1007 (1909); *Hill* v. *Walker*, 167 Fed. 241 (1909).

CHISM v. SMITH

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1910

138 *App. Div.* (*N. Y.*) 715

The plaintiffs were owners of land bordering Lake George, including avenues and streets, one of which known as White avenue ran to the lake shore. The defendant built a boat house and dock for his private use beyond low-water mark directly across what would have been White avenue, had it extended into the water, and also in front of block 13. The plaintiffs brought an action of ejectment, on the trial of which judgment was given ejecting the defendant from that part of his boat house and pier in the lake adjacent to block 13, but refusing judgment so far as the same was adjacent to White avenue. Both plaintiff and defendant appealed.[89]

HOUGHTON, J.: We are of the opinion that the complaint should have been dismissed on the ground that an action of ejectment is not the proper remedy. While the owners of uplands have the right of access to the water and the right to build such docks and piers from such lands into the water as will not interfere with navigation, this right is only an appurtenance or easement incident to the ownership of the uplands. If a private person builds any structure which interferes with this littoral right of the owner of the upland he can by appropriate action cause its removal. Not, however, by ejectment, for the right to eject depends upon superior title to the land itself. Such rights incident to the ownership of the shore are incorporeal hereditaments. Ejectment does not lie for an incorporeal hereditament but only for a corporeal hereditament of which a sheriff can deliver possession. *Rowan* v. *Kelsey*, 18 Barb. (N. Y.) 484; *Moore* v. *Brown*, 139 N. Y. 127; *Butler* v. *Frontier Telephone Co.*, 186 N. Y. 486. It is apparent that the sheriff could not put the plaintiffs in possession of lands not belonging to them but belonging to the people of the state, whatever the character of the defendant's occupation might be.

Notwithstanding the claim of the plaintiffs on the trial and upon the argument on appeal that the action is purely one of ejectment and that it is maintainable as such, it is suggested that the action may be treated, in view of the answer of defendant, as an equitable action for the removal of structures interfering with plaintiff's right in the waters of the lake. The defendant plead several special defenses, all, however, tending to defeat the plaintiffs' title. All the evidence introduced upon the trial was pertinent to an action of ejectment. At the close of the plaintiffs' case the defendant moved for dismissal of the complaint on the ground that the plaintiffs had shown no title to the property in question, and in his requests to the court to find he specifically asked the court to rule that the action

[89]The statement of facts is from the opinion of the court, part of which is omitted.

was not maintainable and that an incorporeal hereditament could not be recovered in an action of ejectment. The learned counsel for the plaintiffs in his brief says that the gist of the defendant's objection to recovery by plaintiffs was that the dock (as well as the boathouse) was not proved to be on land belonging to plaintiffs. There was not, therefore, either on the trial or the argument on appeal any abandonment by plaintiffs of the position that ejectment would lie, or surrender by the defendant of his attitude that ejectment was not the proper remedy, and it would be doing violence to the pleadings and the course of the trial to treat the present action as one in equity when all parties have consistently maintained that it was one at law.[90]

Judgment reversed and new trial granted.

Kellogg, J., and Smith, P. J., dissent.

---

[90]The appellate court will determine a cause on the theory on which it was tried in the court below. *Stapenhorst* v. *Wolff*, 65 N. Y. 596 (1875); *Larison* v. *Pohlmus*, 39 N. J. Eq. 303 (1884); *Walls* v. *Campbell*, 125 Pa. St. 346, 17 Atl. 422 (1889); *Burbank* v. *Bigelow*, 154 U. S. 558, 19 L. ed. 51 (1893); *Pillars* v. *McConnell*, 141 Ind. 670, 40 N. E. 689 (1895); *Galligan* v. *Old Colony St. R. Co.*, 182 Mass. 211, 65 N. E. 48 (1902); *Lesser Cotton Co.* v. *St. Louis R. Co.*, 114 Fed. 133 (1902); *Indemnity Co.* v. *Thompson*, 83 Ark. 575, 104 S. W. 200, 10 L. R. A. (N. S.) 1064n (1907); *Madison* v. *Octavia Oil Co.*, 154 Cal. 768, 99 Pac. 176 (1908); *Conkling* v. *Standard Oil Co.*, 138 Iowa 596, 116 N. W. 822 (1908); *Planters P. Co.* v. *Webb*, 156 Ala. 551, 46 So. 977 (1908); *Edgewater & Ft. L. R. Co.* v. *Valvolene Oil Co.*, 76 N. J. L. 789, 72 Atl. 85 (1908); *Hunter* v. *Allen*, 127 App. Div. 572, 111 N. Y. S. 820 (1908); *Dolinski* v. *First Nat. Bank of Pittsburg* (Tex. Civ. App.), 122 S. W. 276 (1909); *Gelford* v. *Hatford*, 85 Conn. 689, 84 Atl. 85 (1912); *American Sales B. Co.* v. *Pope*, 7 Ala. App. 304, 61 So. 45 (1913); *American Surety Co. of N. Y.* v. *Spice*, 119 Md. 1, 85 Atl. 1031 (1913); *Richardson* v. *Flower*, 248 Pa. 35, 93 Atl. 777 (1915); *Schulz* v. *New York S. & W. R. Co.* (N. J.), 94 Atl. 579 (1915).

So, generally, an appellant will not be permitted to take advantage of errors for which he himself was responsible. *Clemson* v. *President & Directors of State Bank*, 2 Ill. (1 Scam.) 45 (1832); *Mudget* v. *Kent*, 18 Maine 349 (1841); *Williams* v. *Carr*, 1 Rawle (Pa.) 420 (1829); *Shropshire* v. *McClain*, 6 Ark. 438 (1846); *Robinson* v. *White*, 42 Maine 209 (1856); *Denny* v. *Moore*, 13 Ind. 418 (1859); *Newton* v. *Allis*, 16 Wis. 197 (1862); *West* v. *Lynn*, 110 Mass. 514 (1872); *Fish* v. *Bangs*, 113 Mass. 123 (1873); *Wilson* v. *Blake*, 53 Vt. 305 (1880); *Benson* v. *Maxwell*, 105 Pa. St. 274 (1884); *Marx* v. *Heidenheimer*, 63 Tex. 304 (1885); *McGillin* v. *Bennett*, 132 U. S. 445, 33 L. ed. 422 (1889); *Harris* v. *Lloyd*, 11 Mont. 390, 28 Pac. 736, 28 Am. St. 475 (1891); *Williams* v. *Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150 (1895); *Warren* v. *Sheldon*, 173 Ill. 340, 50 N. E. 1065 (1898); *People* v. *Offerman*, 84 Ill. App. 132 (1899); *Poehler* v. *Reese*, 78 Minn. 71, 80 N. W. 847 (1899); *Lewis* v. *Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 (1900); *Pantall* v. *Rochester Coal Co.*, 204 Pa. 158, 53 Atl. 751 (1902); *Eppens* v. *Littlejohn*, 164 N. Y. 187, 58 N. E. 195, 2 L. R. A. 811 (1900); *Zimmerman* v. *Harding*, 227 U. S. 489, 57 L. ed. 608 (1913); *Davidson Fruit Co.* v. *Produce Distributors Co.*, 74 Wash. 551, 134 Pac. 510 (1913); *Chicago & E. R. Co.* v. *Ohio City Lumber Co.*, 214 Fed. 751 (1914); *Hunter* v. *W. M. Roylance Co.*, 45 Utah 135, 143 Pac. 140 (1914).

GLINES *v.* CROSS

COURT OF QUEEN'S BENCH FOR MANITOBA, 1899

12 Manitoba 442

Plaintiff sued to recover a commission upon a sale of land, claimed to have been effected by them for the defendant. Judgment was at first given for the plaintiffs for $375, the full amount claimed, but upon application under section 308 of the County Courts Act, this amount was reduced by one-half. Plaintiffs appealed upon the grounds that the clause did not give power to make the reduction and that plaintiffs were entitled to the full amount.[91]

L. Means for plaintiffs.

C. P. Wilson for defendant. Defendant submits that it was not shown that the plaintiffs were the real moving cause of the sale and that in strictness they should not recover anything. *Whitcomb* v. *Bacon,* 170 Mass. 479, 49 N. E. 742; *Glasscock* v. *Vanfleet,* 100 Tenn. 603, 46 S. W. 449. Upon this appeal the court can set aside the judgment entirely. *Rockwood Election Case,* 2 Manitoba 129. In any event the judgment appealed from can not be disturbed.

KILLAM, J.: It is claimed by the defendant that the plaintiffs were not entitled to any compensation, and he asks the court to set aside entirely the judgment for the plaintiff, although he has not appealed. I do not think that this course is now open. The County Courts Act, as amended by 59 Vic., chapter 3, section 2 (M. 1896), gives to any party dissatisfied with a judgment of a county court an opportunity to obtain relief by an appeal. It does not appear to contemplate his obtaining it without taking upon himself the burden of a direct appeal.[92] By section 319 the appeal is to be brought into

---

[91] Only so much of the case as relates to the appeal is printed.

[92] A defendant in error or appellee can not have affirmative relief as to matters upon which he has not appealed or brought error. *Canter* v. *American Ins. Co. of New York,* 3 Pet. (U. S.) 307, 7 L. ed. 688 (1830); *Glassner* v. *Wheaton,* 2 E. D. Smith (N. Y.) 352 (1854); *Bush* v. *Schooner Alonzo,* 2 Cliff. (U. S.) 548 (1866); *The Maria Martin,* 12 Wall. (U. S.) 31, 20 L. ed. 251 (1870); *Bundy* v. *Youmans,* 44 Mich. 376, 6 N. W. 851 (1880); *Hoff* v. *Hoff,* 48 Mich. 281, 12 N. W. 160 (1882); *May* v. *Gates,* 137 Mass. 389 (1884); *Texas & N. O. R. Co.* v. *Skinner,* 4 Tex. Civ. App. 661, 23 S. W. 1001 (1893); *United States* v. *Blackfeather,* 155 U. S. 180, 39 L. ed. 114 (1894); *Lane* v. *Parsons,* 108 Iowa 241 (1809); *Bolles* v. *Outing Co.,* 175 U. S. 262, 44 L. ed. 156 (1899); *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 52 L. ed. 420 (1907); *Masters* v. *Wayne Automobile Co.,* 198 Mass. 25, 84 N. E. 103 (1908); *McElroy* v. *McCarville* (R. I.), 71 Atl. 646 (1909); *Herpel* v. *Herpel,* 162 Mich. 606, 127 N. W. 763 (1910); *Vanhoose* v. *Wheeler,* 141 Ky. 746, 133 S. W. 779 (1911); *Smith* v. *Diamond Ice Co.,* 65 Wash. 576, 118 Pac. 646 (1911); *Portuguese Fraternity* v. *Liberty Trust Co.,* 215 Mass. 27, 102 N. E. 96 (1913). So, in the absence of a statute authorizing a different practice, an appellee or defendant in error who takes no appeal or writ of error, is not entitled to have the appellate court consider, review or decide rulings against him below. *Texas Co.* v. *Central Fuel Oil Co.,* 194 Fed. 1 (1912); *Chittenden* v. *Brewster,* 69 U. S. (2 Wall.) 191, 17 L. ed. 839 (1864); *The Stephen Morgan,* 94 U. S. 599, 24 L. ed. 266 (1876); *Scotten* v. *Sutter,* 37 Mich. 526 (1877); *Toledo & Ann Arbor R. Co.* v. *Johnson,* 49 Mich. 148, 13 N. W. 492 (1882); *Holdsom-*

this court by praecipe, which, under section 320, is to set out the nature of the application and the grounds therefor. No provision is made for any notice by a respondent of his objections to the judgment. Subject to the powers of amendment, the questions to be considered and the relief to be given on the appeal are such as are raised or sought by the praecipe, or as may be incident thereto. The opinion cited from the *Rockwood Election Case*, 2 Manitoba 129, while entitled to the highest respect, was that of only one member of the court upon a point not considered by the other members, and it referred to an entirely different statute.

On the other hand, I think that the objection to a reconsideration of his judgment by the judge of the county court entirely fails. Section 308 authorizes a reversal or a variation of the judgment, and the reduction in amount was certainly a variation.

BAIN, J.: The defendant has not appealed against the judgment, so we have not to consider if it was proper that the plaintiffs should recover for their services; but, assuming that it was, I think the amount allowed by the county court judge was quite sufficient compensation.

Dubuc, J., concurred.

Appeal dismissed with costs.[93]

---

beck v. *Fancher*, 112 Ala. 469, 20 So. 519 (1895); *Cox* v. *Stokes*, 150 N. Y. 491, 51 N. E. 316 (1898); *South San Bernardino &c. Co.* v. *San Bernardino Nat. Bank*, 127 Cal. 245, 59 Pac. 699 (1899); *Hinkley* v. *Reed*, 182 Ill. 440, 55 N. E. 337 (1899); *Rose* v. *Hale*, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. 40 (1900); *Moy* v. *Moy*, 111 Iowa 161, 82 N. W. 481 (1900); *Carter* v. *Brewing Co.*, 111 Iowa 457, 82 N. W. 930 (1900); *Miller* v. *Michigan C. R. Co.*, 123 Mich. 374, 82 N. W. 58 (1900); *National Mutual Building Assn.* v. *Burch*, 124 Mich. 57 (1900); *Westminster College* v. *Piersol*, 161 Mo. 270, 61 S. W. 811 (1900); *Field* v. *Barber Asphalt Pav. Co.*, 194 U. S. 618, 48 L. ed. 1142 (1904); *Haas* v. *Malto-Grapo Co.*, 148 Mich. 358, 111 N. W. 1059 (1907); *Turner* v. *Mills* (Okla.), 97 Pac. 558 (1908); *O'Neill* v. *Wolcott Co.*, 174 Fed. 527 (1909); *Tilton* v. *Gates Land Co.*, 140 Wis. 197, 121 N. W. 331 (1909); *Shull* v. *Missouri Pac. R. Co.*, 221 Mo. 140, 119 S. W. 1086 (1909); *Hatfield* v. *Cline*, 143 Ky. 565, 137 S. W. 212 (1911); *Wells* v. *Knight*, 32 R. I. 432, 80 Atl. 16 (1911); *Leschen* v. *Patterson*, 130 La. 557, 58 So. 336 (1912); *Hibernia Bank* v. *Whitney*, 130 La. 817, 58 So. 583 (1912); *Swager* v. *Smith*, 194 Fed. 762 (1912); *Campbell* v. *Brandywine Co.*, 52 Pa. Super. Ct. 511 (1913); *Johnson* v. *Foust*, 158 Iowa 195, 139 N. W. 451 (1913); *Carroll Co. Comrs.* v. *Westminster*, 123 Md. 198, 91 Atl. 412 (1914); *Slote* v. *Constantine H. Co.*, 182 Mich. 260, 148 N. W. 666 (1914).

[93]Cross assignments of error are frequently permitted by statutes or rules; see *Childers* v. *Loudin*, 51 W. Va. 559, 42 S. E. 637 (1902); *Bryant* v. *Anderson*, 5 Ga. App. 517, 63 S. E. 638 (1908); *Jones* v. *Lampe*, 85 Kans. 401, 116 Pac. 619 (1911); *Kuh* v. *O'Reilly*, 261 Ill. 437, 104 N. E. 5, 51 L. R. A. (N. S.) 420 (1914); *Wheeler* v. *Thomas*, 116 Va. 259, 81 So. 51 (1914); *Sharum* v. *Muskogee*, 43 Okla. 22, 141 Pac. 22 (1914); *Hunter* v. *W. R. Roylance Co.*, 45 Utah 135, 143 Pac. 140 (1914). And in some jurisdictions an appeal in equity may open the whole case for consideration de novo. *Neubert* v. *Massman*, 37 Fla. 91, 19 So. 625 (1896); *West* v. *West*, 90 Iowa 41, 57 N. W. 639 (1894). In proceedings for an accounting compare *Sweeney* v. *Neely*, 53 Mich. 421, 19 N. W. 127 (1884); *Moors* v. *Washburn*, 159 Mass. 172, 34 N. E. 182 (1893); *Gray* v. *Chase*, 184 Mass. 444, 68 N. E. 676 (1903), with *Cox* v. *Schermerhorn*, 18 Hun (N. Y.) 16 (1879); *Foster* v. *Ambler*, 24 Fla. 519, 5 So. 263 (1888). For England see Rules of the Supreme Court, Order LVIII, rule 6; *Harris* v. *Aaron*, 36 L. T. (N. S.) 43 (1877); *The Beeswing*, L. R. 10 Probate Div. 18 (1884); *Jones* v. *Stott*, L. R. (1910) 1 K. B. 893.

IN RE McNULTY'S ESTATE

SUPREME COURT OF PENNSYLVANIA, 1911

230 Pa. 387

Appeal by S. E. Kingsley from a decree of the Orphans' Court of Allegheny County dismissing exceptions to adjudication in re first account of the Colonial Trust Company of Pittsburg, administrator d. b. n. c. t. a. of estate of P. J. McNulty, deceased. C. M. Johnston and S. E. Kingsley each presented claims to the auditing judge for commissions or compensation for selling certain real and personal property. The claims were allowed by the orphans' court, but Kingsley, being dissatisfied with the amount awarded him, appealed, alleging as error the action of the court in awarding compensation to Johnson and not allowing his claim in full. Neither the estate nor any other creditor appealed from the decree allowing Johnston's claim. It appeared that if Kingsley was entitled to additional compensation there were funds in the hands of the accountant amply sufficient to pay the claim.[94]

MESTREZAT, J.: Before a party has the right to appeal, he must be aggrieved by the decree that it entered. If he is not aggrieved, he is not affected or injured and, hence, has no standing to complain. Under the circumstances of this case, it is apparent, we think, that Kingsley was not aggrieved or injured by the decree allowing compensation to Johnston. His right to compensation does not depend upon Johnston's claim against the estate for services in the sale of the property. If he rendered services to the estate in making the sale and satisfied the court that he was entitled to compensation therefor, a decree should have been entered for him, regardless of any claim which Johnston may have against the estate for similar services. It by no means follows that if Johnston is entitled to compensation for assisting in the sale of the property, that Kingsley did not also aid in making the sale and was entitled to compensation for services rendered the estate. The claims of Johnston and Kingsley were separate and distinct and whether either or both should be allowed depended upon the ability of each party to support his claim by proper testimony. Kingsley is not injured by the allowance of Johnston's claim. As already observed, there are funds undistributed in the hands of the accountant ample to meet any claim which the court may award as compensation to Kingsley. He therefore, has no standing to attack Johnston's claim or appeal from the decree which allows it. So far as this appeal alleges error in awarding Johnston's claim it is quashed.[95]

---

[94]The statement of facts is abridged from the court's opinion, part of which is omitted.

[95]*Hone* v. *Van Schaick*, 7 Paige (N. Y.) 221 (1838), per Walworth, Ch.: "It is well settled that no person is authorized to appeal from a decree unless he is aggrieved by it; and that a party who is aggrieved by one part of a decree only, can not by appeal call in question another part of the decree in

The administrator has filed a paper book in which the claims of Johnston and Kingsley are attacked and in which we are asked to reject both claims. Unfortunately for the administrator, it has no standing in this court to attack either claim. Until the contrary appeared in its paper book, it seems to have been satisfied with the amount awarded each of the two claimants. It has not taken an appeal and, therefore, it can not contest the claims here. The only appellant and party who can be heard in this court is Kingsley, who has appealed from the decree of the court below in refusing to allow him sufficient compensation for his services in selling the Bijou property. It must be conceded that the argument of the administrator against Johnston's claim is not without force, but as it has not taken the proper legal step to contest the claim by appealing from the decree, we are not in a position to either hear or heed the argument. Whether, therefore, Johnston is entitled to any commission or compensation for services rendered in selling the Bijou property we are not called upon to determine and, therefore, do not decide. The administrator occupies the same position in regard to Kingsley's claim. By its failure to appeal, it admits that it is satisfied with the decree.[93]

Decree affirmed.

---

which he is not interested." Accord: *Green* v. *Blackwell*, 32 N. J. Eq. 768 (1880); *People* v. *Reis*, 76 Cal. 269, 18 Pac. 309 (1888); *Stribling* v. *Splint Coal Co.*, 31 W. Va. 82, 5 S. E. 321 (1888); *Hayes* v. *Klosky*, 104 Ala. 418, 16 So. 533 (1893); *Kennard* v. *Curran*, 141 Ill. App. 621 (1908). So, also, party on appeal can not urge alleged errors which concern some other person or party not complaining thereof. *Whiting* v. *Cochran*, 9 Mass. 532 (1813); *Shirley* v. *Luenburgh*, 11 Mass. 379 (1814); *Morgan* v. *Crabb*, 3 Port. (Ala.) 470 (1836); *Arrington* v. *Cheatham*, 2 Rob. (Va.) 492 (1843); *Cash's Appeal*, 1 Pa. St. 166 (1843); *Walker* v. *Jones*, 23 Ala. 448 (1853); *Graves* v. *Edwards*, 32 Miss. 305 (1856); *Clark* v. *Barnett*, 24 Ark. 30 (1862); *Kirby* v. *Corning*, 54 Wis. 599, 12 N. W. 69 (1882); *Lamb* v. *The Council Bluffs Ins. Co.*, 70 Iowa 238, 30 N. W. 497 (1886); *Coates* v. *Wilkes*, 94 N. Car. 174 (1886); *Randolph* v. *Chisholm*, 29 Ill. App. 172 (1888); *Crigler* v. *Conner*, 12 Ky. L. 502, 14 S. W. 640 (1890); *Moreland* v. *Houghton*, 94 Mich. 548, 54 N. W. 285 (1893); *Kruger* v. *Braender*, 3 Misc. 275, 23 N. Y. S. 324, 51 N. Y. St. 906 (1893); *Grand G. A. O. D.* v. *Garibaldi Grove No. 71 of U. A. O. of Druids*, 105 Cal. 219, 38 Pac. 947 (1894); *Conshohocken T. Co.* v. *Iron C. Co.*, 167 Pa. St. 589, 31 Atl. 934 (1895); *Connor* v. *Schildt*, 16 Pa. Super. Ct. 88 (1901); *Clark* v. *Shawen*, 190 Ill. 47, 60 N. E. 116 (1901); *Lanum* v. *Patterson*, 151 Ill. App. 36 (1909); *Lanyon* v. *Lanquist*, 157 Ill. App. 316 (1910); *Gray* v. *Hayhurst*, 157 Ill. App. 488 (1910); *Alexander* v. *Vaughan*, 106 Ark. 438, 153 S. W. 594 (1913); *Chicago B. & Q. R. Co.* v. *Gilsdorff*, 258 Ill. 212, 101 N. E. 546 (1913).

[93]Parties who are not before the appellate court by appeal or writ of error have no standing to allege error. *Morse* v. *Smith*, 83 Ill. 396 (1876); *Anderson* v. *Silliman*, 92 Tex. 560, 50 S. W. 576 (1899); *Fitchie* v. *Brown*, 211 U. S. 321, 53 L. ed. 202 (1908); *Lee* v. *Powell*, 122 La. 639, 48 So. 134 (1909); *Lehman Co.* v. *Lemoine*, 129 La. 382, 56 So. 324 (1911); *Akers* v. *Lord*, 67 Wash. 179, 121 Pac. 51 (1912); *Sears* v. *Hull*, 147 Ky. 745, 145 S. W. 760 (1912); *Brown* v. *Bay City Bank & Trust Co.* (Tex.), 161 S. W. 23 (1913).

LINSON *v.* SPAULDING

SUPREME COURT OF OKLAHOMA, 1909.

23 Okla. 254

DUNN, J.: This case presents an appeal from the judgment of the District Court of Kingfisher County. There is but one point relied on by counsel for plaintiff in error to secure a reversal, which is, that a motion for a new trial was overruled by the trial court pro forma. No contention or claim is made that in fact the judgment was wrong on the merits.

A case from the Supreme Court of the Territory of Oklahoma. *Board of Commissioners of Washita County* v. *Hubble,* 8 Okla. 169, declared the familiar rule that: "Error is never presumed by the Supreme Court; it must always be shown affirmatively by the record, or it will be presumed that no judicial error was committed by the trial court, and the judgment must be sustained."

In the light of this, it will be seen that we must in the absence of a showing of error in the case, conclude that the judgment of the lower court was correct in all particulars, that both parties had a fair trial, that the court duly and fully considered their different claims, and for its conclusion rendered a judgment in strict accordance with the law giving proper relief to the proper party. This being true, conceding the question to be properly raised, the ends of justice in our judgment would not be attained by remanding such a case for another trial for the reason here urged.

The cases of *Lewis* v. *Hall,* 11 Okla. 684, and *Pinson* v. *Prentise,* 8 Okla. 143, appear to be in point on the question. In the case of *Lewis* v. *Hall,* 11 Okla. 684, Justice Pancoast in the consideration thereof, said: "If the judgment was correct, no good purpose could be served by reversing the case, but, on the contrary, great injury would be done to the defendant in error. The plaintiff in error having failed to bring the case here in such form as to enable this court to examine the entire record, and determine whether or not there was, in fact, error in the judgment of the court below, and the presumption being in favor of the correctness of the judgment of the trial court, this case must be affirmed." In the case of *Pinson* v. *Prentise,* 8 Okla. 143, Mr. Justice Hainer said: "The only question that should be considered by this court is, did the trial court render a proper judgment in the case? And, if the court rendered a proper judgment, what sound reason can be given that the overruling of a motion for a new trial, even pro forma, is prejudicial to the substantial rights of the plaintiffs? We can not assent to establish a rule of practice in this territory which would require this court to reverse a case upon such a frivolous ground, regardless of the merits of the case, and the justness of the decision of the trial court."

The judgment of the trial court is accordingly affirmed.[97]

All the justices concur.

---

[97] "The burden is always upon the party who avers error to make the same appear affirmatively—nothing is to be presumed against a judgment. The error, if any is charged, must be definitely shown." Per Duncan, J., in

Kieshkowski v. *Bostrom*, 179 Ill. App. 73 (1913). Accord: *Carroll* v. *Peake*, 1 Pet. (U. S.) 18, 7 L. ed. 34 (1828); *Gram's Appeal*, 4 Watts (Pa.) 43 (1835); *Bagnell* v. *Broderick*, 13 Pet. (U. S.) 436, 10 L. ed. 235 (1839); *Graham* v. *Dixon*, 4 Ill. 115 (1841); *Conoway* v. *Weaver*, 1 Ind. (Smith) 263 (1848); *Proctor* v. *Hart*, 5 Fla. 465 (1854); *Hendrie* v. *Rippey*, 9 Iowa 351 (1859); *Cram* v. *Cram*, 33 Vt. 15 (1860); *Mead* v. *Bunn*, 32 N. Y. 275 (1865); *Wise* v. *Ringer*, 42 Ala. 488 (1868); *Sorg* v. *First German Evangelical St. Paul's Congregation*, 63 Pa. St. 156 (1869); *Peabody* v. *McAvoy*, 23 Mich. 526 (1871); *Dritt* v. *Dodds*, 35 Ind. 63 (1871); *Van Patten* v. *Wilcox*, 32 Wis. 340 (1873); *Loweree* v. *Newark*, 38 N. J. L. 151 (1875); *Danvers* v. *Durkin*, 14 Ore. 37, 12 Pac. 60 (1886); *Moulthrop* v. *School Dist.*, 59 Vt. 381, 9 Atl. 608 (1887); *Campbell* v. *Walls*, 77 Cal. 250, 19 Pac. 427 (1888); *Vinyard* v. *Barnes*, 124 Ill. 346, 16 N. E. 254 (1888); *Taylor* v. *Birely*, 130 Ind. 484, 30 N. E. 696 (1891); *Donovan* v. *McCarty*, 155 Mass. 543, 30 N. E. 221 (1892); *Berry* v. *Berry*, 84 Maine 541, 24 Atl. 957 (1892); *In re Bates*, 105 Cal. 646, 38 Pac. 941 (1895); *McCrimmen* v. *Parish*, 116 N. Car. 614, 21 S. E. 407 (1895); *Coonan* v. *Loewenthal*, 129 Cal. 197, 61 Pac. 940 (1900); *Hobbs* v. *Warman*, 63 Nebr. 703, 89 N. W. 255 (1902); *Tandy* v. *St. Louis Transit Co.*, 178 Mo. 240, 77 S. W. 994 (1903); *Staniels* v. *Whitcher*, 73 N. H. 152, 59 Atl. 934 (1905); *Waggaman* v. *Earle*, 25 App. D. C. 582 (1905); *Clements* v. *State*, 51 Fla. 6, 40 So. 432 (1906); *Merrill* v. *Milliken*, 101 Maine 50, 63 Atl. 299 (1905); *Southern R. Co.* v. *Lester*, 151 Fed. 573 (1907); *Bautz* v. *Adams*, 131 Wis. 152, 111 N. W. 69 (1907); *Ropes* v. *Stewart*, 54 Fla. 185, 45 So. 31 (1907); *Boatwright* v. *Crosby*, 83 S. Car. 190, 65 S. E. 174 (1909); *Dailey* v. *Aspen Democratic Pub. Co.*, 46 Colo. 145, 103 Pac. 303 (1909); *San Domingo Gold Co.* v. *Grand Pacific Co.*, 10 Cal. App. 415, 102 Pac. 548 (1909); *Pierce* v. *Pierce*, 52 Wash. 679, 101 Pac. 358 (1909); *Manchester* v. *Duggan*, 75 N. H. 33, 70 Atl. 1075 (1908); *Whitcomb* v. *Whitcomb*, 205 Mass. 310, 91 N. E. 210 (1910); *Johnson* v. *Michaux*, 110 Va. 595, 66 S. E. 823 (1910); *McKinnon* v. *Lewis*, 60 Fla. 125, 53 So. 940 (1910); *Scott* v. *Newell*, 69 W. Va. 118, 70 S. E. 1092 (1911); *Taylor* v. *Jackson*, 92 S. Car. 113, 75 S. E. 275 (1912); *Williamson* v. *Richardson*, 205 Fed. 245 (1913); *Interstate Ry. Co.* v. *Missouri River & C. R.*, 251 Mo. 707, 158 S. W. 349 (1913); *Chicago & E. R. Co.* v. *Dinius*, 180 Ind. 596, 103 N. E. 652 (1913); *Iowa S. S. Bank* v. *Henry* 22 Wyo. 189, 136 Pac. 863 (1913); *Haggett* v. *Jones*, 111 Maine 348, 89 Atl. 140 (1913); *Teter* v. *Franklin Fire Ins. Co.*, 74 W. Va. 344, 82 S. E. 40 (1914); *Ringling* v. *Smith R. D. Co.*, 48 Mont. 467, 138 Pac. 1098 (1914); *Costa* v. *Raza*, 23 Cal. App. 754, 139 Pac. 899 (1914); *Hoehler* v. *Short*, 40 Okla. 681, 140 Pac. 146 (1914).

Error must be prejudicial. Harmless error does not justify a reversal. *Gammon* v. *Jones*, 4 T. R. 509 (1792); *O'Donnell* v. *Connecticut Fire Ins. Co.*, 73 Mich. 1, 41 N. W. 95 (1888); *Marshall* v. *Hancock*, 80 Cal. 82, 22 Pac. 61 (1889); *Whiteside* v. *Brawley*, 152 Mass. 133, 24 N. E. 1088 (1890); *Hannum* v. *Hill*, 52 W. Va. 166, 43 S. E. 223 (1902); *Shultz* v. *Seibel*, 209 Pa. 27, 57 Atl. 1120 (1904); *Vanderslice* v. *Donner*, 26 Pa. Super. Ct. 319 (1904); *Ostegaard* v. *Greek Catholic Congregation*, 75 N. J. L. 736, 68 Atl. 86 (1907); *Bowman* v. *Saigling* (Tex. Civ. App.), 111 S. W. 1082 (1908); *Farmers' & Merchants' Bank of Springfield* v. *Zook*, 133 Mo. App. 603, 113 S. W. 678 (1908); *St. Louis L. M. R. Co.* v. *Williams*, 92 Ark. 534, 123 S. W. 403 (1909); *Rock Creek S. Co.* v. *Boyd*, 111 Md. 189, 73 Atl. 662 (1909); *Peoples R. Co.* v. *Baldwin*, 7 Del. 383, 72 Atl. 979 (1909); *Southern Home Ins. Co.* v. *Putnal*, 57 Fla. 199, 49 So. 922 (1909); *Rullman* v. *Rullman*, 81 Kans. 521, 106 Pac. 52 (1910); *Southern Pac. R. Co.* v. *Da Costa*, 190 Fed. 689 (1911); *Geer* v. *Chapin*, 163 Ill. App. 654 (1911); *St. Louis L. M. R. Co.* v. *Marlin*, 33 Okla. 510, 128 Pac. 108 (1912); *Greer* v. *Downing*, 176 Ill. App. 355 (1912); *Davidson Fruit Co.* v. *Produce Distributors Co.*, 74 Wash. 551, 134 Pac. 510 (1913); *Perry* v. *Van Matre*, 176 Mo. App. 100, 161 S. W. 643 (1913); *Richardson* v. *Bohney*, 26 Idaho 35, 140 Pac. 1106 (1914); *Carter* v. *Seaboard Air Line R. Co.*, 165 N. Car. 244, 81 S. E. 321 (1914). In *Neville* v. *Frary*, 88 Conn. 50, 89 Atl. 882 (1914), the error complained of was the inclusion of an item of $6 in a judgment for nearly $1,000. The court refused to interfere on the ground that the item was too insignificant to claim their attention. Accord: *Perin* v. *Cathcart*, 115 Iowa 553, 89 N. W. 12 (1902) (22 cents); *Missouri K. & T. R. Co.* v. *Kirkpatrick* (Tex. Civ. App.), 165 S. W. 500 (1914).

BINDBEUTAL *v.* ST. RY. CO.

COURT OF APPEALS OF MISSOURI, KANSAS CITY, 1891

43 *Mo. App.* 463[98]

SMITH, P. J.: Plaintiff brought this action for alleged personal injuries, claiming that, while driving on the defendant's track a cable car collided with his wagon throwing him therefrom and injuring him. The petition was in two counts, the first claiming that the act of defendant was wilful, while the second count was founded upon negligence. All the evidence has not been preserved in full, but the bill of exceptions shows what its tendency was. The verdict of the jury was silent as to the first count, but found for the plaintiff on the second count and assessed his damages at $1,000. The defendant has appealed from the judgment.

The questions presented by the record before us arise out of the action of the trial court in the giving and refusing of instructions. A preliminary matter however has been presented, which we will dispose of before proceeding to examine the instructions.

It has been argued by the counsel for the defendant that, when the record of a cause disclosed an erroneous ruling of the trial court that then the presumption arises that such error was prejudicial to the rights of the party against whom committed and that such presumption continues unless the record shows beyond a doubt that it was not prejudicial; or, to state the contention in a different way, that when the revisory court discovers in the record that an error has been committed that this per se enjoins upon it the duty to reverse the judgment, unless it further appears that such error did not operate prejudicially. The rule, thus stated in defendant's contention, seems quite reasonable and unless in some way it is affected by the statute we should be inclined to approve it. The statute just referred to, Revised Statutes, section 2303, provides that the appellate courts of this state shall not reverse the judgment of any court unless it shall believe that error was committed by such court against the appellant, or plaintiff in error, materially affecting the result. Under this mandatory prohibition the appellate courts can not reverse a judgment in any case unless it is believed, not only that error was committed, but that it materially affected the merits of the action; unless these two essential conditions are believed to coexist there can be no reversal. The existence of nonprejudicial error in a case affords no ground for disturbing the judgment. There must be inseparably connected with it the element of prejudice, else the case falls within the terms of the statutory prohibition. Errors discovered go for naught unless coupled with prejudice. Errors are, therefore, of two kinds, reversible and irreversible, or prejudicial

[98]The arguments of counsel and part of the opinion of the court are omitted. The court, finding that some of the instructions to the jury were erroneous and that the plaintiff (the appellee) had not shown that in the record which repelled the presumption of prejudice, reversed the judgment.

and nonprejudicial. Reversible when accompanied by its twin sister, prejudice, and irreversible when found existing alone. Error and prejudice go hand in hand, until the latter, which is the creature of presumption, is met and neutralized by something in the record. It follows, therefore, that the interference of the appellate court with the judgment of the lower court can be successfully invoked by showing an error in the record; for when the error is shown the law supplies and attaches the consequence of prejudice. The judgment in such case would be necessarily reversed, unless the defendant shows from the record that which clearly rebuts the presumption of prejudice.

We can not discover that the statute is repugnant to, or encroaches on, this rule of presumption; on the contrary, we are inclined to think that it supplements the rule with a practical definition of what shall constitute prejudicial error. As we understand it, when error intervenes, the prejudice presumed is of the kind mentioned in the statute, that is, it must affect materially the merits. In all the cases cited by the plaintiff, it will be observed that the judgment was not reversed on account of the error complained of, but because of something contained in the record by which it was made to appear that the complainant was not substantially injured or harmed. They decide nothing at variance with what is here held. The adjudged cases abound in the use of such terms as "reversible error," "harmful error" and "prejudicial error," and the like, but we think that the meaning of them all is that, when error intervenes, it is presumed to be reversible, harmful and prejudicial, and authorizes a reversal, unless the party claiming the benefit of the judgment can show that in the record which rebuts the presumption.

The St. Louis court of appeals has thrice decided that error is presumed to be prejudicial. To justify an appellate court to affirm a judgment, when error has intervened in the trial, the burden is upon the party claiming the benefit of the judgment to satisfy the appellate court that the error is not prejudicial. *Suttie* v. *Aloe*, 39 Mo. App. 38; *Clark* v. *Fairley*, 30 Mo. App. 335; *Walton* v. *Railroad*, 40 Mo. App. 544. And we can see no valid reason why the rule just stated is not correct, nor why it should not be followed.[99]

---

[99] In *Deery* v. *Cray*, 72 U. S. 795, 18 L. ed. 653 (1866), it is said by Miller, J.: "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights." In accord, many cases hold that prejudice will be presumed when error is shown or admitted. *Smith* v. *Shoemaker*, 84 U. S. 630, 21 L. ed. 717 (1873); *Wayland* v. *Ware*, 109 Mass. 248 (1872); *Moores* v. *Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870 (1881); *Jones* v. *Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664 (1883); *Gilmer et al.* v. *Highley*, 110 U. S. 47, 28 L. ed. 62 (1884); *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 99, 30 L. ed. 299 (1886); *Cleary* v. *City R. Co.*, 76 Cal. 240, 18 Pac. 269 (1888); *Houk* v. *Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706 (1890); *DuBois* v. *Perkins*, 21 Ore. 189, 27 Pac. 1044 (1891); *Simmons* v. *Spratt*, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343 (1890); *Mexia* v.

Oliver, 148 U. S. 664, 37 L. ed. 602 (1893); *Solomon* v. *City Compress Co.*, 69 Miss. 319, 10 So. 446, 12 So. 339 (1891); *Peck* v. *Heurich*, 167 U. S. 624, 42 L. ed. 302 (1897); *Bell* v. *Samuels*, 60 N. J. L. 370, 37 Atl. 613 (1897); *Langston* v. *Southern R. Co.*, 147 Mo. 457, 48 S. W. 835 (1898); *Parrin* v. *Montana Cent. R. Co.*, 22 Mont. 290, 56 Pac. 315 (1899); *Gulf R. Co.* v. *Johnson*, 91 Tex. 569, 44 S. W. 1067 (1898); *Smuggler Union Mining Co.* v. *Broderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. 106 (1898); *Loughran* v. *Des Moines*, 107 Iowa 639, 78 N. W. 675 (1899); *Collett* v. *Northern Pacific R. Co.*, 23 Wash. 600, 63 Pac. 225 (1900); *Callaway & Truitt* v. *Gay*, 143 Ala. 524, 39 So. 277 (1904); *Inman Bros.* v. *Dudley & Daniels Lumber Co.*, 146 Fed. 449 (1906); *Armour & Co.* v. *Russell*, 144 Fed. 614 (1906); *National Biscuit Co.* v. *Nolan*, 138 Fed. 6 (1905); *Wheeling Mold Co.* v. *Steel Co.*, 62 W. Va. 289, 57 S. E. 826 (1907); *United States* v. *Ute Coal Co.*, 158 Fed. 20 (1907); *Meyer* v. *Chicago M. R. Co.*, 22 S. Dak. 377, 117 N. W. 1037 (1908); *Mutual Reserve Life Ins. Co.* v. *Heidel*, 161 Fed. 535 (1908); *Archbold* v. *Joline*, 114 N. Y. S. 169 (1909); *Norfolk Tr. Co.* v. *Miller*, 174 Fed. 607 (1909); *Crawford* v. *United States*, 212 U. S. 183, 53 L. ed. 465 (1909); *Olopp* v. *Rapid Tr. Co.*, 69 Misc. 595, 126 N. Y. S. 184 (1910); *Morgan* v. *Bankers Trust Co.*, 63 Wash. 476, 115 Pac. 1047 (1911); *McBride* v. *Huckins*, 76 N. H. 206, 81 Atl. 528 (1911); *Butchers Slaughtering Assn.* v. *Boston*, 214 Mass. 254, 101 N E. 426 (1913); *Conway* v. *Coursey*, 110 Ark. 557, 161 S. W. 1030 (1913); *Linter* v. *Wiles*, 70 Ore. 350, 141 Pac. 871 (1914). The principle is sometimes stated in this manner: "Where it is shown on appeal that the trial court erred in some ruling or decision, the error will be presumed to be harmful, and the burden is not upon the party aggrieved to show that it is harmful, but on the opposite party to show by the record that the error was harmless." *Vandalia Coal Co.* v. *Yemm*, 175 Ind. 524, 92 N. E. 49, 94 N. E. 881 (1910); *Greene* v. *White*, 37 N. Y. 405 (1867); *Lack* v. *Weber*, 61 Misc. (N. Y.) 91 (1908); *Crane Co.* v. *Hogan*, 228 Ill. 338, 81 N. E. 1032 (1907); *Meleny* v. *Library Bureau*, 148 Ill. App. 437 (1909); *Casey* v. *Prudential Ins. Co. of America*, 162 Ill. App. 581 (1911); *Davis* v. *Cox*, 178 Ind. 486, 99 N. E. 803 (1912); *Neely* v. *Louisville Tr. Co.*, 53 Ind. App. 659, 102 N. E. 455 (1913).

Where the case is tried by the court without a jury it will not be presumed, on appeal, that improper evidence objected to at the time misled the court. It will be assumed that the immaterial or improper evidence was disregarded in arriving at a decision. *Merchants' Despatch Co.* v. *Joesting*, 89 Ill. 152 (1878); *Mallers* v. *Crane Co.*, 92 Ill. App. 514 (1900); *Llewellyn* v. *Cauffiel*, 215 Pa. 23, 64 Atl. 388 (1906); *Boening* v. *N. American Union*, 155 Ill. App. 528 (1910); *Sharp* v. *Trustee of Schools*, 261 Ill. 44, 103 N. E. 562 (1913); *Diggs* v. *Henson*, 181 Mo. App. 34, 163 S. W. 565 (1914); *Fairbank* v. *Fairbank*, 92 Kans. 45, 139 Pac. 1011 (1914). See *Colonial Securities Trust Co.* v. *Massey*, L. R. (1896) 1 Q. B. 38. The principle has been applied to auditors, *Breneman's Estate*, 65 Pa. St. 298 (1870), and to a master in equity, *Long* v. *Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96 (1907). But contra where it appears that the decision was influenced by the objectionable evidence. *Weibert* v. *Hanan*, 202 N. Y. 328, 95 N. E. 688 (1911); *Harding* v. *Conlon*, 159 App. Div. 441, 144 N. Y. S. 663 (1913); *Swan* v. *Price* (Tex. Civ. App.), 162 S. W. 994 (1914); *Elston* v. *McGlauflin*, 79 Wash. 355, 140 Pac. 396 (1914).

PRESS PUB. Co. *v.* MONTEITH

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, 1910

180 *Fed.* 356

In error to the Circuit Court of the United States for the Southern District of New York.

Action by Laura W. Monteith against the Press Publishing Company for libel. Judgment for plaintiff for $15,000, and defendant brings error.[1]

COXE, J.: The defendant realizing, apparently, that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

Prejudice must be perceived, not presumed or imagined. The writer, speaking only for himself, is in hearty accord with the modern tendency.

The object of all litigation should be to arrive at a just result by the most direct, speedy and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

One of the English rules provides:

"A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial."[2]

---

[1] A part only of the opinion is printed.

[2] Rules of the Supreme Court, Order 39, rule 6. In *Floyd* v. *Gibson*, 100 L. T. (N. S.) 761 (1909), the court misdirected the jury by leaving it open to them to treat the plaintiff's injury as permanent when there was no evidence of any permanent injury, but the plaintiff had admittedly been seriously injured and the damages were moderate. *Held*, The damages being reasonable in respect to the injuries actually suffered, no "substantial wrong or miscarriage" was occasioned by the misdirection within the rule, and a new trial should be refused. Compare *Bray* v. *Ford*, L. R. (1896) A. C. 44, 65 Q. B. 213, 73 L. T. 609, and see *Tait* v. *Beggs*, 2 R. I. 525 (1905); *O'Reilly* v. *McCall* (1910), 2 I. R. 42.

Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court and the resources of the litigants become exhausted.

Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts.

The judgment is affirmed with costs.[8]

SYPHERD *v.* MYERS

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1911

80 *N. J. L.* 321

By this writ of error Herman M. Sypherd, trustee in bankruptcy of Channell Brothers, seeks to reverse a judgment of the Supreme Court entered upon a verdict directed in his favor for six cents damages against Charles R. Myers, whom plaintiff in error had sued for the breach of an option given to his bankrupts.

Myers had leased the Piedmont Hotel to Channell Brothers for one year. The lease gave to the lessees an option to purchase the property for $57,000, if the lessor should obtain title during the term. The term expired without the fulfillment of this condition and was renewed for one year from June 1, 1900, at a higher rental, with a purchase price of $62,000 under a similar option. During this term

---

[8] In accord with the principal case it is frequently said that unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed. *Allegheny* v. *Nelson*, 25 Pa. St. 332 (1855); *Hooker* v. *Johnson*, 10 Fla. 198 (1860); *Fulmer* v. *Fulmer*, 22 Iowa 230 (1867); *Warner* v. *Jones*, 140 Mass. 216, 5 N. E. 645 (1885); *Worcester Coal Co.* v. *Utley*, 167 Mass. 558, 46 N. E. 114 (1897); *Toole* v. *Bearce*, 91 Maine 209, 39 Atl. 558 (1898); *Wood* v. *Finson*, 91 Maine 280, 39 Atl. 1007 (1898), where it is said: "It must be shown affirmatively that the excepting party has been aggrieved"; *Koplan* v. *Gas Light Co.*, 177 Mass. 15, 58 N. E. 183 (1900); *Wills* v. *Hardcastle*, 19 Pa. Super. Ct. 525 (1902); *Commonwealth* v. *Phila. H. & P. R. Co.*, 23 Pa. Super. Ct. 235 (1903); *Cox* v. *Wilson*, 25 Pa. Super. Ct. 635 (1904); *Neal* v. *Rendall*, 100 Maine 574, 62 Atl. 706 (1905); *National Valley Bank* v. *Houston*, 66 W. Va. 336, 66 S. E. 465 (1909); *Berger* v. *Abel & Bach*, 141 Wis. 321, 124 N. W. 410 (1910); *Roach* v. *Skelton*, 86 Kans. 63, 119 Pac. 315 (1911); *Smith* v. *Iola Portland Cement Co.*, 86 Kans. 287, 120 Pac. 349 (1912); *Totten* v. *Barlow*, 165 Cal. 378, 132 Pac. 749 (1913); *Leonard* v. *Hartzler*, 90 Kans. 386, 133 Pac. 570 (1913); *Hoogendorn* v. *Daniel*, 202 Fed. 431 (1913); *Wells-Fargo & Co.* v. *Benjamin* (Tex. Civ. App.), 165 S. W. 120 (1914). See also *Garland* v. *State of Washington*, 232 U. S. 642, 58 L. ed. 772 (1914), overruling *Crain* v. *United States*, 162 U. S. 625, 40 L. ed. 1097 (1896).

the lessees defaulted wholly in the payment of their rent and about August 25, 1900, notified Myers that they could not pay him any money at all and would have to get out. They went out of possession and Myers went in. On September 8th Myers obtained title and on September 12th tendered it to Channell Brothers, who, without disclosing the bankruptcy proceeding, informed Myers that they were not in a condition to comply with their agreement; whereupon Myers, on September 15th, sold the property to one Bechtel. On October 15, 1900, the plaintiff in error was appointed the trustee in bankruptcy of Channell Brothers, and on January 3, 1902, he began this suit for damages for the loss of the bargain resulting from Myers' breach of the option contained in the lease. To this action Myers pleaded specially that before he acquired the title in question the lessees had abandoned their option to purchase, and had surrendered their term to the defendant, who accepted such surrender.

On the trial the defendant sustained his pleas and at the close of the testimony the court, of its own motion, directed a verdict for six cents damages, to which the defendant excepted upon the ground that he was entitled to a verdict. The plaintiff also excepted and took this writ of error.[4]

GARRISON, J.: If the trial judge was right in directing a verdict for the plaintiff in error he was wrong in limiting the recovery to nominal damages, for, if the defendant was liable to the plaintiff at all, there was testimony that should have gone to the jury in support of a more substantial measure of damage.

This error does not, however, entitle the plaintiff to have the judgment for nominal damages reversed if it conclusively appears that he was not entitled to a judgment for any sum.[5]

We think that this does conclusively appear in two different aspects of the case.

First, because Channell Brothers, prior to their being adjudged bankrupts, abandoned their option from inability to comply with its terms and so notified Myers, who, in good faith, acted upon it. The facts in respect to this are uncontroverted.

---

[4]Part of the opinion of the court is omitted.

[5]Judgment will not be reversed in favor of an appellant who is not entitled to succeed in any event. *Cowen* v. *Eartherly Hardware Co.*, 95 Ala. 324, 11 So. 195 (1891); *Ice* v. *Ball*, 102 Ind. 42, 1 N. E. 66 (1884); *McCreery* v. *Wells*, 94 Cal. 485, 29 Pac. 877 (1892); *Horn* v. *Schwinn & Co.*, 150 Ill. App. 559 (1909); *First Nat. Bank of Antigo* v. *Larsen*, 146 Wis. 653, 132 N. W. 610 (1911); *Ritter* v. *Pittsburg R. Co.*, 230 Pa. 249, 79 Atl. 549 (1911); *Webber* v. *Old Colony S. R. Co.*, 210 Mass. 432, 97 N. E. 74 (1912); *Peterson* v. *Purinton*, 90 Nebr. 837, 134 N. W. 942 (1912); *Atwood* v. *Atwood*, 86 Conn. 579, 86 Atl. 29 (1913); *Wilson* v. *Draper*, 9 Ala. App. 585, 63 So. 779 (1913). So, the fact that plaintiff recovers on a mistaken view of the character of the agreement upon which the suit is based is not ground for reversal, where he is entitled to recover for other reasons. *American Structural Steel Co.* v. *Rush*, 107 N. Y. S. 3 (1907).

In *Butterhof* v. *Butterhof*, 84 N. J. L. 285, 86 Atl. 394 (1912), it is said, per Garrison, J.: "To review seriatim the inconsequential errors that the trial judge may have made in what he said to the jury, while at the same time ignoring the fundamental error he made in not directing a verdict for the defendant, would be at once sheer waste of time and a flagrant unobservance of the legislative precept."

The second point is that the title to the property was not obtained by Myers during the continuance of the lease, which was the condition on which the right of purchase by Channell Brothers depended. The giving up of possession by Channell Brothers and its acceptance by Myers, which was specially pleaded by the latter, was conclusively established at the trial by testimony of acts that by operation of law constituted a surrender.

The circumstance that these views should have led at the trial to a direction of a verdict for the defendant rather than for the plaintiff does not militate against their consideration now upon the question, not of what judgment the defendant should have had, but of what injury is done to the plaintiff by the judgment that he is seeking to reverse. The defendant can not have the judgment that he should have had; that is his loss. He was foreclosed from moving for it by the action of the trial court; that may have been his misfortune, but he has taken no writ of error. The plaintiff, who has taken a writ of error, shows thereby a judgment which, as far as it is in his favor, was erroneous, and, as far as he complains of it, does him no injury. His writ of error avers that error has intervened to his damage; this he has not shown and hence has not shown himself entitled to have the erroneous judgment reversed.

Plaintiff in error can not complain because he is required to make out in this court the case upon which he has invoked its remedial jurisdiction and he is not, in any legal sense, aggrieved if this court decides adversely to him the questions that his case presents, providing they be purely legal questions fairly raised at the trial and upon which he has had full opportunity to be heard. The question whether or not a given act constitutes a surrender in law is a purely legal one and where, as in the present case, the act on which the law operates is conclusively established beyond any controversy or jury question, the legal question thus presented may be decided by the appellate court, provided it was one of the issues raised at the trial, and one of the matters argued or presented for argument in the appellate court. The present case complies with each of these conditions. The abandonment of the option and the surrender of the lease were specially pleaded by the defendant, who fully supported them by proof at the trial where the parties had an equal opportunity to litigate them. Both matters have been argued by counsel for defendant in his brief in this court and if the plaintiff's counsel has not done so it was because he did not choose to avail himself of the right of reply afforded by our rules; on the oral argument reference was pointedly made to these questions and the attention of counsel directed to them. The questions thus presented and decided negative the averment of the writ of error that the plaintiff is damnified by the judgment he seeks to reverse; upon this writ of error, therefore, the judgment of the Supreme Court must be affirmed.[6]

---

[6] In *Gillespie* v. *Ferguson*, 78 N. J. L. 470, 74 Atl. 460 (1909), the plaintiff, a discharged employé was injured before leaving the defendant's premises. A nonsuit was entered below on the ground that no duty was owing to the plaintiff. On error judgment was affirmed on the ground that plaintiff on his

1 *Kent's Commentaries* 476

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules

---

own showing had been guilty of contributory negligence. Trenchard, J., said: "A judgment entered upon a nonsuit directed by the trial judge and brought up for review will be affirmed if correct on any legal ground, although the reason advanced by the court below is erroneous. 2 Enc. P. & Pr. 372; 3 Cyc. 221. The rule announced to the contrary in *Wolfarth* v. *Sternberg*, 70 N. J. L. 198, 56 Atl. 173, does not meet the approval of this court."

So, generally, "a right decision will not be reversed merely because a wrong reason has been assigned therefor." *Taylor* v. *Thomas*, 129 N. Y. App. Div. 53 (1908); *Benson* v. *Bawden*, 149 Mich. 584, 113 N. W. 20 (1907); *Newell* v. *Wood*, 1 Munf. (Va.) 555 (1810); *Easley* v. *Craddock*, 4 Rand. (Va.) 423 (1826); *Prescott* v. *Hobbs*, 30 Maine 345 (1849); *Silsby* v. *Foote*, 14 How. (U. S.) 218, 14 L. ed. 394 (1852); *Ellicott* v. *Turner Peterson*, 4 Md. 476 (1853); *Stiles* v. *Lightfoot*, 26 Ala. 443 (1855); *Thomas* v. *Mann*, 28 Pa. St. 520 (1857); *Ireland* v. *Berryman*, 3 Bush (Ky.) 356 (1867); *Seyburn* v. *Deyris*, 25 La. Ann. 483 (1873); *Jamison* v. *Perry*, 38 Iowa 14 (1873); *Wieland* v. *Shillock*, 23 Minn. 227 (1876); *Marvin* v. *Universal Life Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657 (1881); *Susquehanna Mut. F. Ins. Co.* v. *Gackenbach*, 115 Pa. St. 492, 9 Atl. 90 (1886); *Christy* v. *Stafford*, 123 Ill. 463, 14 N. E. 680 (1888); *Atwood* v. *Partree*, 56 Conn. 80, 14 Atl. 85 (1888); *Whitehead* v. *Patterson*, 88 Ga. 748, 16 S. E. 66 (1891); *Howes* v. *District*, 2 App. Cas. D. C. 188 (1894); *York Mfg. Co.* v. *Bessemer Ice Mfg. &c. Co.*, 111 Ala. 332, 20 So. 13 (1895); *Estate of Grossman*, 175 Ill. 425, 51 N. E. 750, 67 Am. St. 219 (1898); *Blanchard* v. *Wilbur*, 153 Ind. 387, 55 N. E. 99 (1899); *Brew* v. *Hastings*, 206 Pa. 155, 55 Atl. 922 (1903); *McNicholas* v. *Tinsler*, 127 Ill. App. 381 (1906); *Corgan* v. *George F. Lee Coal Co.*, 218 Pa. 386, 67 Atl. 655 (1907); *Clegg* v. *Seaboard Steel Casting Co.*, 34 Pa. Super. Ct. 63 (1907); *Fordyce L. Co.* v. *Wallace*, 85 Ark. 1, 107 S. W. 160 (1907); *Vasser* v. *Liberty*, 50 Tex. Civ. App. 111, 110 S. W. 119 (1908); *Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453 (1908); *Depue* v. *Miller*, 65 W. Va. 120, 64 S. E. 740 (1909); *Murrell* v. *Peterson*, 57 Fla. 480, 49 So. 31 (1909); *Vogel* v. *Minn. Canal Co.*, 47 Colo. 534, 107 Pac. 1108 (1910); *Joslyn* v. *Cadillac Automobile Co.*, 177 Fed. 863 (1910); *Tucker* v. *Gillespy*, 169 Ala. 491, 53 So. 909 (1910); *Londonderry* v. *Fryor*, 84 Vt. 294, 79 Atl. 46 (1911); *McKee* v. *Title Ins. Co.*, 159 Cal. 206, 113 Pac. 140 (1911); *Lopes* v. *Conolly*, 210 Mass. 487, 97 N. E. 80, 38 L. R. A. (N. S.) 986n (1912); *Fountain* v. *Standard Fire Ins. Co.*, 155 Iowa 96, 134 N. W. 1090 (1912); *McDermott* v. *Burke*, 256 Ill. 401, 100 N. E. 168 (1912); *Meisel* v. *Merchants Nat. Bank*, 85 N. J. L. 253, 88 Atl. 1067 (1913); *Upham* v. *Plankinton*, 152 Wis. 275, 140 N. W. 5 (1913); *Hendricks* v. *Jackson*, 139 Ga. 604, 77 S. E. 816 (1913); *Adams* v. *Boston E. R. Co.*, 214 Mass. 1, 100 N. E. 1012 (1913); *Thomas* v. *Brown*, 168 Mo. App. 667, 154 S. W. 423 (1913); *Cooper* v. *Romney*, 49 Mont. 119, 141 Pac. 289 (1914); *Thompson* v. *Southern Lumber Co.*, 113 Ark. 380, 168 S. W. 1068 (1914); *Fourth Nat. Bank of Macon, Ga.*, v. *Willingham*, 213 Fed. 219 (1914); *Young* v. *Duncan*, 218 Mass. 346, 106 N. E. 1 (1914).

that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. The language of Sir William Jones is exceedingly forcible on this point. "No man," says he, "who is not a lawyer, would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate."[7]

Throughout the whole period of the year books, from the reign of Edward III to that of Henry VII, the judges were incessantly urging the sacredness of precedents, and that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught. If we judge against former precedents, said Chief Justice Prisot, it will be a bad example to the barristers and students at law, and they will not give any credit to the books, or have any faith in them.[8] So the Court of King's Bench observed in the time of James I, that the point which had been often adjudged ought to rest in peace.[9] The inviolability of precedents was thus inculcated at a period which we have been accustomed to regard as the infancy of our law, with as much zeal and decision as at any subsequent period.

But I wish not to be understood to press too strongly the doctrine of stare decisis, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity

---

[7] Jones on Bailments, 46.

[8] Y. B. 33, Hen. VI 41. See further Pollock's First Book of Jurisprudence, ch. 6.

[9] *Spicer* v. *Spicer*, Cro. Jac. 527 (1619). The doctrine of stare decisis, it is said, is most strictly applied when decisions have settled rules of property upon which rights are predicated and under which titles have vested. 26 A. & E. Encyc. of Law (2d ed.) 180; Black on Judicial Precedents, §§ 76-80; *Goodtitle* v. *Otway*, 7 T. R. 399 (1797) at p. 419; *Anderson ex dem. Eden* v. *Jackson*, 16 Johns. (N. Y.) 382 (1819); *Goodell* v. *Jackson ex dem. Smith*, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351 (1823); *Doe ex dem. Clarke* v. *Ludlam*, 7 Bingh. 275 (1831); *White* v. *Denman*, 1 Ohio St. 110 (1853); *Reichert* v. *McClure*, 23 Ill 516 (1860); *Kurtz* v. *Campbell*, 218 Pa. 524, 67 Atl. 843 (1907); *Cape Girardeau B. R. Co.* v. *Southern Illinois & Missouri Bridge Co.*, 215 Mo. 286, 114 S. W. 1084 (1908); *Jefferson* v. *Bangs*, 197 N. Y. 35, 90 N. E. 109, 134 Am. St. 856 (1909); *Miles* v. *National Bank*, 140 Ky. 376, 131 S. W. 26 (1910).

of errors. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only. Precedents were to illustrate principles and to give them a fixed certainty. His successor, Lord Kenyon, acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield, as dangerous innovations, and on the ground that they had departed from the precedents of former times, disturbed the landmarks of property, and had unauthorizedly superadded equity powers to a court of law. "It is my wish and my comfort," said the venerable judge, "to stand super antiquas vias. I can not legislate, but by my industry I can discover what our predecessors have done, and I will tread in their footsteps." The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly, and so often, or so long established, as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness, of the rule.[10] There is great weight in the maxim of Lord Bacon, that optima est lex, quae minimum relinquit, arbitrio judicis; optimus judex, qui minimum sibi.[11] The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into

[10]See *Hallett's Estate* (1879), 13 Ch. Div. 696; *Pugh* v. *Golden Val. R. Co.*, 15 Ch. Div. 330 (1880); *In re Lashmar* (1891), 1 Ch. 258 at pp. 267, 268; *Pledge* v. *Carr*, 64 L. J. 51 (1895); *Vale* v. *Rice*, 104 L. T. 658 (1911). In *Osborne* v. *Rowlett* (1879), 13 Ch. Div. 785, it is said, however, by Jessel, M. R.: "Now I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided: but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle." See also *In re Peiser*, 79 Misc. 668, 140 N. Y. S. 844 (1913); *Montrose* v. *Baggott*, 161 App. Div. 494, 146 N. Y. S. 649 (1914).

[11]Bacon's Works II 448, Aphor. 46.

extreme confusion. The exercise of sound judgment is as necessary in the use, as diligence and learning are requisite in the pursuit, of adjudged cases.[12]

HERTZ *v.* WOODMAN

SUPREME COURT OF THE UNITED STATES, 1910

218 *U. S.* 205

This case comes to this court upon a certificate under par. 6 of the Act of 1891, creating circuit courts of appeals. The action in the circuit court was one by the executor and legatees under the will of James F. Woodman, to recover an amount of money which had been paid, under protest, as a tax upon legacies under the will of the testator, by virtue of sections 29 and 30 of the Act of June 13, 1898, and amendments, known as the War Revenue Act.

The facts certified are: That Woodman died at Chicago, March 15, 1902, leaving a will, which was there duly probated on May 3, 1902, and that the Illinois Trust and Savings Bank qualified as executor. The clear value of legacies payable under the will to the defendants in error was $166,250. On January 17, 1905, and before the payment of these legacies, the collector claimed and collected, as the amount of duty and tax due and payable upon said legacies, under the act of Congress before mentioned, the sum of $2,812.49. After stating the facts, substantially as above, the certificate concludes as follows:

"Upon the foregoing facts the question of law concerning which this court desires the instruction and advice of the Supreme Court is this: Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing Act of April 12, 1902 (U. S. Comp. Stat. Supp. 1903, p. 279), relieve from taxation legacies otherwise taxable under sections 29 and 30 of the Act of June 13, 1898, as amended by the Act of March 2, 1901?" [13]

---

[12] See further *Bates* v. *Relyea*, 23 Wend. (N. Y.) 336 (1840); *Callender* v. *Keystone Mutual L. Ins. Co.*, 23 Pa. St. 471 (1854); *Martin* v. *Martin*, 25 Ala. 201 (1854); *Hart* v. *Burnett*, 15 Cal. 530 (1860); *Ocean Beach Assn.* v. *Brinley*, 34 N. J. Eq. 438 (1881); *Hibbits* v. *Jack*, 97 Ind. 570, 49 Am. Rep. 478 (1884); *Paul* v. *Davis*, 100 Ind. 422 (1884); *Ellison* v. *Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809 (1891); *Rumsey* v. *New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. 600 (1892); *Truxton* v. *Fait*, 1 Pen. (Del.) 483, 42 Atl. 431, 73 Am. St. 81 (1899); *Daniels* v. *State*, 2 Pen. (Del.) 586, 48 Atl. 196, 54 L. R. A. 286 (1901); *Brader* v. *Brader*, 110 Wis. 423, 85 N. W. 681 (1901); *Thomas* v. *Blair*, 111 La. 678, 35 So. 811 (1903); *Washington R. Co.* v. *Chapman*, 26 App. D. C. 472 (1906); *Bowman* v. *Essex Freeholders*, 73 N. J. L. 543, 64 Atl. 1010 (1905); *Commonwealth* v. *Walsh*, 196 Mass. 369, 82 N. E. 19 (1907); *Daughty* v. *Northwestern R. Co.*, 92 S. Car. 361, 75 S. E. 553 (1912); *Gochegan* v. *Union E. R. Co.*, 266 Ill. 482, 107 N. E. 786 (1915).

[13] The statement of facts is from the opinion of the court, only a portion of which is printed. On the merits, the question certified was answered in the negative. Fuller, C. J., McKenna and Day, JJ., dissenting.

LURTON, J.: It is urged that the Circuit Court of Appeals for the Seventh Circuit is precluded from requesting the instruction of this court, because it had in two cases theretofore decided the very question now certified. *United States* v. *Marion Trust Co.*, 143 Fed. 301; *United States* v. *Stephenson*, not yet reported. In both cases the decision was adverse to the contention of the United States. The first was affirmed by this court without opinion, by an evenly divided court, 203 U. S. 594, and, in the second, an application by the United States for a writ of certiorari was denied. 212 U. S. 527. It is further contended that, if not concluded by its own decisions it was bound to follow the judgment of this court in *Eidman* v. *Tilghman*, affirming the judgment of the circuit court of appeals of the second circuit, reported in 136 Fed. 141, the affirmance by this court being reported in 203 U. S. 580, and similar judgments of affirmance in *Philadelphia Trust Co.* v. *McCoach*, 142 Fed. 120, and 203 U. S. 539, and *United States* v. *Marion Trust Co., supra.*

All of these cases were affirmances by an equally divided court of the judgments of the court below in favor of the legatees or distributees who had sued to recover taxes paid upon legacies or shares which had passed to the plaintiff within one year after the death of the testator or intestate, the several lower courts having ruled that the tax had not been saved because it was not due and payable at the time of the repeal of the act under which the tax was claimed.

The circuit court of appeals was obviously not bound to follow its own prior decision. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided. The court below in this instance, when called upon to reconsider its former construction of the inheritance tax act, found itself confronted by the fact that this court had been equally divided in opinion as to the proper interpretation of the act, and for that reason alone obliged to affirm the ruling of that and other courts against the legality of the tax which had been collected. If the decision of the court under review had been in favor of the legality of the tax an affirmance must likewise have resulted from an equal division. That court also found that its own former view of the act had not been satisfactory to the circuit court of appeals for the eighth circuit, which court had decided contrariwise in *Westhus* v. *Union Trust Co.*, 164 Fed. 795. In such circumstances the court below was not only free to regard the question as one open for determination, but one which might well be certified to this court, that the question of law which had never been authoritatively decided by this court might be so determined by an instruction as to how it should decide the matter when thus presented for reconsideration.

When this court in the exercise of its appellate powers is called upon to decide whether that which has been done in the lower court shall be reversed or affirmed, it is obvious that that which has been done must stand unless reversed by the affirmative action of a ma-

jority.[14] It has therefore been the invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause. The earliest precedent is that of *Etting* v. *United States Bank*, 11 Wheat. (U. S.) 59, 78. Chief Justice Marshall said at the conclusion of the opinion: "In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. No attempts will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued can not be settled; but the judgment is affirmed, the court being divided in opinion upon it."

In *Durant* v. *Essex Co.*, 7 Wall. (U. S.) 107, 110, Mr. Justice Field, for this court, said, in respect of the effect of the affirmance by a divided court: "There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of this judgment; but the reason is no part of the judgment itself."

To the same effect are *Westhus* v. *Union Trust Co.*, 168 Fed. 617; *Hartmann* v. *Greenhow*, 102 U. S. 672, 676. A different rule seems to have been sanctioned in the English courts.[15] *Catherwood* v. *Caslon*, 13 Mees. & Wells. 261; *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

---

[14]Accord: *Commonwealth* v. *Beaumarchais*, 3 Call (Va.) 122 (1801); *Clark* v. *Kean*, 1 Del. Ch. 114 (1820); *The Antelope*, 10 Wheat. (U. S.) 66, 6 L. ed. 268 (1825); *Etting* v. *Bank of United States*, 11 Wheat. (U. S.) 59, 6 L. ed. 419 (1826); *Beltzhoover* v. *Darragh*, 16 Serg. & R. (Pa.) 329 (1827); *Bridge* v. *Johnson*, 5 Wend. (N. Y.) 342 (1830); *Cook* v. *Drew*, 3 S. & P. (Ala.) 392 (1833); *Shannon* v. *Shannon*, 92 Mass. (10 Allen) 249 (1865); *Huncke* v. *Francis*, 27 N. J. L. 55 (1858); *Newman* v. *Wright*, 28 Ind. 105 (1867); *Channon Co.* v. *Hahn*, 90 Ill. App. 256 (1890); *Gran* v. *Spagenberg*, 53 Minn. 42, 54 N. W. 933 (1893); *Santa Rosa R. Co.* v. *Central R. Co.*, 112 Cal. 436, 44 Pac. 733 (1896); *Fisher* v. *Kansas City Mining Co.*, 30 Colo. 220, 70 Pac. 330 (1902); *Notley* v. *Shoemaker*, 25 Pa. Super. Ct. 584 (1904); *Barnard & Leas Mfg. Co.* v. *Smith*, 77 Ark. 590, 92 S. W. 858 (1906); *Hutchinson* v. *Turner*, 88 S. Car. 318, 70 S. E. 410, 70 S. E. 806 (1910); *Pensacola Electric Co.* v. *Humphreys*, 61 Fla. 389, 54 So. 452 (1911); *Dillivan* v. *German Sav. Bank* (Iowa), 136 N. W. 120; *Abbott* v. *Treat* (Maine), 87 Atl. 361 (1913); *Rubinow* v. *Public Service R. Co.*, 87 N. J. L. 328, 94 Atl. 54 (1915). In *Smith* v. *United States*, 5 Pet. (U. S.) 292, 8 L. ed. 130 (1831), judgment was reversed by a majority of the court although on each of the principal grounds of error a majority of the members of the court did not find error. The minorities were held to unite and constitute a majority. Contra: *Shollenberger* v. *Brinton*, 52 Pa. St. 9, 10 (1866); *Grogan* v. *Wisconsin Sugar Co.*, 156 Wis. 406, 146 N. W. 491 (1914). Compare *Florida East Coast R. Co.* v. *Hayes*, 65 Fla. 1, 60 So. 782 (1913).

[15]At common law on error in the King's Bench when the court was equally divided no action could be taken without consent. *Thornby* v. *Fleetwood*, 1 Str. 379 (1719); *Dean* v. *Pierce*, 1 Camp. 466 (1808); *Chapman* v. *Lamphire*, 3 Mod. 155 (1687). See *Iveson* v. *Moore*, 1 Salk. 15 (1698); *Procter's Case*, 12 Coke 118 (1614); *Deane* v. *Clayton*, 7 Taunt. 489 (1817). In the Exchequer Chamber and House of Lords judgment was affirmed, 2

Under the precedents of this court, and as seems justified by reason as well as by authority, an affirmance by an equally divided court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.[16] The affirmance by a divided court in the second case shows this, for if it was not so the second equal division could not have happened, for the case would have been controlled by the first equal division.

We shall therefore proceed to determine the question of law presented by the cerificate of the circuit court of appeals, feeling free to decide it as our judgments may dictate.

SOUTHERN BELL TEL. & T. CO. *v.* GLAWSON

SUPREME COURT OF GEORGIA, 1913

140 *Ga.* 507

The Court of Appeals certified the following question:

"Where a petition is dismissed in the trial court upon general demurrer, and that judgment has been reviewed by the court of appeals and reversed in a decision holding that the petition sets

---

Tidd's Pr. (9th ed.) 1178. In the present Court of Appeals where the court is equally divided the judgment of the court below stands. *The Franconia,* 2 P. D. 163 (1877), but the case does not become a precedent to be followed in similar cases subsequently brought before the court. *The Vera Cruz* (No. 2), 9 P. D. 96 (1881). In *Eastern Steamship Co.* v. *Smith,* L. R. (1891), A. C. 310, in the House of Lords, where the court was equally divided the record is as follows: "Question put, that the judgment or decree complained of be reversed; and it appearing that the votes were equal, thereupon according to the ancient rule in the law, *semper praesumitur pro negante,* it was determined in the negative; therefore the judgment or decree complained of was affirmed, and the appeal dismissed." Accord: *Paquin* v. *Beauclerk* (1906), A. C. 148; *Jolly* v. *Kine* (1907), A. C. 1; *Smith* v. *Lion Brewery Co.* (1911), A. C. 150. In *Beamish* v. *Beamish,* 9 H. L. C. 274 (1861), it is laid down by Lord Campbell that a decision of the House of Lords, although the lords are equally divided, is as binding on the House itself and upon all inferior courts as if it had been pronounced *nemine dissentiente.*

[16]Accord: *People ex rel. The Attorney-General* v. *New York,* 25 Wend. (N. Y.) 252, 35 Am. Dec. 669 (1840), at p. 256; *Morse* v. *Goold,* 11 N. Y. 281, 62 Am. Dec. 103 (1854); *Hopkins* v. *McCann,* 19 Ill. 113 (1857); *Dubuque* v. *Illinois Cent. R. Co.,* 39 Iowa 56 (1874); *Grief's Estate,* 171 Pa. St. 412, 33 Atl. 375 (1891); *Luco* v. *DeToro,* 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543 (1891); *Stanstead Election Case,* 20 Canada Sup. Ct. 12 (1891); *Puryear* v. *Lynch,* 121 N. Car. 255, 28 S. E. 410 (1897); *State ex rel Hampton* v. *McClung,* 47 Fla. 224, 37 So. 51 (1904); *Hand* v. *Stapleton,* 145 Ala. 118, 39 So. 651 (1905); *Territory* v. *Gaines,* 11 Ariz. 270, 93 Pac. 281 (1908); *Kalamazoo* v. *Crawford,* 154 Mich. 58, 117 N. W. 572 (1908); *Fleming* v. *Philadelphia Co.,* 234 Pa. 74, 82 Atl. 1095 (1912); *Dewey Land Co.* v. *Stevens,* 83 N. J. Eq., 314, 90 Atl. 1040 (1914). Contra: *Florence* v. *Berry,* 62 S. Car. 469, 40 S. E. 871 (1901); *American Mortg. Co. of Scotland* v. *Woodward,* 83 S. Car. 521, 65 S. E. 739 (1909).

forth a cause of action, and, subsequently to the rendition of such decision by the Court of Appeals, the Supreme Court renders a decision in another case, the effect of which is to show that the decision of the Court of Appeals is erroneous, and, after the rendition of such decision by the Supreme Court, the case first mentioned again comes before the Court of Appeals upon writ of error assigning error upon the judgment overruling a motion for new trial filed by the defendant, is the Court of Appeals, upon consideration of the second writ of error, bound by its own decision in the former case, or should it follow and apply the contrary decision of the Supreme Court?" [17]

LUMPKIN, J.: The first question propounded by the Court of Appeals raises an interesting question of practice. It involves what is commonly called the doctrine of "the law of the case." This doctrine is thus stated in 26 A. & E. Encyc. of Law (2d ed.), 184: "The doctrine of 'the law of the case' may be stated thus: A matter decided on one appeal can not be re-examined on a second appeal in the same case; for the decision of an appellate court, whether right or wrong, in a case before it, is conclusive upon the points presented throughout all the subsequent proceedings in the case, both upon the appellate court itself and upon the trial court. Concisely it is said that the decision on appeal becomes 'the law of the case.'" [18] In this court the rule is well settled. In *Western & Atlantic R. Co.* v. *Third Nat. Bank,* 125 Ga. 489, it was held: "A

[17] A second point in the case is omitted.

[18] Accord: *Skillern* v. *May,* 6 Cranch (U. S.) 267, 3 L. ed. 220 (1810); *The Santa Maria,* 10 Wheat. (U. S.) 431, 6 L. ed. 359 (1825); *Booth* v. *Commonwealth,* 48 Mass. (7 Metc.) 285 (1843); *Washington Bridge Co.* v. *Stewart,* 44 U. S. (3 How.) 413, 11 L. ed. 658 (1845); *Semple* v. *Anderson,* 9 Ill. (4 Gilm.) 546 (1847); *Dewey* v. *Gray,* 2 Cal. 374 (1852); *Wilson* v. *Wilson,* 5 H. L. Cas. 40 (1854); *Miller* v. *Jones,* 29 Ala. 174 (1856); *Beamish* v. *Beamish,* 9 H. L. Cas. 274 (1859); *Davidson* v. *Dallas,* 15 Cal. 75 (1860); *Stacy* v. *Vermont Cent. R. Co.,* 32 Vt. 551 (1860); *Leese* v. *Clark,* 20 Cal. 387 (1862); *Mason* v. *Mason,* 5 Bush. (Ky.) 187 (1868); *Page* v. *Fowler,* 37 Cal. 100 (1869); *Headley* v. *Challiss,* 15 Kans. 602 (1875); *Caverly* v. *McOwen,* 126 Mass. 222 (1879); *Turner* v. *Staples,* 86 Va. 300, 9 S. E. 1123 (1889); *Brandon* v. *Fritz,* 94 Pa. St. 88 (1880); *Klauber* v. *San Diego R. Co.,* 98 Cal. 105, 32 Pac. 876 (1893); *Henning* v. *Eldridge,* 146 Ill. 305, 32 N. E. 754 (1893); *Bolton* v. *Hey,* 168 Pa. St. 418, 31 Atl. 1097 (1895); *Brown* v. *Pontiac Min. Co.,* 109 Mich. 535, 67 N. W. 546 (1896); *Cowen* v. *Pennsylvania Plate Glass Co.,* 188 Pa. St. 542, 41 Atl. 615 (1898); *Saxe* v. *Burlington,* 70 Vt. 449, 41 Atl. 438 (1898); *London St. Tramways Co.* v. *London County Council,* L. R. (1898), A. C. 375; *Dempster* v. *People,* 183 Ill. 321, 55 N. E. 713 (1899); *Cottrell* v. *Watkins,* 96 Va. 783, 32 S. E. 470 (1899); *Hopkins* v. *Roth,* 105 Ky. 357, 49 S. W. 18 (1899); *Sherman* v. *Port Huron Engine &c. Co.,* 13 S. Dak. 95, 82 N. W. 413 (1900); *In re Laudy,* 161 N. Y. 429, 55 N. E. 914 (1900); *Smith* v. *Neufield,* 61 Nebr. 699, 85 N. W. 898 (1901) (disapproving *Hastings* v. *Foxworthy,* 45 Nebr. 676, 63 N. W. 955, 34 L. R. A. 321 (1895)); *Illinois* v. *Illinois Cent. R. Co.,* 184 U. S. 77, 46 L. ed. 440 (1902); *Hillyer* v. *Winsted,* 77 Conn. 304, 59 Atl. 40 (1904); *James* v. *Lyons Co.,* 147 Cal. 69, 81 Pac. 275 (1905); *Harwi Hardware Co.* v. *Klippert,* 73 Kans. 783, 85 Pac. 784 (1906); *Brady* v. *Carteret,* 72 N. J. Eq. 904, 67 Atl. 606 (1907); *Alerding* v. *Allison,* 170 Ind. 252, 83 N. E. 1006 (1907); *Huntington* v. *Westerfield,* 119 La. 615, 44 So. 317 (1907); *Cape Girardeau & T. B. T. R. Co.* v. *S. T. & M. Bridge Co.,* 215 Mo. 286, 114 S. W. 1084 (1908); *McDonough* v *Williams,* 86 Ark. 600, 112 S. W. 164 (1908); *Roach* v. *Sanborn L. Co.,* 140 Wis. 435, 122 N. W. 1020 (1909); *Smith* v. *Lord,* 111 Md. 500, 75 Atl. 109 (1909); *Heard* v. *Cherry,* 150 Ky. 318, 150 S. W. 361 (1912); *Brown* v.

decision by the Supreme Court is controlling upon the judge of the trial court, as well as upon the Supreme Court when the case reaches that court a second time. The principle in the decision may be reviewed and overruled in another case between different parties, but as between the parties the decision stands as the law of the case, even though the ruling has been disapproved by the Supreme Court in a case decided before the second appearance of the case in that court." [19] Had the decision on the demurrer been rendered here, it would stand as the law of the case, although a different ruling might have been made in regard to the principle involved before the case reached this court for the second time. Does it alter the rule that the decision on the demurrer was made by the Court of Appeals, and that the case is in that court for the second time? We think not. It was argued, that, as the constitution declares that "the decisions of the Supreme Court shall bind the Court of Appeals as precedents," this abolished the "law of the case" rule under circumstances like those involved in the question now under consideration; and that the Court of Appeals was bound to follow the later decision of this court on the same principle in a different case, instead of its own former decision in the same case. To this contention there are two replies. The first is that, in the fallibility and imperfection which inheres in all human institutions, lawyers, and even judges, sometimes honestly differ as to the application of a precedent. The Court of Appeals is a court of last resort as to the cases within its jurisdiction (omitting reference to constitutional questions and certified questions). Its decisions within its jurisdiction, are final. They can not be treated as nullities. If by any chance the judgment in a particular case should be erroneous, it would still be binding. *Saffold* v. *Mangum,* 139 Ga. 119; *Buck* v. *Duval,* 139 Ga. 599.[20]

Western Union Telegraph Co., 92 S. Car. 354, 75 S. E. 542 (1912); *Norton* v. *Lilley,* 214 Mass. 239, 101 N. E. 367 (1913); *O'Connor* v. *Great Northern R. Co.,* 120 Minn. 359, 139 N. W. 618 (1913); *Gibson* v. *Cleary,* 77 Wash. 683, 138 Pac. 269 (1914); *Monroe* v. *Penna. R. Co.,* 87 N. J. L. 701, 94 Atl. 585 (1915); *Connelley* v. *Penna. R. Co.,* 221 Fed. 508 (1915); *Nat. Bank of Commerce* v. *United States,* 224 Fed. 679 (1915). In some jurisdictions an erroneous judgment may be overruled on a second appeal in the same case. *Henry* v. *Atchison, T. & S. F. R. Co.,* 83 Kans. 104, 109 Pac. 1005 (1910); *Moulton* v. *Reid,* 54 Ala. 320 (1875), statute; *Burns* v. *Ledbetter,* 56 Tex. 282 (1882); *United States* v. *Elliott,* 12 Utah 119, 41 Pac. 720 (1895); *Bealey* v. *Smith,* 158 Mo. 515, 59 S. W. 984, 81 Am. St. 317 (1900), and semble; *Smith* v. *Lewis,* 26 Conn. 110 (1857); *Penna. Co.* v. *Platt,* 47 Ohio, 366, 25 N. E. 1028 (1890); *Cluff* v. *Day,* 141 N. Y. 580, 36 N. E. 182 (1894); *Eaton* v. *Alger,* 47 N. Y. 345 (1872).

[19]Citing *Gilmore* v. *Johnson,* 29 Ga. 67 (1859); *Ingram* v. *Trustees of Mercer University,* 102 Ga. 226, 29 S. E. 273 (1897); *Allen* v. *Schweigert,* 113 Ga. 71, 38 S. E. 397 (1901); *McLandon* v. *Macon D. & S. R. Co.,* 123 Ga. 253, 51 S E. 317 (1905).

[20]Accord: *Wakelee* v. *Davis,* 44 Fed. 532 (1891); *Henning* v. *Eldridge,* 146 Ill. 305, 33 N. E. 754 (1893); *Silva* v. *Pickard,* 14 Utah 245, 47 Pac. 144 (1896); *Solomon* v. *Continental Fire Ins. Co.,* 28 App. Div. 213, 50 N. Y. S. 922 (1898); *Union Nat. Bank of Chicago* v. *Post,* 93 Ill. App. 339 (1900); *Morgan* v. *Johnson,* 106 Fed. 452 (1901); *Leeds* v. *New York Telephone Co.,* 79 App. Div. 121, 80 N. Y. S. 114 (1903); *Cleveland, C., C. & St. L. R. Co.* v. *Alfred,* 123 Ill. App. 477 (1905); *In re School Street of Yonkers,* 162 App. Div. 158, 147 N. Y. S. 195 (1914).

Any other rule would create utter confusion. It is the duty of the superior courts to follow the decisions of the Supreme Court as precedents. Suppose a superior court should make errors in the effort to do so, but no exception could be taken to the judgment, it could not be disregarded as void. There must be somewhere an end of controversy, and that necessity is what former Chief Justice Bleckley doubtless had in mind when in his opinion in *Broome* v. *Davis*, 87 Ga. 584, he humorously referred to "the fallibility which is inherent in all courts except those of last resort."

Counsel for the plaintiff in error relied strongly on the decision in *Messenger* v. *Anderson*, 225 U. S. 436. But the statement there made, that the phrase, "the law of the case," expresses the practice of the courts generally to refuse to open what has been decided, rather than a limit on their power, does not alter the fact that in courts of last resort the rule is generally followed. We need not distinguish between the propriety of the Federal Court of Appeals following a construction of a will by the higher court in the state where it was executed and a court of last resort following its decision in the same case.[21]

To the first question propounded we accordingly answer that the former decision of the Court of Appeals has settled the law of the case to the extent to which the decision went; and it should be followed in this case, though in others the subsequent decision of the Supreme Court should be followed.[22]

---

[21]Citing *Illinois* v. *Illinois Cent. R. Co.*, 184 U. S. 77, 46 L. ed. 440 (1901); *United States* v. *Camou*, 184 U. S. 572, 46 L. ed. 694 (1901); *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 343, 40 L. ed. 993 (1895). And see *King* v. *West Va.*, 216 U. S. 92, 54 L. ed. 396 (1909).

[22]Although a decision has been overruled in a subsequent case it will continue to be the law of the particular case in which it was made. *Thomson* v. *Albert*, 15 Md. 268 (1859); *Herrick* v. *Belknap*, 27 Vt. 673 (1854); *Barton* v. *Thompson*, 56 Iowa 571, 9 N. W. 899, 41 Am. Rep. 119 (1881); *Brown* v. *Marion Bank*, 18 Ky. L. 186, 35 S. W. 926 (1896); *Kelley* v. *Rhoads*, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. 904 (1897); *State* v. *Clinton County*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373 (1903); *State* v. *Bell*, 136 N. Car. 674, 49 S. E. 163 (1904), and semble; *Hibbits* v. *Jack*, 97 Ind. 570, 49 Am. Rep. 478 (1884); *Burlington R. Co.* v. *Dey*, 89 Iowa 13, 56 N. W. 267 (1893); *Bradley* v. *Norris*, 67 Minn. 48, 69 N. W. 624 (1896); *McMaster* v. Dyer, 44 W. Va. 644, 29 S. E. 1016 (1898); *State* v. *Savage*, 64 Nebr. 684, 90 N. W. 898, 91 N. W. 557 (1902). So also, a party who accepts the decision of an intermediate appellate court, makes the decision the law of the case notwithstanding a subsequent conflicting decision of the court of last resort. *Ogle* v. *Turpin*, 8 Ill. App. 453 (1881); *District of Columbia* v. *Brewer*, 32 App. D. C. 388 (1909); *Campbell* v. *Perth Amboy Mut. Loan Homestead Assn.*, 76 N. J. Eq. 347, 74 Atl. 144 (1909); *Metzger's Estate*, 242 Pa. 69, 88 Atl. 915 (1913). Contra: *Thompson* v. *Irwin*, 76 Mo. App. 418 (1898); *Wolf* v. *Dwelling House Ins. Co.*, 86 Mo. App. 580 (1900). But where a case is tried and then retried by order of a subordinate court, while the subordinate court may be limited by its original decision, the highest court, when the case reaches it, is not so limited. *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152 (1911), reversing 171 Fed. 785; *Sidenbach* v. *Riley*, 111 N. Y. 560, 19 N. E. 275 (1888); *Panama R. Co.* v. *Napier S. Co.*, 166 U. S. 280, 41 L. ed. 1004 (1896); *Brown* v. *Tourtelotte*, 24 Colo. 204, 50 Pac. 195 (1897); *Paddock* v. *Mo. Pac. R. Co.*, 155 Mo. 524, 56 S. W. 453 (1899); *United States* v. *Denver &c. R. Co.*, 191 U. S. 84, 48 L. ed. 106 (1903).

SECTION 8. JUDGMENT

JEFFRY *v.* WOOD

IN THE KING'S BENCH, 1720

1 *Str.* 439

The plaintiff in error assigned errors in law, and in fact; and on demurrer for duplicity the question was, what judgment should the court give; and after consideration they ordered an entry quod affirmetur,[23] according to Yelv. 58.

BANK OF THE COMMONWEALTH OF KY. *v.* ASHLEY

SUPREME COURT OF THE UNITED STATES, 1829

2 *Pet.* (*U. S.*) 327

Error to the Circuit Court of Kentucky.

This action was in all respects similar to that of the *President, Directors and Company of the Bank of the Commonwealth of Kentucky* v. *Wister, Price and Wister*,[24] with the exception only, that it was founded on the notes of the bank payable to bearer, and usually

---

[23]The common judgment for the defendant in error is that the judgment be affirmed. Y. B. 21 Edw. IV 44; Roll. Abr. 805; Bac. Abr. Error (m) 2. "But when the defendant has pleaded a release of errors or the Statute of Limitations, and it is found for him, the judgment is that the plaintiff be barred of his writ of error, and not quod affirmetur." 1 Arch. Pr. (7th ed.) 376; *Dent* v. *Lingood*, 1 Str. 683 (1725); *Street* v. *Hopkinson*, 2 Str. 1055 (1736). Compare *Kerle* v. *Clifton*, 3 Salk. 214 (1689); *Cunningham* v. *Houston*, 1 Str. 127 (1719), where the judgment was "nil capiat per breve."

In *State* v. *Krug*, 94 Ind. 366 (1883), it is said: "An appeal to the Supreme Court does not affect the binding force of a judgment until it is reversed. It was said in *Nill* v. *Comparet*, 16 Ind. 107, 79 Am. Dec. 411, that 'the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment until annulled or reversed, stands binding upon the parties, as to every question directly decided.' If an appeal does not destroy the binding force of a judgment, then certainly the affirmance of the judgment can not have that effect. A general judgment in the trial court decides all the issues in favor of the successful party. The affirmance of the judgment on appeal, without reference to the ground upon which it is placed, leaves it in full force precisely as though no appeal had been taken." Accord: *Finch* v. *Hollinger*, 46 Iowa 216 (1877); *Prescott* v. *Barnes*, 51 Iowa 409, 1 N. W. 660 (1879); *Steinbach* v. *Stewart*, 11 Wall. (U. S.) 566, 20 L. ed. 56 (1870). See also, *Chickering* v. *Failes*, 29 Ill. 294 (1862); *Werborn* v. *Pinney*, 76 Ala. 291 (1884); *Aldrich* v. *Maher*, 153 Ill. App. 413 (1910); *Freeman* v. *Young*, 136 Ga. 754, 72 S. E. 41 (1911); *Plunkett* v. *Hamnett*, 51 Pa. Super. Ct. 98 (1912); *In re Culver's Estate*, 159 Iowa 679, 140 N. W. 878 (1913).

[24]2 Pet. (U. S.) 318 (1829).

denominated bank notes. The declaration contained counts in debt on simple contract, averring that the plaintiffs in the case were the holders of the notes, and that they became their property by delivery, and that payment had been demanded and had been refused. The defendants entered the same plea as in the case referred to, which was adjudged against them, and a trial was had and a verdict and judgment rendered for the plaintiff below for the whole debt, with damages for the detention from the commencement of the suit.

The bill of exceptions presented the same points to the court as in the former case, and the only question which was argued before this court was upon the effect of an omission to describe one of the sixty-eight bank notes in the declaration, the verdict and judgment having been given for a sum including the note, as if the same had been so described.

The counsel for the defendants in error, Mr. Caswell, stated that a remittitur would be entered for the amount of the note which had not been set out in the declaration, if this court would permit the same. The debet and detinet in the declaration, stated correctly the amount of the plaintiff's claim, and the verdict and judgment were in conformity therewith.

Mr. Nicholas, for the plaintiff in error, replied that this court can not amend the declaration, and that the plaintiffs have a right to avail themselves of the error. Amendments may be made in the courts from which the case is brought, while the record is in the possession of those courts; but this writ of error has brought up the whole record, and the power to amend in the circuit court no longer exists.

JOHNSON, J.: This was an action of debt instituted upon the bank notes of the Commonwealth Bank, in which the defendants have recovered judgment for six thousand three hundred and fifty dollars, with interest. The bank filed the same plea to the jurisdiction of the court below, as was filed in the case of Wister, Price and Wister. The decision therefore delivered in that case, renders it unnecessary to remark upon this part of the present cause. No other plea having been filed, judgment went by default for the sum claimed by the writ. But upon examining the declaration which purports to count severally upon sixty-eight bills, it appears that one of the sixty-eight has been omitted. Of consequence, the declaration makes out a less sum, and one debt less in number than the writ claims or the judgment gives. This is error; but the plaintiffs now move for leave to cure it, by entering a remittitur of the debt so omitted, and damages pro tanto. And this court has taken time to consider the motion.

That the party would have had a right to remit in the court below can not be questioned; it is every day's practice, sustained by the gravest precedents. And the right extends, not only to the amount of damages, but to several causes of action, distinct debts, distinct acres of land, and distinct pleas. Cro. Jac. 146; Hob. 178; Raym. 395; 3 D. & E. 659. And the right is recognized as existing after error brought, and while the cause is depending in the court above,

and the court of error will suspend its judgment to give time for the defendant in error to amend in the court below. 3 D. & E. 349, 659, 749, etc.

But the difficulty consists in this, that the writ of error here does not bring up the original record, but only a transcript, as in the case of error to the House of Lords. In error to the King's Bench, that court will permit a remittitur, because it gets possession of the record (3 D. & E. 349); but in error to the house of lords it is otherwise, and the entry must be made below for the reason assigned. 3 D. & E. 659. After such amendment made in our circuit courts, the party would have to avail himself of it by suggesting diminution, and bringing up the amended record by certiorari.

This court, therefore, thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice shall be introduced; and to allow the party to enter his remittitur here; but on payment of the costs, if the writ of error is prosecuted no farther after such amendment made. Such seems to be the rule in the British courts (Barnes, 17), and we think it reasonable. The defendant here will be permitted to enter the remittitur, and upon such entry the judgment will be affirmed, without costs in error.[25]

---

[25]Accord: *Pickwood* v. *Wright*, 1 H. Bl. 642 (1791); *Fury* v. *Stone*, 2 Dall. 184 (1792); *Hardy* v. *Cathcart*, 1 Marshall 180 (1814); *Usher* v. *Dausey*, 4 M. & S. 94 (1815); *Herbert* v. *Hardenbergh*, 10 N. J. L. 222 (1828); *Clark* v. *Pritchett*, 5 Harr. (Del.) 283 (1850); *Graham* v. *Keys*, 29 Pa. St. 189 (1857); *McKinley* v. *Beasley*, 5 Sneed (Tenn.) 170 (1857); *Doty* v. *Rigour*, 9 Ohio St. 526 (1859); *De Costa* v. *Flat Water Mining Co.*, 17 Cal. 613 (1861); *Ward* v. *Haws*, 5 Minn. 440 (1861); *Sears* v. *Conover*, 142 N. Y. (3 Keyes) 113, 4 Abb. Dec. 179, 33 How. Pr. (N. Y.) 324 (1866); *Mackey* v. *Olssen*, 12 Ore. 429, 8 Pac. 357 (1885); *Emerson* v. *Schoonmaker*, 135 Pa. St. 437, 19 Atl. 1025 (1890); *Hausen* v. *Boyd*, 161 U. S. 397, 40 L. ed. 746 (1895), but the order was to file the remittitur in the circuit court and produce and file a certified copy thereof in the Supreme Court; *Farrell* v. *Manhattan R. Co.*, 43 App. Div. 143, 59 N. Y. S. 401, 30 Civ. Pro. R. 118 (1899); *Carberry* v. *Farnsworth*, 177 Mass. 398, 59 N. E. 61 (1901); *Thornton* v. *Rhode Island R. Co.* (R. I.), 67 Atl. 452 (1906); *Smith* v. *Hoctor*, 107 N. Y. S. 33 (1907); *Ludwig Piano Co.* v. *Browne*, 33 Pa. Super. Ct. 81 (1907), remittitur filed below; *Schwitters* v. *Springer*, 236 Ill. 271, 86 N. E. 102 (1908); *Weinert* v. *Merchants' S. W. Co.*, 127 App. Div. 826, 112 N. Y. S. 123 (1908); *Skow* v. *Green Bay & W. R. Co.*, 141 Wis. 21, 123 N. W. 138 (1909); *Moore* v. *St. Louis Tr. Co.*, 226 Mo. 689, 126 S. W. 1013 (1909); *East St. Louis & St. Louis Exp. Co.* v. *Ill. Trac. Co.*, 169 Ill. App. 24 (1911); *Osterling* v. *Carpenter*, 230 Pa. 153, 79 Atl. 405 (1911); *Ellison* v. *Greenville S. & A. R. Co.*, 94 S. Car. 425, 77 S. E. 723, 78 S. E. 231 (1913); *Kretzinger* v. *Lewis*, 174 Ill. App. 45 (1912); *Stepan* v. *Svoboda*, 178 Ill. App. 227 (1913); *Simoneau* v. *Pacific E. R. Co.*, 166 Cal. 264, 136 Pac. 544 (1913); *Van Deenburg* v. *Scott*, 158 App. Div. 87, 143 N. Y. S. 310 (1913); *St. Louis & S. F. R. Co.* v. *Goode*, 42 Okla. 784, 142 Pac. 1185 (1914); *Gibbons* v. *Rhode Island*, 37 R. I. 89, 91 Atl. 9 (1914). Otherwise where the appellate court can not ascertain the extent to which the error was prejudicial. *Swearingen* v. *Pendleton*, 4 Serg. & R. (Pa.) 389 (1818); *Seeman* v. *Feeney*, 19 Minn. 79 (1872); *Orange & A. R. Co.* v. *Fulvey*, 17 Grat. (Va.) 366 (1867); *Williams* v. *Durst*, 35 Tex. 421 (1871); *Thompson* v. *Lumley*, 7 Daly (N. Y.) 74 (1877); *Dillard* v. *Ellington*, 62 Ga. 389 (1879); *Pavey* v. *American Ins. Co.*, 56 Wis. 221, 13 N. W. 925 (1882); *McNail* v. *Welch*, 21 Ill. App. 378 (1886); *St. Louis I. M. & S. R. Co.* v. *Waren*, 65 Ark. 619, 48 S. W. 222 (1898); *Noel Const. Co.* v. *Armored Con. Co.*, 120 Md. 237, 87 Atl. 1049, Ann. Cas. 1915A, 1032n (1913); *Midland V. R. Co.* v. *Scoville*, 109 Ark. 29, 158 S. W. 954 (1913). Contra:

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the district of Kentucky, and it was argued by counsel. On consideration whereof, it appearing to this court that the judgment of the said circuit court is for a larger sum than that claimed and counted upon in the declaration in said cause in said court, the said defendants in error filed here in open court a remittitur in the following words, to wit:

"Supreme Court of the United States of January term, in the year of our Lord eighteen hundred and twenty-nine. Be it remembered, that on the trial of this cause before the Supreme Court of the United States on a writ of error to the Circuit Court of the United States, for the district of Kentucky, on the fourteenth day of February, in the year aforesaid, it appeared that one of the sixty-eight bills upon which the declaration purported to count severally, to wit, a bill for the amount of fifty dollars, had been omitted in said declaration; the declaration making out a less sum, and one debt less in number, than the writ claimed or the judgment gave. And hereupon the said John Ashley and John Ella, Junior, defendants in error, by Daniel J. Caswell, their attorney and counsel in this court, freely here in court remit to the said president and directors of the Bank of the Commonwealth of Kentucky, plaintiffs in error as aforesaid in this cause, as well the said debt of fifty dollars so omitted as aforesaid, the residue of the debt aforesaid, together with interest on the said fifty dollars at the rate of six per centum per annum, from the twenty-second day of September, in the year of our Lord eighteen hundred and twenty-five, as also damages pro tanto. As witness our hands this fourteenth day of February, in the year of our Lord eighteen hundred and twenty-nine. John Ashley and John Ella, Junior, by Daniel J. Caswell, their attorney and counsel in this court."

Whereupon it is considered, ordered, and adjudged by this court, that the judgment of the said circuit court in this cause be,

---

Wray v. *Lister*, 2 Str. 1110 (1738); *Cheveley* v. *Morris*, 2 Wm. Bl. 1300 (1770); *Hutchinson* v. *Crossen*, 10 Mass. 252 (1813); *Greenleaf* v. *Hill*, 30 Maine 165 (1849); *Frank* v. *Morrison*, 55 Md. 399 (1880).

Very generally, today, an appellate court having all the facts before it on the record may, in the interests of justice, modify a judgment without reversing it, if no injustice is done thereby to either party. *Dunbar* v. *Hitchcock*, 3 M. & S. 591 (1815); *Spackman* v. *Byers*, 6 Serg. & R. (Pa.) 385 (1821); *Herbert* v. *Hardenbergh*, 10 N. J. L. 222 (1828); *Haas* v. *Evans*, 5 Watts & S. (Pa.) 252 (1843); *Conwell* v. *Claypool*, 8 Blackf. (Ind.) 124 (1846); *Commonwealth* v. *Haffey*, 6 Pa. St. 348 (1847); *Anna Tryon* v. *Sutton*, 13 Cal. 490 (1859); *Brownell* v. *Winnie*, 29 N. Y. 400, 29 How. Pr. (N. Y.) 193, 86 Am. Dec. 314 (1864); *Milly* v. *Harrison*, 7 Coldw. (Tenn.) 191 (1869); *Lehigh V. R. Co.* v. *McFarland*, 44 N. J. L. 674 (1882); *Hayes* v. *Pratt*, 147 U. S. 557, 37 L. ed. 279 (1892); *Terry* v. *Wenderoth*, 147 Pa. St. 519, 23 Atl. 763 (1892); *Curran* v. *Burgess*, 155 Mass. 86, 28 N. E. 1135 (1891); *Commonwealth* v. *Phila. Co.*, 157 Pa. St. 531, 27 Atl. 378 (1893); *Burnham* v. *Dillon*, 100 Mich. 359, 59 N. W. 643 (1894); *Reynolds* v. *Aetna L. I. Co.*, 160 N. Y. 635, 55 N. E. 305 (1899); *Jones* v. *Jones*, 141 Ga. 727, 82 S. E. 451 (1914); *National Council, &c.* v. *Sealey* (Tex. Civ. App.), 162 S. W. 455 (1914).

and the same is hereby affirmed, without costs, deducting from the said judgment of the said circuit court, the amount so deducted as aforesaid.

LOOMIS *v.* LEHIGH VALLEY R. CO.

COURT OF APPEALS OF NEW YORK, 1913

208 *N. Y.* 312

The plaintiffs, who were dealers in produce shipped over the defendant's lines, both within and without the state of New York, brought this action to recover $322, expended by them in constructing grain doors and bulkheads in defendant's freight cars, which, they contended, should have been furnished by the defendant. From a verdict and judgment for plaintiffs the defendant appealed. The Court of Appeals found that as to intrastate shipments the defendant was liable, as there was a common-law duty to equip its cars for the service for which they were intended, but that the state courts had no jurisdiction over interstate shipments, because that subject had passed exclusively under the jurisdiction of the federal courts by virtue of the Interstate Commerce Act. The question then was, should the judgment be modified or reversed?[26]

WERNER, J.: We have yet to consider whether we can divide the single judgment recovered by the plaintiffs, so as to sustain that part predicated upon the intrastate shipments, and to disallow for lack of jurisdiction that part which rests upon the interstate shipments. The general rule in actions at law is that upon appeal from a single judgment the appellate court must affirm or reverse as to the whole of the recovery and as to all the parties.[27] *Goodsell* v.

---

[26]The statement of facts is condensed and only so much of the opinion given as relates to the judgment on appeal.

[27]Accord: Bac. Abr., Error (m); *Loyd* v. *Pearse*, Cro. Jac. 424 (1611); *Williams* v. *Cutting*, 2 Ld. Raym. 825 (1702); *Cuming* v. *Sibly*, 4 Burr. 2489, 1 Term Rep. 239 (1769); *Riggs* v. *Tyson*, 1 N. J. L. 34 (1790); *Jackson* v. *Commonwealth*, 2 Binn. (Pa.) 79 (1809); *Richards* v. *Walton*, 12 Johns. (N. Y.) 434 (1815); *Swearingen* v. *Pendleton*, 4 Serg. & R. (Pa.) 389 (1818); *Gaylord* v. *Payne*, 4 Conn. 190 (1822); *Burris* v. *Johnson*, 1 J. J. Marsh. (Ky.) 196 (1829); *Herd* v. *Dew*, 8 Humph. (Tenn.) 501 (1847); *Murray* v. *Emmons*, 26 N. H. 523 (1853); *Wolstenholme* v. *Wolstenholme File Mfg. Co.*, 64 N. Y. 272 (1876); *Rollins* v. *Fisher*, 17 W. Va. 578 (1880); *Little R. R. Co.* v. *Perry*, 37 Ark. 164 (1881); *Mutual Loan & B. Assn.* v. *Price*, 19 Fla. 127 (1882); *Ala. R. Co.* v. *McAlpine*, 80 Ala. 73 (1885); *Bond* v. *Wabash R. Co.*, 67 Iowa 712, 25 N. W. 892 (1885); *Webster-Glover Lumber &c. Co.* v. *St. Croix*, 71 Wis. 317, 36 N. W. 864 (1888); *Goodsell* v. *Western Union Telegraph Co.*, 109 N. Y. 147, 16 N. E. 324 (1888); *Beam* v. *Jennings*, 96 N. Car. 82, 2 S. E. 245 (1887); *Moses* v. *Grainger*, 106 Tenn. 1, 58 S. W. 1067, 53 L. R. A. 857 (1900); *Newbold* v. *Douglas*, 123 Wis. 28, 100 N. W. 1040 (1904); *Hunter S. P. Co.* v. *Hunter*, 100 App. Div. 191, 91 N. Y. S. 620 (1905); *Powers* v. *World's Fair Mining Co.*, 10 Ariz. 5, 86 Pac. 15 (1906); *Chicago City R. Co.* v. *Schaefer*, 121 Ill. App. 334 (1905); *Glos* v. *Greiner*, 226 Ill. 546, 80 N. E. 1055 (1907); *Adams* v. *Carter*, 92 Miss. 579, 47 So. 409 (1908); *Emanuel* v. *Walter*, 138 App. Div. 818, 123 N. Y. S. 491 (1910); *Borough Const. Co.* v. *New York*, 200 N. Y. 149, 93 N. E. 480 (1910); *Maney* v. *Dennison*, 110 Ark. 571, 163 S. W. 783 (1914).

Western Union Tel. Co., 109 N. Y. 147; *Wolstenholme* v. *Wolstenholme File Mfg. Co.*, 64 N. Y. 272; *Nat. Bd. of Marine Underwritters* v. *Nat. Bank of the Republic*, 146 N. Y. 64. The reason of the rule is that it would produce endless confusion and embarrassment in the administration of justice to permit single causes of action and judgments to be split up so that different parts thereof could be in litigation in different courts at the same time. We do not think this case is within the reason of the rule. Although there is no separation of causes of action, either in the complaint or in the judgment, there are manifestly two such causes if we are right in holding that there is a distinction between intrastate shipments and interstate shipments. They are easily separable. The result of our decision is that the plaintiffs are entitled to recover upon one and not upon the other. In these circumstances it is both logical and just to make an end to the litigation by directing that the judgment shall be reduced to $64.45, and as thus modified affirmed, without costs of this appeal to either party.[28]

Judgment accordingly.

CROW *v.* WILLIAMS

COURT OF APPEALS OF MISSOURI, ST. LOUIS, 1904

104 *Mo. App.* 451

REYBURN, J.: This, an action of forcible entry and detainer, was begun February, 1903, before a justice of the peace in Newton County, and from jury trial and judgment in favor of complainants, defendants appealed to the circuit court, where, upon trial anew, a jury returned a verdict of guilty against all the defendants with damages assessed at $90; the complaint appears to have been devoid of claim for any rents or profits. After unsuccessful motions for new trial and in arrest, defendants have appealed to this court.[29]

---

[28]Accord: *Reymer* v. *Grimstone*, Moore 708 (1595); *Grymston* v. *Reyner*, Cro. Eliz. 537; *Miles* v. *Jacob*, Hob. 6 (Temp. Jac. I); *Bellew* v. *Aylmer*, 1 Str. 189 (1718); *Henriques* v. *Dutch West-India Co.*, 2 Str. 807 (1729); *Kent* v. *Kent*, 2 Str. 971 (1733); *Frederick* v. *Lookup*, 4 Burr. 2018, 2021 (1767); *Wood* v. *Tallman*, 1 N. J. L. 177 (1793); *Smith* v. *Jansen*, 8 Johns. (N. Y) 111 (1811); *Defarges* v. *Lipscomb*, 2 Munf. (Va.) 451 (1811); *Cummings* v. *Pruden*, 11 Mass. 206 (1814); *Commonwealth* v. *Derby*, 13 Mass. 433 (1816); *Miller* v. *Keene*, 5 Watts (Pa.) 348 (1836); *Saterwhite* v. *Carson*, 25 N. Car. 549 (1843); *Eames* v. *Stevens*, 26 N. H. 117 (1852); *Jeter* v. *Jeter*, 36 Ala. 391 (1860); *Pratt* v. *Wallbridge*, 16 Ind. 147 (1861); *Selleck* v. *Rusco*, 46 Conn. 370 (1878); *Schuster* v. *Bauman J. Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. 327 (1890); *Domestic B. Assn.* v. *Nelson*, 172 Ill. 386, 50 N. E. 194 (1898); *Glasse* v. *Stewart*, 32 Pa. Super. Ct. 385 (1907); *Robinson* v. *Muir*, 151 Cal. 118, 90 Pac. 521 (1907); *Gray* v. *Railway Co.*, 81 S. Car. 370, 62 S. E. 442 (1908); *People* v. *Banhagel*, 151 Mich. 40, 114 N. W. 669 (1908); *Emmons* v. *Hawk*, 62 W. Va. 526, 59 S. E. 519 (1908); *Austin* v. *Langlois*, 83 Vt. 104, 74 Atl. 489 (1909); *Gray* v. *Cotton*, 166 Cal. 130, 134 Pac. 1145 (1913); *Camden* v. *McAndrews*, 85 N. J. L. 260, 88 Atl. 1034 (1913); *Auwarter* v. *Kroll*, 79 Wash. 179, 140 Pac. 326 (1914); *Seevers* v. *Cleveland Coal Co.*, 166 Iowa 284, 147 N. W. 761 (1914).

[29]The argument of counsel and part of the opinion are omitted.

The judgment rendered is assailed as embracing, additional to decree of restitution of the lands, described in the complaint, a general judgment for the amount of damages assessed by the jury, doubled and made a general judgment as well as against all the defendants and also their two sureties on the appeal bond filed in perfecting appeal to the circuit court. In the absence of statutory authority a summary judgment against sureties as well as principals on the appeal bond in an action of this character can not be maintained. *Hadley* v. *Bernero*, 97 Mo. App, 314; *Julett* v. *Nugent*, 71 Mo. 131; *Keary* v. *Baker*, 33 Mo. 603. Nor is there any evidence warranting a judgment against Williams, the owner and lessor of all parties; the record is barren of any evidence tending to connect him with the acts of his codefendants, either in dispossession of complainants or in usurping possession, and the judgment was also erroneous as to him. *Orrick* v. *Public School*, 32 Mo. 315. The rule of law that a judgment in an action at law was an entirety and that if it was vacated as to one must be annulled as to all the parties defendant against whom it was rendered, was adopted by numerous of the early decisions of the Supreme Court.[30] This rule, however, has been relaxed and from the later decisions may be deduced the present doctrine that a judgment is not now regarded as such an entirety as to prohibit amendment or correction by reversal as to one or more of the parties, where the substantial rights of the other parties thereto will not be thereby impaired. *Neenam* v. *St. Joseph*, 126 Mo. 89; *Hadley* v. *Bernero*, 97 Mo. App. 314; *Patterson* v. *Yancey*, 97 Mo. App. 681; *Christopher & Simpson Architectural Iron &c. Co.* v. *Kelly*, 91 Mo. App. 93.

The judgment herein is therefore affirmed as to defendants Marion F. Brown and E. R. Hyatt, and reversed as to defendant L. F. Williams and the sureties P. L. Schwartz and L. H. Ornduff.[31]

---

[30]Accord: Roll. Abr. 776; Bac. Abr., Error (m); *Bird* v. *Orms*, Cro. Jac. 289 (1611); *King* v. *Marlborough*, Cro. Jac. 303 (1612); *Aylet* v. *Oates*, Style 121, 125 (1648); *Anon.*, Style 406 (1654); *Arnold, Duncan & Others* v. *Sandford*, 14 Johns. (N. Y.) 417 (1817); *Cruikshank* v. *Gardner*, 2 Hill (N. Y.) 333 (1842); *Sheldon* v. *Quinlen*, 5 Hill (N. Y.) 441 (1843); *Van Schoonhoven* v. *Comstock*, 1 Denio (N. Y.) 655 (1845); *Wilson* v. *Moore*, 26 N. J. L. 458 (1857); *Dickerson* v. *Chrisman*, 28 Mo. 134 (1859); *Pomeroy* v. *Betts*, 31 Mo. 419 (1862); *Buffum* v. *Ramsdell*, 55 Maine 252, 92 Am. Dec. 589 (1867); *Gargan* v. *School Dist. No. 15*, 4 Colo. 53 (1877); *Seymour* v. *O. S. Richardson Fueling Co.*, 205 Ill. 77, 68 N. E. 716 (1903); *Kris* v. *Peege*, 119 Wis. 105, 95 N. W. 108 (1903); *Peterson* v. *Middlesex Tr. Co.*, 71 N. J. L. 296, 59 Atl. 456 (1904); *Massey* v. *Oates*, 143 Ala. 248, 39 So. 142 (1904); *North Chicago Street R. Co.* v. *O'Donnell*, 115 Ill. App. 110 (1904); *East Baltimore Lumber Co.* v. *Israel Congregation*, 100 Md. 689, 62 Atl. 575 (1905); *Goldberg* v. *Harney*, 122 Ill. App. 106 (1905); *Peter Valley* v. *Illinois Tunnel Co.*, 178 Ill. App. 388 (1913); *Walters* v. *B. & O. R. Co.*, 120 Md. 644, 88 Atl. 47 (1913); *Pressley* v. *Kinloch-Bloomington Tel. Co.*, 184 Ill. App. 113 (1913); *Ewing* v. *Rider*, 125 Md. 149, 93 Atl. 409 (1915).

[31]A judgment clearly entire must be affirmed or reversed as to all. But the influence of modern statutes has led to a more liberal practice in reversing as to one or more parties and affirming as to the rest, where the error exists as to a separate claim or defense upon which a decision can be made without injuriously affecting the rights of others. *Jamieson* v. *Pomeroy*,

ST. JOHN *v.* ANDREWS INSTITUTE

COURT OF APPEALS OF NEW YORK, 1908

192 *N. Y.* 382

Motion to amend remittitur.[32]

CULLEN, C. J.: The question presented by this motion is whether certain of the next of kin of the testator who failed to appeal from the judgment of the Supreme Court, which declared that they had no right to any part of the estate of said testator, can take advantage of a reversal of said decree by this court made upon the appeal of certain other of the next of kin.[33]

The rule is stated by Mr. Freeman in his work of Judgments (vol. 2, sec. 481): "Where a judgment is against two or more persons, one only of whom appeals, its reversal, if the judgment was binding upon the defendants jointly, or if all must co-operate in complying with the judgment, affects the parties who did not appeal to the same extent as those who did. *Pittsburg, etc., Ry. Co.* v. *Reno*, 123 Ill. 273. But if a defendant does not appeal, and is not made a party to the appeal by the service on him of notice thereof, an appeal by his co-defendant, followed by a reversal of the judgment, can not authorize the retrial of the cause as against the non-appealing defendant, and the new trial must be confined to the issues between the parties to the appeal." *Minturn* v. *Baylis*, 33 Cal. 129, 134; *Nichols* v. *Dunphy*, 58 Cal. 605; *Little* v. *Superior Court*, 74 Cal. 219; *Withers* v. *Jacks*, 79 Cal. 297.[34] So a joint judgment such as that rendered against partners or against joint obligors can not be affirmed as to one defendant and reversed as to another, but

---

9 Pa. 230 (1848), see Pa. Act of May 20, 1891, P. L. 101, § 2, 1 P. & L. Dig. (2d ed.) 322; *McCanna* v. *Johnson*, 19 Pa. St. 434 (1852); *Sopp* v. *Winpenny*, 68 Pa. St. 78 (1871); *Robinson* v. *Buck*, 71 Pa. St. 386 (1872); *Reugler* v. *Lilly*, 26 Ohio St. 48 (1875); *Cook* v. *Ligon*, 54 Miss. 368 (1877); *Sutton* v. *McConnell*, 46 Wis. 269, 50 N. W. 414 (1879); *Alling* v. *Wenzell*, 35 Ill. App. 246 (1890), equity; *Hamilton* v. *Prescott*, 73 Tex. 565, 11 S. W. 548 (1889); *Walker* v. *Tupper*, 152 Pa. St. 1, 25 Atl. 172 (1892); *Garr* v. *Shaffer*, 139 Ind. 191, 38 N. E. 811 (1894); *Vance Shoe Co.* v. *Haught*, 41 W. Va. 275, 23 S. E. 553 (1895), equity; *Louisville, N. A. & C. R. Co.* v. *Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794 (1895); *Western Cornice & Mfg. Co.* v. *Leavenworth*, 52 Nebr. 418, 72 N. W. 592 (1897); *Altman* v. *Hofeller*, 152 N. Y. 498, 46 N. E. 961 (1897); *Missouri K. & T. R. Co.* v. *Enos*, 92 Tex. 577, 50 S. W. 928 (1899); *Louisville-Southern R. Co.* v. *Tucker*, 105 Ky. 402, 49 S. W. 314, 20 Ky. L. 1303 (1899); *Clark* v. *Torchiana*, 19 Cal. 786, 127 Pac. 831 (1912); *Moersdorf* v. *N. Y. Telephone Co.*, 84 N. J. L. 747, 87 Atl. 473 (1913); N. J. Practice Act of 1912; *Chicago B. & M. Co.* v. *Butler*, 139 Ga. 816, 78 S. E. 244 (1913); *Voves* v. *Great Northern Co.*, 26 N. Dak. 110, 143 N. W. 760 (1913); *North Alabama Tr. Co.* v. *Hays*, 184 Ala. 592, 64 So. 39 (1913); *Kansas C. M. R. Co.* v. *Cave* (Tex. Civ. App.), 174 S. W. 872 (1915); *Brown* v. *Sessler*, 128 Tenn. 665, 163 S. W. 812 (1914). See also note to *Sparrow* v. *Bromage*, 83 Conn. 27, 74 Atl. 1070 (1910), in 19 Ann. Cas. 797.

[32] Parts only of the opinion of the court and of the dissenting opinion are printed.

[33] *Lambert* v. *Westchester Electric R. Co.*, 191 N. Y. 252.

[34] But compare *Tillett* v. *Lynchburg & D. R. Co.*, 115 N. Car. 662, 20 S. E. 480 (1894); *Hall* v. *Calhoun Circuit Judge*, 123 Mich. 555, 82 N. W. 229 (1900).

must be reversed in its entirety except so far as the rule is modified by statute (1 Black on Judgments, section 211, *et seq.*), and this rule is applicable to a judgment in equity as well as to one in an action at law. *Altman* v. *Hofeller,* 152 N. Y. 498. But the question remains, and this is the only substantial question in the case, was the judgment rendered by the special term, and from which no appeal was taken by certain of the defendants, a joint judgment or a several judgment. For even in an action at law against several joint tort feasors the liability of the defendants being several, though in form a single judgment may be entered against them all, the judgment may be reversed on appeal as to one defendant and affirmed as to the other. *Hubbell* v. *Meigs,* 50 N. Y. 480. See *McIntosh* v. *Ensign,* 28 N. Y. 169; *Bullis* v. *Montgomery,* 50 N. Y. 352.[35]

Up to this point I understand my brother Chase and myself to be in accord. Our difference is whether the judgment is a joint or a several judgment. Here I may dispose of the suggestion that the judgment is against a class. There is no authority for suing a class as such as distinguished from the individuals composing that class, except that given by section 448 of the Code of Civil Procedure, where the parties of a class are too numerous to render it practicable to join them all as parties to the action, one or more may be selected as representing the class. No such situation existed in the present case, nor was there any attempt to sue one defendant as representing the others, but each person in interest was made a party, that he might defend or assert his rights in person and on his own behalf. The argument of my brother seems to proceed on the theory that because the issues on which the case was disposed of at the special term were common to all the defendants, the next of kin, therefore, the judgment against them was necessarily joint. I think the question of the identity of issue between the several parties has no necessary bearing on the question whether the judgment is joint or several. The distinction between the interest in a question and interest in a particular judgment is well illustrated by the rule which disqualifies judges from hearing causes. A judge can not sit in the hearing of an appeal from a judgment in an action in which he is interested or he is related to the parties within the specified degree, and the judgment rendered by a court in which such disqualified judge takes part is a nullity, *Oakley* v. *Aspinwall,* 3 N. Y. 547, but on the other hand, interest of the judge in the question involved in the case has no effect on his qualification to sit and determine it. *People* v. *Edmunds,* 15 Barb. (N. Y.) 529. Another illustration is the case of a judgment against two tort feasors. The issue on which the parties have been held liable may be identical and the ground on which the judgment has been reversed may be as fatal to the recovery

[35] Accord: *Nichols* v. *Dunphy,* 58 Cal. 605 (1881); *Union Trust Co.* v. *Atchison, T. & S. F. R. Co.,* 8 N. Mex. 159, 42 Pac. 89 (1895); *Schultz* v. *United States Fidelity Co.,* 201 N. Y. 230, 94 N. E. 601 (1911). Contra: *Mohr* v. *McKenzie,* 60 Ill. App. 575 (1895); *Massey* v. *Oates,* 143 Ala. 248, 39 So. 142 (1904); *South Side E. R. Co.* v. *Nevig,* 214 Ill. 463, 73 N. E. 749 (1905); *Pecos & N. T. R. Co.* v. *Holmes* (x. Civ. App.), 177 S. W. 505 (1915).

against one defendant as against the other, yet, as already stated, a reversal against one will inure in no respect against the other. Such was the case of *Geraud* v. *Stagg*, 10 How. Pr. (N. Y.) 369. The action was for libel against two defendants. From a judgment in favor of the plaintiff only one defendant appealed. The judgment was reversed on the ground that the plaintiff's own evidence did not show a cause of action. The order entered by the general term of the common pleas reversed the judgment as to the appealing defendant only. A motion was thereupon made to amend the order so as to reverse the entire judgment. The motion was denied in an opinion written by an eminent judge, Woodruff, afterwards a judge of this court. What then does determine the question whether the judgment in this action was joint or several? Had the cause been determined at the special term in accordance with the view subsequently held by this court there would have been awarded to the several next of kin their proportionate shares under the statute of distribution of the rents and profits which accumulated between the death of the deceased and the incorporation of the defendant, the Andrews Institute, and such will be the nature of the judgment entered on the remittitur from this court. The interest of each of the next of kin in the accumulated rents was several, belonging solely to himself and subject at all times to assignment by him, to seizure through a court of equity by his creditors. The interest of the next of kin in undisposed of personalty in no way differs from the interest of the heirs at law in undisposed of realty. They are not joint tenants, but tenants in common, and the action or litigation of one can not conclude or affect the rights of the others. In the share of each of the next of kin the others had no interest. *Pelly* v. *Bowyer*, 7 Bush (Ky.) 513. Therefore, the judgment against the interest of each was several. Had such judgment in the first instance been in favor of the next of kin and the Andrews Institute had appealed from it, we could have reversed that judgment only so far as it made the defendants parties to that appeal. *McCammon* v. *Worrall*, 11 Paige Ch. (N. Y.) 99; *Tate* v. *Liggat*, 2 Leigh (Va.) 84, 108; *Fasker* v. *Small*, 1 C. P. Cooper 225. See also, *South Portland Land Co.* v. *Munger*, 30 Ore. 457; *Todd* v. *Daniel*, 16 Pet. (U. S.) 521; *French* v. *Powers*, 177 Mass. 568. Had it seen fit to serve its notice of appeal solely on the four defendants who have appealed to this court, the court could not have reversed the judgment of the special term in favor of the two defendants who were not made parties to the appeal. I am at a loss to see why the principle must not necessarily be the same in both cases. The great stumbling block in this case seems to be the apparent, if not real, incongruity of the result arrived at; that is to say, that a distribution will be made in favor of four of a certain class of defendants, which is denied to two others of the class, whose rights are exactly the same. For this incongruity, however, this court is not responsible. It is occasioned by the voluntary action of the two nonappealing defendants themselves. They acquiesced in the decision of the special term, erroneous though it was, and it is that and that alone that causes the incongruity.

The motion should be granted.

CHASE, J. (dissenting): This motion is made to amend the remittitur of this court so as to deny to said next of kin who did not appeal the right to partake in the division of the income upon the fund in the hands of the plaintiff which accrued between the time when the testator died and the organization of the Andrews Institute for Girls. It is made in behalf of said Andrews Institute for Girls to whom said income was directed to be paid by the judgment entered at the special term.

If the modification of the judgment directed by us does not apply to all of the next of kin it will result in inconsistent judgments upon the same issue and the court will instruct the plaintiff as executor and trustee to distribute the income of the estate for the time mentioned to a part of a class and withhold the shares from the others of said class, not pursuant to any possible construction of the will or in accordance with the judgment of the court based upon the duty of the executor and trustee, but pursuant to the claimed rights of the parties growing out of the practice in connection with the appeal. The appeal taken from the judgment was general and no question relating to the identity of the next of kin is involved.

I am of the opinion that the reversal of the judgment in part, as stated in the opinion previously filed herein, inures to the benefit of the next of kin as a class.

Werner, Willard, Bartlett and Hiscock, JJ., concur with Cullen, Ch. J.; Gray and Haight, JJ., concur with Chase, J.

Ordered accordingly.[36]

---

[36]Where one of several parties appeals and secures a reversal it is generally said that this does not disturb the judgment against his co-party unless the judgment or decree below is an entirety that can only be disposed of by a total reversal. In the application of the rule the cases are not consistent. See, where the reversal was as to the appellant alone. *Lanahan* v. *Latrobe*, 7 Md. 268 (1854); *Howard* v. *Waggamann*, 28 La. 99 (1876); *Annely* v. *De Sanssure*, 12 S. Car. 488 (1879); *Donovan* v. *Driscoll*, 12 W. N. Cas. (Pa.) 203 (1882); *Solinsky* v. *Lincoln, S. Bk.*, 85 Nebr. 368, 4 S. W. 836 (1886); *Michener* v. *Bengel*, 135 Ind. 188, 34 N. E. 664, 816 (1893); *Littell* v. *Miller*, 8 Wash. 566, 36 Pac. 492 (1894); *Newburgh S. Bk.* v. *Woodbury*, 64 App. Div. 305, 72 N. Y. S. 222 (1901); *Bowlby* v. *DeWit*, 47 W. Va. 323, 34 S. E. 919 (1899); *Merchants Nat. Bank* v. *Stebbins*, 15 S. Dak. 280, 89 N. W. 674 (1901); *Moore* v. *Price*, 101 Ark. 142, 141 S. W. 501 (1911); *State* v. *Dayton L. Co.* (Tex. Civ. App.), 164 S. W. 48 (1914), and compare, where the judgment was held an entirety, *Wilson* v. *Moore*, 26 N. J. L. 458 (1857); *Wood* v. *Cullen*, 13 Ill. (Gil. 365) 394 (1868); *Huckabee* v. *Nelson*, 54 Ala. 12 (1875); *Murphy* v. *O'Reiley*, 78 Ky. 263 (1880); *Bradford* v. *Taylor*, 64 Tex. 169 (1885); *Bradford* v. *Bennett*, 48 Ill. App. 145 (1891); *Hall* v. *Calhoun Circuit Judge*, 123 Mich. 555, 82 N. W. 229 (1900); *Schoenberger* v. *White*, 75 Conn. 605, 54 Atl. 882 (1903); *Lesh* v. *Davison*, 181 Ind. 429, 104 N. E. 642 (1914); *Rowell* v. *Ross*, 89 Conn. 201, 93 Atl. 236 (1915). In Washington, by statute, a party who does not join in an appeal or prosecute an independent appeal shall derive no benefit from an appeal by another unless from necessity. *Morgan* v. *Williams*, 77 Wash. 343, 137 Pac. 476 (1914).

GARR *v.* GOMEZ

COURT OF ERRORS OF NEW YORK, 1832

9 *Wend.* (*N. Y.*) 649

Error from the Supreme Court.

Gomez, the plaintiff below, sued Garr, his declaration consisting of three counts. The defendant pleaded non assumpsit and four special pleas to which the plaintiff demurred. On the trial under the general issue general damages were assessed upon all three counts and on the demurrer judgment was given for the plaintiff. The court of errors adjudged that the fourth special plea was a sufficient bar to the action as to the second and third counts, but that a venire de novo should be awarded to ascertain the damages on the first count, the pleas to which were bad.[37]

The counsel for the plaintiff in error, I. L. Wendell, prayed to be heard on the question of the award of a venire de novo before the court pronounced judgment, and he was indulged. He insisted, with all deference to the intimations in the opinions which had been read, that in a case like the present, the plaintiff below was not entitled to a venire de novo. That the rule is, where judgment is given in the court below against the defendant and he brings a writ of error, the judgment in the court of error, if given for him, is quod judicium reversitur; but if the judgment in the court below were given against the plaintiff and he bring a writ of error and succeed, the judgment below is not only reversed, but the court of error gives such judgment as the court below ought to have given, and cited 1 Archbold's Pr. tit. Writ of Error (Judgment) and the cases there collected. He contended that on the reversal of a judgment, a venire de novo was awarded only in one of the following cases: 1. Where the plaintiff brought error; 2. When there was a special verdict; 3. An imperfect verdict; 4. Demurrer to evidence; and 5. A bill of exceptions. And he cited the following cases as instances to support this position: 3 T. R. 27; Cowp. 89, 91; 2 Str. 1051, 1124; 1 T. R. 34 and 783; 2 T. R. 53 and 125; 5 T. R. 367; 1 Wend. (N. Y.) 64; 5 Wend. (N. Y.) 341; 6 Wend. (N. Y.) 173. He insisted that not a case was to be found in the English reports, where a venire de novo had been awarded on the reversal of a judgment where entire damages had been given on separate counts, some good and some bad, except the case of *Grant* v. *Astle,* Doug. 722, decided in 1781, which case was condemned by counsel in 1 T. R. 528, as not warranted by the old authorities; and Buller, J., upon whose suggestion the order was made in *Grant* v. *Astle,* afterward, in 1789, in *Hancock* v. *Haywood,* 3 T. R. 435, in the most unqualified terms admits, that on a writ of error where one count appears bad and the

[37]Only so much of the case as relates to the reversal of judgment is given, beginning page 673 of the report. The formal judgment and part of the opinion of Nelson, J., are omitted.

verdict is entered generally on all the counts, the court must reverse the judgment in toto, since they can not see on which of the counts the damages were given. Besides, the case of *Grant* v. *Astle* comes within one of the exceptions, in which it is admitted that it is according to the practice of the court to award a venire de novo, for that was a verdict subject to the opinion of the court on a case reserved, and therefore in substance a special verdict.

Walworth, Ch.: In some of the early cases it is said, if the defendant brings a writ of error, and the judgment against him is reversed, the appellate court can not award a venire de novo, or give any other judgment than a mere judgment of reversal, leaving the plaintiff in the court below to seek his remedy by a new suit. See *Parker* v. *Harris*, 1 Salk. 262;[88] *Steele* v. *Hopkinson*, 2 Str. 1055; *Cumming* v. *Sibley*, 4 Burr. 2489. This, however, can not be considered as the law at the present day; for it has frequently been decided, both here and in England, that upon a writ of error, whether the same is prosecuted by the plaintiff or the defendant in the court below, the court of errors upon a reversal of the judgment may proceed and give such judgment as the court below ought to have given; and may award a venire de novo, if necessary for the attainment of justice. When a judgment is reversed in this court, or in the exchequer chamber, or the house of lords in England, the practice is to direct the venire de novo to be awarded in the court below. See *Livingston* v. *Rogers*, 1 Caines (N. Y.) 586.

In the case of *Shrewsbury* v. *Kynerston*, 7 Bro. P. C. (Toml. ed.) 396, the writ of error was prosecuted by the defendant in the court below, and the judgment was reversed, for a defect in the verdict on which the judgment was rendered, but the house of lords being against the plaintiff in error on the merits of the case, directed a venire de novo to be awarded in the Court of King's Bench. A similar decision was made in the case of *Haswell* v. *Challie*, 2 Str. 1125, upon the reversal of a judgment of the King's Bench upon a writ of error prosecuted by the defendant in the court below. In *Green* v. *Bailey*, 5 Munf. (Va.) 246, the court of appeals in Virginia, upon

[88] *Parker* v. *Harris*, King's Bench 1692, 1 Salk. 262 per cur.: "Where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be eased and discharged of that judgment. But where the plaintiff brings error, the judgment shall not only be a reversal, but the court shall also give such judgments as the court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit wherein erroneous judgment was given." Bac. Abr., Error (m) 2; *Faldowe* v. *Ridge*, Cro. Jac. 206 (1608); *Swearingen* v. *Pendleton*, 4 Serg. & R. (Pa.) 389 (1818); *Atkinson* v. *Fortinberry*, 7 Sm. & M. (Miss.) 302 (1846); *Robinson* v. *Robinson*, 5 Harr. (Del.) 8 (1848). On error in the King's Bench the court could award a writ of inquiry to assess damages and upon the return of the inquest give final judgment. 2 Saund. 101, 1; 1 Arch. Pr. (7th ed.) 376; 2 Tidd's Pr. (9th ed.) (1180). It was, at length, finally settled that a court of error could award a venire facias de novo. *Kynaston* v. *Shrewsbury*, 2 Str. 1051 (1722); *Parker* v. *Wells*, 1 D. & E. 783, 18 Ch. Div. 477 (1787); *Davies* v. *Pierce*, 2 T. R. 125 (1787); *Lickbarrow* v. *Mason*, 2 H. Bl. 211 (1793). Contra: *Street* v. *Hopkinson*, 2 Str. 1055 (1723), and contra on error from inferior local courts. *Trevor* v. *Wall*, 1 D. & E. 151 (1786); *Bishop* v. *Kaye*, 3 B. & Ald. 605 (1820).

error brought by the defendant, not only reversed the judgment, but also proceeded to give such judgment as the court below ought to have given, by awarding a repleader. So in the case of *Gardner* v. *Vidal*, 6 Rand. (Va.) 106, upon a writ of error brought by the defendant, the judgment was reversed on account of a defective finding of the jury, and a venire de novo was directed to be awarded. And in the case of *Ward* v. *Johnson*, 1 Munf. (Va.) 45, a judgment of the circuit court was reversed by the court of appeals because the circuit court, upon a writ of error brought by the defendant, had reversed a judgment, but had not proceeded to give such judgment in favor of the plaintiff in the court below as ought to have been given there. Similar decisions have been made in several other of our sister states. See *Commonwealth* v. *Howard*, 13 Mass. 221; *Davenport* v. *Bradley*, 4 Conn. 311.

In the case of the *King* v. *Amery*, 1 Anst. 183, the house of lords propounded the question to the judges, whether if the judgment of the court below be reversed on error, the appellate court must give the same judgment as the court below ought to have given? And upon this question, which was general, and applied to a writ of error brought by the defendant in the court below, as well as to a writ of error prosecuted by plaintiff, Chief Justice Eyre delivered the unanimous answer of the judges in the affirmative. So in *Gildart* v. *Gladstone*, 12 East 668, where the common pleas had given judgment for the plaintiff on a special verdict, the Court of King's Bench, upon a writ of error, reversed the decision of the common pleas. The question then arose whether the plaintiff in error was entitled to a mere judgment of reversal, or whether he should have a judgment in his favor upon the verdict, together with the costs of his defense in the court below, and upon argument the Court of King's Bench decided that he was entitled to such a judgment as the court of common pleas ought to have given, which of course included the costs of his defense in that court. In *Grant* v. *Astle*, 2 Doug. 731, entire damages were given upon a declaration consisting of several counts, some of which were good and others defective, and the judgment was for this reason reversed; but the Court of King's Bench held it was a proper case for venire de novo to assess the damages on the counts which were good. And in the case of *Shaffer* v. *Kintzer*, 1 Bin. (Pa.) 546, which was also a case of general damages, where some of the counts of the plaintiff's declaration were bad, Tilghman, Ch. J., said the case of *Grant* v. *Astle*, was good law and good sense, and that he was willing to abide by it; a venire de novo was awarded accordingly, in conformity to that decision. In the case of *Flower* v. *Allen*, in this court, 5 Cow. (N. Y.) 668, Spencer, senator, refers to the same case, as well as to other English decisions, as establishing the principle that whenever a judgment is reversed upon some ground which does not involve the merits of the cause, a venire de novo is awarded of course to try those merits. And it appears by the report of the case of *Richardson* v. *Mellish*, 3 Bing. 346, that the Court of King's Bench had again followed the decision in *Grant* v. *Astle*, by awarding

a venire de novo upon the reversal of a judgment, because some of the counts were defective, and general damages had been assessed. So in the recent case of *Bemus* v. *Beekman*, in this court, 3 Wend. (N. Y.) 676, where the judgment was reversed, on account of a defective finding of the jury as to some of the issues, a venire de novo was awarded, although the writ of error was brought by the defendant in the court below.

I have no doubt, therefore, that this court ought to authorize the issuing of a venire de novo to try the issue, and to assess the plaintiff's damages on the first count of his declaration; as it was his own fault that the issue was tried before the judgment was given on the demurrer to the several pleas, he should not be permitted to have an award of such venire, except upon the terms of paying the costs of the formal trial.

NELSON, J.: It is laid down in the books, and supported by adjudged cases, that if judgment be given against a defendant, and he brings a writ of error, upon which the judgment below is reversed, the judgment shall only be quod judicium reversitur, and the reason given is, that the writ of error is brought by the defendant merely to be discharged of the judgment below. Bacon's Abr. tit. Error, 503. This as a general proposition may be correct, and is founded upon the idea or assumption that the whole merits of the case are fully and finally determined by the decision in the court above, and that the plaintiff below has no cause of action. In such a case, judgment of reversal is the only action of the court necessary to a just and definite settlement of the matters in litigation between the parties, and the result is the same as if the court below had done what they ought to have done, according to the decision of the court above, viz., given judgment against the plaintiff on the merits. But there are exceptions to this rule, if it may be called a general one, which are as thoroughly settled as is the rule itself, and upon as sound and conclusive reasons. Where the defendant brings the writ of error, and the court above sees that the judgment is not reversed upon the whole merits of the case of the plaintiff below, but upon a formal or technical question not involving the substantial ground of litigation, there the court order the court below to award a venire de novo. The reason is obvious. The plaintiff is entitled to the trial of his cause upon the merits; it would be a reproach to the administration of justice if he was not; and this can be done with more convenience and less delay and expense to both parties by awarding in the court below a venire de novo than by bringing a new suit. Indeed, it might frequently happen that without the continuance of the suit in the court to its final determination on the merits, the demand would be barred by the statute of limitations. When the cause is again remitted to the court below, the plaintiff may on application to it, or otherwise, disentangle his case from the nets of form and technicality and obtain a trial upon the merits. Whether the trial is had on the new venire ordered by this court, or on one in a new suit, is wholly immaterial, so far as the substantial rights or interests of the defendant are concerned.

The difference may be very material as to those of the plaintiff, as has already been shown.

If the judgment is given against the plaintiff below, and he brings the writ of error, and the decision is in his favor, the judgment shall not only be reversed, but the court shall give such a judgment as the court below ought to have given, or order the award of a venire de novo; and the reason is that the judgment of the reversal revives the first cause of action. The right of the court to order a venire in such a case is not questioned. The reason, however, is no stronger for the venire than in the case where the defendant brings the writ of error and reverses the judgment below on ground which does not involve the plaintiff's cause of action.[39]

Judgment accordingly.

MILLER *v.* RALSTON

SUPREME COURT OF PENNSYLVANIA, 1815

1 *Serg. & R.* (*Pa.*) 309

In error.

On the fourth of May, 1812, Ralston obtained a judgment before Richard Renshaw, Esq., an alderman of the city, against Miller, and on the twelfth of the same month an appeal was entered to the common pleas of Philadelphia County.

Browne and Grinnell, now showed for error that the promise laid in the declaration was after the appeal was entered, to wit, on the first of June, 1812.

Hopkins, for the defendants in error, said that the day was not material.

By THE COURT: It appears by the record that the action was brought before the debt was due, which is manifest error. The judgment must therefore be reversed.

Mr. Hopkins then moved for a venire facias de novo, which the court refused, because there was no error in the course of the trial, but it appeared from the plaintiff's own averment that there was no cause of action at the time the suit was commenced.

Judgment reversed.[40]

---

[39]Accord: *Shaffer* v. *Kintzer*, 1 Binn. (Pa.) 537, 2 Am. Dec. 488 (1809); *Commonwealth* v. *Howard*, 13 Mass. 221 (1816); *Davenport* v. *Bradley*, 4 Conn. 309 (1822); *Flower* v. *Allen*, 5 Cowen (N. Y.) 654 (1825); *Thornton* v. *Wynn*, 12 Wheat. (U. S.) 183, 6 L. ed. 595 (1827); *Gardner* v. *Vidal*, 6 Rand. (Va.) 106 (1828). And see *Garr* v. *Stokes*, 16 N. J. L. 493 (1838).

[40]Judgment will be rendered in the appellate court, or the cause remanded for judgment below, without a new trial when upon every view of the facts it is clear that there is no cause of action, or that the defense can not succeed, or where according to many cases, it clearly appears upon a view of the undisputed facts that the result of a second trial will lead to no different conclusions than to which the appellate court has already come. *Griffith* v. *Eshleman*, 4 Watts (Pa.) 51 (1835); *Van Dyke* v. *Van Dyke*, 17 N. J. L. 478 (1840); *Waldo* v. *Moore*, 33 Maine 511 (1851); *Marquat* v. *Marquat*, 12 N. Y.

FIDELITY MUT. LIFE INS. CO. *v.* BECK

SUPREME COURT OF ARKANSAS, 1907

84 *Ark.* 57

Mrs. Beck, the beneficiary, in a policy upon the life of her husband, James W. Beck, brought suit against the appellant life insurance company upon the same, and the trial resulted in the court directing a verdict in favor of the plaintiff. The insurance company appealed and the Supreme Court, holding that the court erred in giving a peremptory instruction, reversed the judgment and remanded the cause for further proceedings. The appellant moved for a rehearing.[41]

HILL, C. J.: Appellant insists, in motion for rehearing, that the judgment of the court should have been for a dismissal instead of remanding for a new trial, because it alleges there was undisputed evidence of a breach of a warranty contained in the sixth question and answer.

On the trial of the case in the lower court, there was a peremptory direction to find for the plaintiff, and there were two grounds for a reversal presented here; one the ground mentioned in the opinion, and the other ground the one now urged in the motion for rehearing.

For reasons stated in the opinion, the direction for a peremptory verdict was error. That is as far as the court went in disposing of the appeal, and was as far as it was necessary or proper for the court to go. It is true that where there is an affirmative showing that there can be no recovery, and a new trial would only portract litigation and occupy the time of the courts and increase costs, then it is the duty of the court to dismiss the case, as was well pointed out by Mr. Justice Hemingway in *Pennington* v. *Underwood,* 56 Ark. 53. The ordinary rule of practice on reversal is to remand

---

336 (1855); *Storing* v. *Onley,* 44 Ill. 123 (1867); *Roberts* v. *Corbin,* 28 Iowa 355 (1869); *Murdock* v. *Ganahl,* 47 Mo. 135 (1870); *Swift* v. *Agnes,* 33 Wis. 228 (1873); *Toledo &c. R. Co.* v. *Durkin,* 76 Ill. 395 (1875); *Brownsville* v. *Basse,* 43 Tex. 440 (1875); *Oregon R. Co.* v. *Bridwell,* 11 Ore. 282, 3 Pac. 684 (1883); *Allen* v. *St. Louis Bank,* 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. 460 (1886); *Webb* v. *Leominster Shirt Co.,* 101 Mich. 136, 59 N. W. 397 (1894); *Bernhardt* v. *Brown,* 118 N. Car. 700, 24 S. E. 527, 715, 36 L. R. A. 402 (1896); *Minnear* v. *Holloway,* 56 Ohio St. 148, 46 N. E. 636 (1897); *Hurlburt* v. *Straub,* 54 W. Va. 303, 46 S. E. 163 (1903); *Miller* v. *Kern Co.,* 150 Cal. 797, 90 Pac. 119 (1907); *Deloria* v. *Atkins,* 158 Mich. 232, 122 N. W. 559 (1909); *Elie* v. *Cowles,* 82 Conn. 236, 73 Atl. 258 (1909); *Knight* v. *Ill. Cent. R. Co.,* 180 Fed. 368 (1910); *Warren* v. *Finn,* 84 N. J. L. 206, 86 Atl. 530 (1913); *Hanick* v. *Leader,* 243 Pa. 372, 90 Atl. 146 (1914); *Schenk* v. *International R. Co.,* 146 N. Y. S. 365 (1914); *Peterson* v. *Ocean E. R. Co.,* 161 App. Div. 720, 146 N. Y. S. 604 (1914). Compare *Slocum* v. *N. Y. Life Ins. Co.,* 228 U. S. 364, 57 L. ed. 879 (1912).

[41] The statement of facts is from the first opinion. Only the judgment on motion for rehearing is printed.

common-law cases for new trial unless there are exceptional reasons, as above indicated, why there should be a dismissal. The court does not see that this case belongs to that exceptional class. While it appears from the application in the transcript that the sixth question was answered by the assured, and it also appears from the testimony that it was not truly answered, yet the issue of fact whether or not there was a breach of warranty in regard to it, like the other issue disposed of in the opinion, has not been tried by the lower court, as it refused to go into a trial of these issues, erroneously holding that no defense was offered, whereas the defenses offered should have been tried, and that is what is now directed. That means, tried first by the lower court as to the sufficiency of the evidence to go to the jury; and, if the court should find it sufficient to go to the jury, then by the jury to find the truth where there is a conflict, or where there may be different conclusions drawn from undisputed evidence.

There should be a trial of the real issues in the circuit court before this court should exercise its power of dismissal. This is especially true in this case, where the testimony on this trial does not show that other evidence raising proper issues of fact may not be adduced not inconsistent with the facts now in evidence.

Motion for rehearing is therefore denied.[42]

---

[42] "It is the duty of an appellate court to determine whether the circumstances of the case require that the litigation shall be ended, or the case shall be remanded for another trial upon the same issues, or for the exercise of the discretion of the lower court in the further proceedings." *Gadsden* v. *Thrush*, 72 Nebr. 1, 99 N. W. 835 (1904). Usually, the court will order a new trial in the exercise of a sound discretion whenever it appears that the ends of justice will be best subserved by such action. *Wilder* v. *Greenlee*, 49 Ill. 253 (1868); *Buchannan* v. *Milligan*, 108 Ind. 433, 9 N. E. 385 (1886); *Houston &c. R. Co.* v. *State*, 24 Tex. Civ. App. 117, 56 S. W. 228 (1900); *Bryan* v. *Straus*, 157 Mich. 49, 121 N. W. 301 (1909). In New York it is said: "In order to justify an appellate court in rendering final judgment against the respondent upon the reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial, but it must appear that he certainly can not." *New* v. *New Rochelle*, 158 N. Y. 41, 52 N. E. 647 (1899); *Howells* v. *Hettrick*, 160 N. Y. 308, 54 N. E. 677 (1899); *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423 (1914). See also, *Shotwell* v. *Dennman*, 1 N. J. L. 342 (1795); *Keyes* v. *Stone*, 5 Mass. 391 (1809); *Wharton* v. *Williamson*, 13 Pa. St. 273 (1850); *Little Schuylkill Navigation R. & Coal Co.* v. *Norton*, 24 Pa. St. 465, 64 Am. Dec. 672 (1855); *Curtis* v. *Brown County*, 22 Wis. 167 (1867); *Schroeder* v. *Gessellschaft*, 60 Cal. 467 (1882); *Latremouille* v. *Bennington & R. R. Co.*, 63 Vt. 336, 22 Atl. 656 (1891); *Couadeau* v. *American Accident Co. of Louisville*, 95 Ky. 280, 25 S. W. 6, 15 Ky. L. 667 (1894); *Bray* v. *Ford*, L. R. (1896), A. C. 44, L. J. 65 Q. B. 213, 73 L. T. 609; *Ahrens* v. *Seattle*, 39 Wash. 168, 81 Pac. 558 (1905); *Shevlin* v. *Shevlin*, 96 Minn. 398, 105 N. W. 257 (1905); *Buck* v. *McKeesport*, 223 Pa. 211, 72 Atl. 514 (1909); *Fay* v. *Hartford & S. R. Co.*, 81 Conn. 578 (1909); *Union Castle Mail Co.* v. *Thomsen*, 190 Fed. 536 (1911); *Borough Bank of Brooklyn* v. *Lamphear*, 154 App. Div. 177, 138 N. Y. S. 864 (1912); *Bonnette* v. *Molloy*, 209 N. Y. 167, 102 N. E. 559 (1913); *Quaker Realty Co.* v. *Labasse*, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073n (1913); *Pennell* v. *Phillips*, 53 Pa. Super. Ct. 324 (1913); *Mier* v. *Chicago Milwaukee & St. Paul R. Co.*, 179 Ill. App. 321 (1913); *Hanick* v. *Leader*, 243 Pa. 372, 90 Atl. 146 (1914); *Pray* v. *New York S. Bk.*, 211 N. Y. 32, 105 N. E. 412 (1914); *Childress* v. *Lake Erie & W. R. Co.*, 182 Ind. 251, 105 N. E. 467 (1914).

SYMPSON *v.* JUXON

In the King's Bench, 1625

Cro. Jac. 699

Error of a judgment in Durham for the plaintiff. The judgment being reversed in the King's Bench, a writ of restitution was awarded, and to enquire what were the profits of the land recovered, a tempore judicii praedicti, which was 7th August, 19 Jac. 1, whereupon the inquisition was returned, that they amounted to ten pounds. Exception was taken to the writ; for it ought not to have been what the profits of the land amounted to from the judgment; for the plaintiff is not to answer the profits longer than from the time of the execution sued, which was long after. And so held all the court; wherefore the writ was ruled to be ill.

The plaintiff in the writ of error had a new writ of restitution, which was to enquire what profits of the land the plaintiff who recovered had taken colore judicii praedicti, which was 7th August, 19 Jac. 1, and after the reversal thereof; which being returned, that he took the profits of the land colore judicii praedicti before the reversal thereof, to the value of ten pounds.

An exception was taken thereto by Sir Henry Yelverton and Sergeant Damport, that this writ was not good; for it ought to have been what profits he took after the execution sued, for that appears of record to be long after the judgment.

But all the court held, that the writ was good enough; for the plaintiff in the writ of error, after the reversal, is to be restored to all that he lost, and what the plaintiff in the judgment by color thereof had taken after the judgment; and that may be well, by entry after the judgment (as in truth the case was affirmed to be) in part, and yet after sue execution of the remainder; wherefore the writ was well made; and so Broom, the Secondary, and the clerks affirmed their precedents to be; wherefore the writ was ordered to be filed, and the plaintiff had execution of the damages found by that writ. I, myself, was of counsel with the plaintiff in the writ of error, by assignment in forma pauperis.[48]

---

[48]Bac. Abr., Error (m) 3; *Eyre* v. *Woodfine*, Cro. Eliz. 278 (1591); *Wilkinson's Case*, Cro. Eliz. 465 (1595); *Goodyere* v. *Ince*, Cro. Jac. 246 (1610); *Westerne* v. *Creswick*, 4 Mod. 161 (1692); *Anonymous*, 2 Salk. 588 (1706); *Laselle* v. *Miller*, 15 Mass. 207 (1818); *Rusell* v. *Gray*, 6 Serg. & R. (Pa.) 208 (1820); *Scott* v. *Conover*, 10 N. J. L. 61 (1828).

In *Murray* v. *Emmons*, 26 N. H. 523 (1853), it is said per Eastman, J.: "When a judgment is reversed upon a writ of error, the party against whom the judgment was rendered in the court below, must be restored to all that he has lost by the erroneous judgment. If an execution has issued against him, and has been extended upon his lands, he is entitled to his possession and seisin, together with the mesne profits. If the execution has been satisfied by his goods or money, he is to have restitution of the defendant in error in money." *Stanard* v. *Brownlow*, 3 Munf. (Va.) 229 (1812); *Safford* v. *Stevens*, 2 Wend. (N. Y.) 158 (1828); *Williams* v. *Simmons*, 22 Ala. 425 (1853); *Raun* v. *Reynolds*, 18 Cal. 275 (1861); *Dickensheets* v. *Kaufman*,

HAEBLER *v.* MYERS

COURT OF APPEALS OF NEW YORK, 1892

132 *N. Y.* 363

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 24, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at special term.

This was an action for money had and received.

In April, 1888, the sheriff of the city and county of New York received the sum of $900 "by reason of" the levy of an attachment which the plaintiffs had caused to be issued in an action brought by them against one Bernharth and others. On October thirtieth, the defendants, "as subsequent lienors," procured an order restraining the sheriff from paying over to the plaintiffs the money so received by him, and on November twenty-second, they procured another

---

29 Ind. 154 (1867); *Bickett* v. *Garner*, 31 Ohio St. 28 (1876); *Gates* v. *Brinkley*, 4 Lea (Tenn.) 710 (1880); *Boyett* v. *Vaughan*, 86 N. Car. 725 (1882); *Wright* v. *Nostrand*, 100 N. Y. 616, 3 N. E. 78 (1885); *Lytle* v. *Lytle*, 94 N. Car. 522 (1886); *Fish* v. *Toner*, 40 Minn. 211, 41 N. W. 972 (1889); *Whitesell* v. *Peck*, 176 Pa. St. 170, 35 Atl. 48 (1896); *Keck* v. *Allender*, 42 W. Va. 420, 26 S. E. 437 (1896); *Brightly* v. *McAleer*, 4 Pa. Super. Ct. 563 (1897); *McElwee* v. *Wilce*, 80 Ill. App. 338 (1898); *First Nat. Bank of Ft. Scott* v. *Elliott*, 60 Kans. 172, 55 Pac. 880 (1899); *McFadden* v. *Swinerton*, 36 Ore. 336, 59 Pac. 816, 62 Pac. 12 (1900); *Jenkins* v. *State*, 60 Nebr. 205, 82 N. W. 622 (1900); *Cowdery* v. *London & San Francisco Bank*, 139 Cal. 298, 73 Pac. 196, 96 Am. St. 115 (1903); *Florence Cotton & Iron Co.* v. *Louisville Banking Co.*, 138 Ala. 588, 36 So. 456, 100 Am. St. 50 (1903); *Chambliss* v. *Hass*, 125 Iowa 484, 101 N. W. 153, 68 L. R. A. 126 (1904); *Lanyon* v. *Chesney*, 209 Mo. 1, 106 S. W. 522 (1907); *Ward* v. *Sherman*, 155 Cal. 287, 100 Pac. 864 (1909); *Drescher-Rotberg Co.* v. *Landeker*, 82 Misc. 441, 143 N. Y. S. 1050 (1913).

Restitution is not a matter of right but depends on the discretion of the court and will not be ordered where the justice of the case does not call for it. *Fitzalden* v. *Lee*, 2 Dall. (U. S.) 205, 1 L. ed. 350, 1 Yeates (Pa.) 207, (1793); *Grant* v. *Rodgers*, 6 Phila. (Pa.) 132 (1866); *Coster* v. *Peters*, 7 Rob. 386, 30 N. Y. Super. Ct. 386 (1868); *Gould* v. *McFall*, 118 Pa. St. 455, 12 Atl. 336, 4 Am. St. 606 (1888); *Teasdale* v. *Stoller*, 133 Mo. 645, 34 S. W. 873, 54 Am. St. 703 (1895); *State* v. *Horton*, 70 Nebr. 334, 97 N. W. 434 (1903); *New Castle* v. *Genkinger*, 37 Super. Ct. (Pa.) 21 (1909); *Carroll* v. *Draughon*, 173 Ala. 338, 56 So. 209 (1911). Compare *Ranck* v. *Becker*, 13 Serg. & R. (Pa.) 412 (1825); *Estus* v. *Baldwin*, 9 How. Pr. (N. Y.) 80 (1853).

The fact that payment was not coerced by execution ought not, alone, to prevent restitution. "We ought not to say that a party must resist the judgment of a court to the last exremity and with what is something like contumacy, if he wishes to preserve his right to restitution in case he succeeds in reversing the judgment." *Lott* v. *Swezey*, 29 Barb. (N. Y.) 87 (1859). Accord: *Gregory* v. *Litsey*, 9 B. Mon. (Ky.) 43, 48 Am. Dec. 415 (1848); *Garr* v. *Martin*, 1 Hilton (N. Y.) 358 (1857); *Scholey* v. *Halsey*, 72 N. Y. 578 (1878); *Hiller* v. *Hiller*, 35 Ohio St. 645 (1880); *Stuart* v. *University L. & S. Co.*, 66 Ore. 546, 135 Pac. 165 (1913). Contra: *Winston* v. *Nunes*, 25 La. Ann. 476 (1873); *Gould* v. *McFall*, 118 Pa. St. 455, 12 Atl. 336, 4 Am. St. 606 (1888), semble; *Kalmbach* v. *Foote*, 86 Mich. 240, 49 N. W. 132 (1891); *Groves* v. *Sentell*, 66 Fed. 179 (1895).

order, granted at special term on notice, vacating said attachment. "After said attachment was so vacated, and in consequence thereof and not otherwise, said sheriff paid over to the defendants, as subsequent lienors, said $900 which he had received under the attachment issued to him, as aforesaid, by the plaintiffs." On the eighteenth of April, 1889, the order vacating the attachment was affirmed by the general term, but on October 31, 1889, the court of appeals reversed the orders made by the general and special terms and denied the motion to vacate the attachment.

November 12, 1888, the plaintiffs recovered judgment in the action brought by them against said Bernharth and others for the sum of $1,258.91, but the execution issued thereon to said sheriff was returned wholly unsatisfied and the judgment is still unpaid. The plaintiffs demanded restitution from the defendants, which was refused, and thereupon they brought this action, and after alleging the foregoing facts, in substance, asked that the defendants be ordered and decreed to make restitution to the plaintiffs of the said sum of $900, with interest thereon from the twenty-second day of November, 1888.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The special term, in sustaining the demurrer, held that the defendants had received nothing from the plaintiffs, which they were bound to restore to them, as the money in question belonged to Bernharth and others until it was devoted to the payment of the defendants' execution. The general term affirmed the judgment upon the same ground, but also suggested that it was the duty of the plaintiffs to obtain a stay of proceedings, if they wished to protect their lien by a successful appeal.[44]

VANN, J.: Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid."

A writ of restitution was thereupon issued, provided the amount that the appellant had lost, or paid under compulsion, appeared of record, as by the return of an execution satisfied. Otherwise process in the nature of an order to show cause was first issued, known as a scire facias quare restitutionem habere non debet. Tomlin's Law Dict. title Restitution; 2 Till. Abr. 472; Rolle Abr. 778; *Westerne* v. *Creswick,* 4 Mod. 161; *Wilkinson's Case,* Cro. Eliz. 465; *Goodyere* v. *Ince,* Cro. Jac. 246; *Manning's Case,* 4 Coke 94; 2 Tidd's Pr. 1033; 1 Burrill Pr. 292.

[44]The arguments of counsel are omitted.

In this state the practice is now regulated by statute and almost every conceivable case is provided for. Code Civ. Pro. sections 445, 1005, 1216, 1292, 1323, 2124, 2263 and 3058. Section 1323 seems especially adapted to the facts set forth in the complaint, as it provides that "where a final judgment or order is reversed or modified upon appeal, the appellate court . . . may make or compel restitution of property, or of a right, lost by means of the erroneous judgment of the order." This is a part of section 330 of the Code of Procedure, under which it was held that the power conferred was cumulative and did not take away the common-law rights of a successful appellant. *Lott* v. *Swezey*, 29 Barb. (N. Y.) 87, 88. There were earlier, though less complete statutes upon the subject. L. 1832, chapter 128, section 1; 2 R. S. 509, section 13; 1 R. L. 96, sections 2, 5.

The statutory remedy is exercised by the entry of a judgment or order in the action in which the erroneous judgment or order was rendered or made. We think that the remedies provided by statute are not exclusive and that they were enacted in recognition of the right of restitution as it existed at common law, to furnish additional means of enforcing that right.

We have before us an effort to procure restitution by an independent action in the nature of indebitatus assumpsit, based upon the theory that the law will imply a promise from the conduct of the defendants and the circumstances of the case. It has been repeatedly held that such an action will lie to recover back money paid on a judgment pending an appeal which resulted in a reversal. The subject was carefully examined in *Clark* v. *Pinney*, 6 Cow. (N. Y.) 298, where it was held that the court would not compel the party to resort to the antiquated remedy of scire facias, but would permit a recovery by a direct action, as for money had and received. In delivering the opinion, Chief Justice Savage said: "The general proposition is that this action lies in all cases where the defendant has in his hands money which, ex aequo et bono, belongs to the plaintiff. When money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected." This principle was recognized by the Supreme Court of the United States in *United States Bank* v. *Bank of Washington*, 6 Pet. (U. S.) 8, where it was declared that "on the reversal of a judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost," and that he might proceed by action, scire facias, or order. The authorities uniformly support this position and out of many that might be cited, the following are sufficient to illustrate the subject: *Sturges* v. *Allis*, 10 Wend. (N. Y.) 355; *Maghee* v. *Kellogg*, 24 Wend. (N. Y.) 32; *Norton* v. *Coons*, 3 Den. (N. Y.) 130; *Langley* v. *Warner*, 1 Sandf. (N. Y.) 209; *Lott* v. *Swezey*, 29 Barb. (N. Y.) 87, 88; *Kidd* v.

Curry, 29 Hun (N. Y.) 215; *Wright* v. *Nostrand*, 100 N. Y. 616; *Traveler's Ins. Co.* v. *Heath*, 95 Pa. 333.[45]

The right of the plaintiffs to recover could hardly be questioned if the money had absolutely belonged to them when it was paid by the sheriff to the defendants, but inasmuch as they only had a lien upon it and had not then completed their title, it is claimed that no action will lie for their relief. In taking this position the defendants lose sight of the fact that a lien is property in the broad sense of that word, and although it has no physical existence it exists by operation of law so effectively as to have pecuniary value, and to be capable of being bought and sold. They also ignore the proceedings that were in progress to convert the lien into a title to the fund. This makes the successful prosecution of the appeal a barren victory and enables the party in fault to retain the fruits of his own wrong.

While the erroneous order was a protection to the sheriff, who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal, and became, as to them, the same as if it had never been made. When they accepted the money that was paid over in consequence of the order that they procured, they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it. They also knew that if, in the meantime, the plaintiffs perfected judgment and issued execution, their right to the money, if not paid over, would be complete upon a reversal of the order. As they acted with knowledge of all the facts, it would be inequitable for them to retain money received under such circumstances, and we see no reason why the law should not infer a promise of restitution the same as if the money had been collected under an execution. In either case the inference rests upon the fact that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it. But to whom did the implied promise run? Obviously to those who would have been entitled to the money upon the reversal of the order, provided it had not been paid to the defendants. It was so held in *Camerton* v. *McCarkle*, 15 Grat. (Va.) 177, which is precisely in point. The law implies the promise for the benefit of the injured party, and if the situation were the same as it was when the money was paid, repayment to the sheriff would be required, because he would be entitled to possession of the fund under the re-

[45]Accord: *Hosmer* v. *Barret*, 2 Root (Conn.) 156 (1794); *Green* v. *Stone*, 1 Har. & J. (Md.) 405 (1803); *Duncan* v. *Kirkpatrick*, 13 Serg. & R. (Pa.) 292 (1825); *Bank of U. S.* v. *Bank of Washington*, 6 Pet. (U. S.) 8, 8 L. ed. 299 (1832); *Catlin* v. *Allen*, 17 Vt. 158 (1845); *Glover* v. *Foote*, 7 Blackf. (Ind.) 293 (1844); *Dupuy* v. *Roebuck*, 7 Ala. 484 (1845); *Stevens* v. *Fitch*, 52 Mass. (11 Metc.) 248 (1846); *Martin* v. *Woodruff*, 2 Ind. 237 (1850); *Ex parte Morris & Johnson*, 9 Wall. (U. S.) 605, 19 L. ed. 799 (1869); *Lewis* v. *Hull*, 39 Conn. 116 (1872); *Crane* v. *Runey*, 26 Fed. 15 (1886); *Ashton* v. *Heydenfeldt*, 124 Cal. 14, 56 Pac. 624 (1899); *Drescher-Rotberg Co.* v. *Landeker*, 82 Misc. 441, 143 N. Y. S. 1050 (1913).

stored attachment. *Pach* v. *Gilbert,* 124 N. Y. 612. But the situation is changed, as the plaintiffs have become entitled to the money by virtue of their judgment and execution. They, and they alone, therefore, can avail themselves of the implied promise, which is plastic in character and for the benefit of whom it may concern. The law implies a promise because in equity and good conscience the defendants ought to have promised, and it will not permit them to say that they did not. It would be an anomaly to hold that the law will imply a promise in favor of one having title, but not in favor of one holding the first lien, when through the action of agencies known by the parties to be in operation and in the ordinary course of legal procedure, the lien would have ripened into a title, but for the erroneous order. The defendants procured the order and acted upon it, and thereby obtained money that did not belong to them, and, under such circumstances, the law presumes that they engaged to do what reason and justice require them to do. They are, therefore, under an obligation to restore the money. In enforcing that obligation, the courts will not be particular to require literal restitution to the sheriff, or late sheriff, but, as the plaintiffs have now become entitled to the fund, will permit them to recover it in a direct action for money had and received. By imputation of law, the defendants received the money for the benefit of the party ultimately entitled to it, and by refusing to pay it over to that party, upon a proper demand after his rights had matured, became liable to an action for the recovery thereof. *Mason* v. *Prendergast,* 120 N. Y. 536.

The suggestion that the plaintiffs should have procured a stay of proceedings is not entitled to much weight, because a stay by order is not a matter of right, while a stay by undertaking upon appealing from a judgment is a matter of right, yet the omission to give an undertaking does not prevent a recovery upon a reversal of the judgment.

We think that the judgments rendered by the courts below should be reversed and the demurrer overruled, with costs in all courts, with leave to the defendants to answer over in twenty days upon payment of costs.[46]

All concur.

Judgment reversed.

---

[46]Accord: *Caperton* v. *McCorkle,* 5 Gratt. (Va.) 177 (1848). Restitution may be had from the assignee of the judgment reversed. *Maghee* v. *Kellogg,* 24 Wend. (N. Y.) 32 (1840); *Reynolds* v. *Harris,* 14 Cal. 667, 76 Am. Dec. 459 (1860); *Florence Cotton & Iron Co.* v. *Louisville Banking Co.,* 138 Ala. 588, 36 So. 456, 100 Am. St. 50 (1903), or an agent of the adverse party who still has the fund in his hands. *Catlin* v. *Allen,* 17 Vt. 158 (1845). But where after the collection of the money, it is paid out to a third person, in good faith, on reversal, the payment can not be recovered from such person: redress must be sought from the adverse party. *Langley* v. *Warner,* 3 N. Y. 327 (1850); *Florida R. Co.* v. *Bisbee,* 18 Fla. 60 (1881); *Green & Miller* v. *Brengle,* 84 Va. 913, 6 S. E. 603 (1888); *Fidelity Trust &c. Co.* v. *Louisville Banking Co.,* 119 Ky. 675, 58 S. W. 712, 22 Ky. L. 202 (1900); *Thaxter* v. *Thain,* 100 App. Div. 488, 91 N. Y. S. 729 (1905). In *McJilton* v. *Love,* 13 Ill. 486, 54 Am. Dec. 449 (1851), it is said per Treat, C. J.: "If the plaintiff has derived any benefit from the judgment, he must make as full restitution to the defendant, as the circumstances of the case will permit. If he has

CORWITH *v.* STATE BANK OF ILLINOIS

SUPREME COURT OF WISCONSIN, 1862

15 *Wis.* 289

Appeal from the Circuit Court for La Fayette County.

The State Bank of Illinois moved the circuit court, at the October term, 1858, to set aside certain sales of real estate made to Corwith, upon executions issued on a judgment in that court in his favor against the bank, upon the ground that the judgment had, after the sales were made, been reversed by the Supreme Court.[47]

DIXON, C. J.: The sale was set aside as to the lands bid in by the plaintiff. The titles of strangers purchasing under the execution remain undisturbed. It is from this order the plaintiff appeals. The rule upon which his counsel rely, or rather, the reason of it, suggests its own exception, and that the plaintiff's case is within it. The rule is, that where a judgment is reversed for error, the sale under the execution shall not be avoided; the reason, if it were, the vendee would lose his property and his money too, and therefore great inconvenience would follow, as no one would buy of the sheriff in such cases, and executions of judgments would not be done. 8 Coke, *Manning's Case*;[48] *Woodcock* v. *Bennett*, 1 Cow. (N. Y.) 734-42. The exception necessarily implied is, if the plaintiff or creditor be the purchaser, the sale may be avoided. He has parted with no money, and has no property to lose. The reversal of his judgment is a judicial determination that he was not entitled to recover. No inconvenience will follow. It is unnecessary, to encourage bidders, that he should be protected. The rule ceases with the reason. The statute gives the debtor a right to redeem. It would be absurd and unjust beyond measure, to say that he can only regain his land by the payment of money which he does not owe. The wisdom of the

---

received payment in money from the defendant, the latter can recover it back in an action of indebitatus assumpsit. If he has obtained money by the sale of the property of the defendant, the latter may recover it as so much money had and received to his use. If he has purchased in property under the judgment, and still retains the ownership, the defendant may recover the specific property in the appropriate action. If he has aliened the property, he is responsible to the defendant for its value. But the rights of third persons are not affected. Their title to property acquired under an erroneous judgment, is not divested by the reversal. In such case the defendant must look to the plaintiff for redress."

[47]Part of the statement of facts and opinion of the court relating to another point are omitted.

[48]"And if the sale of the term should be avoided, the vendee would lose his term, and his money, too, and thereupon great inconvenience would follow, that none could buy of the sheriff goods or chattels in such cases, and so execution of judgment (which is the life of the law in such cases) would not be done." *Amner* v. *Loddington*, cited in *Manning's Case*, 8 Coke 192 (1609). Accord: *Hoe's Case*, 5 Coke 89 (1599); *Coleman* v. *Trabue*, 2 Bibb (Ky.) 518 (1810). But otherwise as to sales on void judgments or executions. See note to *Champney* v. *Smith*, 81 Mass. (15 Gray) 512 (1860), p. 764, *supra*; *Hunter* v. *Ruff*, 47 S. Car. 525, 25 S. E. 65, 58 Am. St. 907 (1896).

law, which looks to the rights of all parties, leads to no such oppression. The power to set aside the sale under such circumstances, of necessity resides with the court, and the order here was fully justified. This conclusion is sustained by the English authorities. See 3 Bac. Abr. Tit. "Execution," Q, where, having given the rule, the exception is thus stated: "But if the plaintiff takes out an elegit on his judgment, and the sheriff upon this writ delivers a lease for years, of the defendant, to the value of £50, to the plaintiff, per rationabile pretium et extentum, to have as his own term, in full satisfaction of £50, part of the sum recovered, and afterwards the defendant reverses the judgment, he shall be restored to the same term and not to the value; for though the sheriff might have sold the term on this writ, yet here is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale, and therefore the owner shall be restored.[49] And for this reason if goods were on this writ delivered to the party, per rationabile pretium et extentum, upon the reversal of the judgment he should be restored to the goods themselves." The right of the debtor, whose lands are purchased by the creditor on execution under our statute, can not be distinguished on principle from those of the debtor whose property is under extent according to the English practice. In *Goodyear* v. *Junce,* Yelv. 179, the distinction between a sale by the sheriff to the party himself and such sale to a stranger, is expressly noted, and it is said the latter only will be protected. If the former be the purchaser, restitution will be awarded. And *Harrison* v. *Doe, 2* Blackf. (Ind.) 1, is an authority fully in point. See also *Simons* v. *Catlin, 2* Caines (N. Y.) 60.[50]

Order affirmed.

---

[49]In *Bryant* v. *Fairfield,* 51 Maine 149 (1863), it is held that if an execution is extended upon the land of the debtor and is set off to the creditor and the judgment is reversed on writ of error, the debtor is entitled to the land again. Accord: *Delano* v. *Wilde,* 77 Mass. (11 Gray) 17, 71 Am. Dec. 687 (1858); *Gay* v. *Smith,* 36 N. H. 435 (1858), semble; *Kennedy* v. *Duncklee,* 67 Mass. 65 (1854), semble. Compare *Horton* v. *Wilde,* 74 Mass. 425 (1857).

[50]One not a party to the suit who purchases at a judicial sale based on proceedings merely erroneous but not void, acquires a title which is not divested by a subsequent reversal; the appellant's remedy being, in such case, an action against the adverse party. *Anonymous,* Dyer 363 (1577); *Taylor* v. *Boyd,* 3 Ohio 337, 17 Am. Dec. 603 (1828); *Hays* v. *Shannon,* 5 Watts. (Pa.) 548 (1836); *Wampler* v. *Wolfinger,* 13 Md. 337 (1858); *Duff* v. *Wynkoop,* 74 Pa. St. 300 (1873); *McWaters* v. *Smith,* 25 La. Ann. 515 (1873); *Shultz* v. *Sanders,* 38 N. J. Eq. 154 (1884); *Whitman* v. *Fisher,* 74 Ill. 147 (1874); *Stout* v. *Gully,* 13 Colo. 604, 22 Pac. 954 (1889); *Parker* v. *Courtney,* 28 Nebr. 605, 44 N. W. 863, 26 Am. St. 360 (1890); *Macklin* v. *Allenberg,* 100 Mo. 337, 13 S. W. 350 (1889); *Shannon* v. *Newton,* 132 Pa. St. 375, 19 Atl. 138 (1890); *Ryan* v. *Staples,* 78 Fed. 563 (1897); *Markle's Estate,* 182 Pa. St. 393, 38 Atl. 620 (1807), semble; *Manfull* v. *Graham,* 55 Nebr. 645, 76 N. W. 19, 70 Am. St. 412 (1898); *Klapneck* v. *Keltz,* 50 W. Va. 331, 40 S. E. 570 (1901); *Kasebeer* v. *Nunemaker,* 82 Nebr. 732, 118 N. W. 646 (1908); *Lanier* v. *Heilig,* 149 N. Car. 384, 63 S. E. 69 (1908); *The John Twohy Jr.,* 189 Fed. 965 (1911); *Chapman* v. *Branch,* 72 W. Va. 54, 78 S. E. 235 (1913). But property purchased by the adverse party, or those in privity with him by some authorities, will be restored to the successful appellant. *Dater* v. *Troy Turnpike R. Co.,* 2 Hill (N. Y.) 629 (1842); *McLagan* v. *Brown,* 11 Ill. 519 (1850); *McBain* v. *McBain,* 15 Ohio St. 337 (1864); *Vogler* v. *Montgomery,* 54 Mo. 577 (1874);

SECTION 9. REMITTITUR

CHAMBERS *v.* PHILADELPHIA PICKLING CO.

SUPREME COURT OF NEW JERSEY, 1911

82 *N. J. L.* 1

On defendant's rule to show cause.

GUMMERE, C. J.: This case was tried at the Camden circuit on April 11, 1911, in the absence of the defendant, and resulted in a verdict for the plaintiff. The case had been in the court of errors and appeals on a review of a judgment overruling a demurrer. The remittitur from the court of errors and appeals bears date March 6, 1911; the file mark endorsed upon it by the clerk of the court of errors and appeals, however, bears date April 24, 1911, thirteen days after the trial at the circuit. The reasonable conclusion to be drawn from these variant dates is that, although the remittitur was ordered by the appellate court on the sixth day of March (that being the date upon which the opinion of that court was delivered in the case), the plaintiff's attorney failed to file the remittitur in the clerk's office until the twenty-fourth of April. On this assumption the trial was premature, for the writ of error removed the record into the court of review, and that record remained there until the remittitur was actually entered. *Welsh* v. *Brown*, 13 Vroom (N. J.) 324. Moreover, under rule 39 of the court of errors and appeals, the record is not permitted to be actually remitted to the court below until after the expiration of ten days from the date of the entry of the remittitur, without a special order of the court. Until the record was returned the court below was without power to try the case. For this reason the rule to show cause will be made absolute.[51]

Fishbach v. *Weaver*, 34 Ark. 569 (1879); *Ogden* v. *Harrison*, 56 Miss. 743 (1879); *Major* v. *Collins*, 17 Ill. App. 239 (1885); *Cottle* v. *Simon*, 153 N. Y. 403, 47 N. E. 815 (1897); *Dunfee* v. *Childs*, 45 W. Va. 155, 30 S. E. 102 (1898); *Di Nola* v. *Allison*, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. 84 (1904). Contra: *Den ex dem. Bickerstaff* v. *Dellinger*, 5 N. Car. 272 (1809); *South Fork Canal Co.* v. *Gordon*, 2 Abb. (U. S.) 479, Fed. Cas. No. 13189 (1868); *Blake* v. *Wolf*, 23 Ky. L. 1143, 111 Ky. 840, 64 S. W. 910, 98 Am. St. 434 (1901).

Where the property is sold to a stranger, restitution will be awarded only in the amount received by the judgment creditor. *Cassell* v. *Cooke*, 8 Serg. & R. (Pa.) 296 (1822); *Gay* v. *Smith*, 38 N. H. 171 (1859); *Peck* v. *McLean*, 36 Minn. 228, 30 N. W. 759, 1 Am. St. 665 (1886). Contra (allowing value of property): *Thompson* v. *Thompson*, 1 N. J. L. 159 (1793); *Maynard* v. *May*, 16 Ky. L. 690, 25 S. W. 879 (1894); *Fush* v. *Egan*, 48 La. Ann. 60, 19 So. 108 (1896).

[51]Accord: *Norris* v. *Tomlin*, 2 Munf. (Va.) 336 (1811); *Lafferty* v. *Rutherford*, 10 Ark. 453 (1850); *Cox* v. *Henry*, 36 Pa. St. 445 (1860); *La Crosse Co.* v. *Reynolds*, 12 Minn. (Gilm.) 213 (1867); *Trowbridge* v. *Sickler*, 48 Wis. 424, 4 N. W. 563 (1879); *Austin* v. *Dufour*, 110 Ill. 85 (1884); *Lloyd* v. *Matthews*, 92 Ky. 300, 17 S. W. 795, 13 Ky. L. 537 (1891); *Oregon R. Co.* v. *Hertzberg*, 26 Ore. 216, 37 Pac. 1019 (1894); *Hubbard* v. *McCrea*, 103 Ga. 680, 30 S. E. 628 (1898); *Lyon* v. *Lyon*, 103 Ga. 747, 30 S. E.

EXCHANGE MUT. LIFE INS. CO. *v.* WARSAW-WILKINSON CO.

CIRCUIT COURT OF APPEALS OF UNITED STATES, THIRD CIRCUIT, 1910

185 *Fed.* 487

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by the Warsaw-Wilkinson Company against the Exchange Mutual Life Insurance Company. On motion to amend mandate in 181 Fed. 330.[52] Denied.

Before Buffington, Circuit Judge, and Archbald and Cross, District Judges.

Per Curiam. According to the memorandum at the foot of the former opinion (181 Fed. 330), the judgment below was reversed, and a procedendo awarded. This order was appropriate to the case. *Showell* v. *Barr,* 228 Pa. 42. And there was nothing obscure about it. It merely remitted the case for further proceedings not inconsistent with what had been decided. *Commonwealth* v. *Magee,* 224 Pa. 171. A procedendo is a writ from a higher to a lower court, directing that the case be proceeded with. It does not undertake to say what the decision shall be, but merely that there shall be one. 3 Blacks. Com. 109; *Yates* v. *People,* 6 Johns. (N. Y.) 462; 2 Cromp. Prac. 433; 1 Fitzh. N. B. 153, 154, 240. And, where there is a reversal, the case is thereupon taken up in the court below at the point where the erroneous judgment was rendered. In the present instance the mandate in strictness should have amplified the memorandum, and not simply repeated it. The judgment being reversed, the case should have been remitted to the court below for further proceedings as to right and justice might pertain, consistent with the decision rendered, a not unfamiliar direction. Cf. *Davis* v. *Railroad,* 217 U. S. 157; *McClellan* v. *Carland,* 217 U. S. 268.

---

575 (1898). Contra: *Judson* v. *Gray,* 17 How. Pr. (N. Y.) 289 (1859); *Becker* v. *Becker,* 50 Iowa 139 (1878). The omission has been regarded as an irregularity that may be remedied by an order nunc pro tunc. *Albright* v. *McGinnis,* 4 Yeates (Pa.) 517 (1808); *In re Benzinger Tp. Rd.,* 135 Pa. St. 176, 19 Atl. 942 (1890).

Either party may file the mandate in the court below. *Campbell* v. *Weakley,* 7 B. Mon. (Ky.) 22 (1846); *Murray* v. *Whittaker,* 17 Ill. 230 (1855). In Pennsylvania the Act of May 19, 1897, P. L. 67, § 20, provides: "At the expiration of ten days from the final decision of any cause by the Supreme Court or superior court, the prothonotary thereof shall send back the record, with a remittitur and a copy of the opinion to the court from which it originally came, unless other steps be taken in the cause which shall require its detention."

[52]The action was on a fire insurance policy for $7,500. Defendant filed an affidavit of defense contending that it was only liable for $1,721.72. Plaintiff took a rule for judgment for want of a sufficient affidavit of defense, which the court made absolute. Defendant brought error. The circuit court of appeals held that it was error to give summary judgment for more than the amount admitted, reversed the judgment and awarded a procedendo.

A motion is made to amend the mandate, and have it declare what shall be the result of the proceedings to be further taken; that is to say, that the rule nisi for judgment for want of a sufficient affidavit of defense should be restored and made absolute, and judgment be thereupon entered in favor of the plaintiff for the amount admitted to be due, with interest, and "a procedendo awarded as to the balance." If there was any uncertainty in the original direction that a procedendo, eo nomine, be awarded, this only serves to repeat and continue it, and to avoid this we ought, in consistency, to go on and tell the court what should be done afterwards. But this is neither wise nor best as to any of it. Authority may exist, in reversing a judgment, to direct that some other one be rendered, and there may be cases which call for it. Rev. Stat., section 701; Act March 3, 1891, chapter 517, section 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552). Nor is there much doubt here as to what is likely to be the result with respect to the part of the plaintiff's claim that is not controverted. But the case in which the appellate court may dictate the judgment are those where final disposition may be so made of them. And the judgment here is not of that character. The case has got to go back as to a part of the controversy, and it is best, therefore, that it should go back as to all of it.

The only question before the court, at the argument, was the validity of the judgment which had been entered in the court below, and not some other which might have been; and, in reversing, the judgment here is properly confined to that. It might be that no harm would result, in the present instance, in controlling the proceedings to the extent asked for. But the precedent is not a good one, and we can not tell the effect it might have on others. The plaintiffs can get all the relief that they are entitled to in the court below, without moving this court, and to that they should be remitted.

The motion to amend the mandate is refused, except that the case will be directed to be sent back for further proceedings not inconsistent with the opinion previously rendered.[58]

---

[58] In *People* v. *Wait*, 243 Ill. 156, 90 N. E. 183 (1909), it is said, per Cartwright, J.: "If a judgment is reversed and the cause is remanded the inferior tribunal can take only such further proceedings as conform to the judgment of the appellate tribunal, and if specific directions are given, nothing can be done except to carry out such directions. If no specific directions are given, it must be determined from the nature of the case what further proceedings would be proper and not inconsistent with the opinion. It is not required that specific directions shall be stated in an order reversing a judgment and remanding a cause, and it is the duty of the court to which the cause is remanded, to examine the opinion and proceed in conformity with the views expressed in it. It makes no difference whether there is a general direction to proceed in conformity with the views expressed in the opinion or not, because that is always the duty of the inferior court, and if the issue has been determined upon its merits and the cause remanded generally, the court can do nothing but enter a judgment accordingly, if it is a case like this [delinquent tax proceeding], where there is no right to a jury trial" See further *Ex parte Sibbald* v. *United States*, 12 Pet. (U. S.) 488 (1838); *Soule* v. *Dawes*, 14 Cal. 247 (1859); *Babcock* v. *Murray*, 61 Minn. 408, 63 N. W. 1076 (1895); *Coughlin* v. *McElroy*, 72 Conn. 444, 44 Atl. 743 (1899). But the lower court may consider and decide any matters left open by the

mandate of the appellate court, and its decision of such matters can be reviewed by a new appeal only. *In re Sandford Fork & Tool Co.*, 160 U. S. 247, 40 L. ed. 414 (1895); *Johns* v. *Norris*, 28 N. J. Eq. 147 (1877); *Kershman* v. *Swehla*, 62 Iowa 654, 17 N. W. 908 (1883); *McDonald* v. *Swisher*, 60 Kans. 610, 57 Pac. 507 (1899); *Hannum* v. *Media &c. R. Co.*, 221 Pa. 454, 70 Atl. 847 (1908); *Ettor* v. *Tacoma*, 77 Wash. 267, 137 Pac. 820 (1914); *State ex rel. McDonald* v. *Farrington*, 86 Nebr. 653, 126 N. W. 91 (1910); *Lake* v. *Weaver*, 77 N. J. Eq. 100, 75 Atl. 906 (1910); *Ward* v. *Haren*, 183 Mo. App. 569, 167 S. W. 1064 (1914); *Kurath* v. *Ludwig*, 146 Wis. 385, 132 N. W. 130 (1911); *State ex rel. Brumley* v. *Jessup*, 26 Del. 329, 83 Atl. 30 (1912); *Fulton* v. *Krull*, 151 App. Div. 142, 135 N. Y. S. 432 (1912); *O'Brien* v. *Seybolt*, 163 App. Div. 162, 148 N. Y. S. 489 (1914); *D'Arcy* v. *Jackson Cushion Spring Co.*, 212 Fed. 889 (1914); *Taylor* v. *Pierce*, 220 Mass. 254 107 N. E. 947 (1915).

APPENDIX

ORIGINAL WRIT IN TRESPASS

Registrum Brevium (1687) 93

Rex, vicecomiti Lincolñ salutem Si A, fecerit te securum de clamore suo prosequendo: tunc pone per vadium & salvos pleg' B. quod sit coram justiariis nostris apud Westm in octavis sancti Michaelis: (vel sic, quod sit coram nobis in octavis sancti Michaelis ubicunq; tunc fuerimus in Angl,') ostensurus quare vi & armis in ipsum A. apud N. insultum fecit, & ipsum verberavit, vulneravit & male tractavit; ita quod de vita ejus desperabatur, & alia enormia ei intulit, ad grave damnum ipsius A. & contra pacem nostram. Et habeas ibi nomina pleg' & hoc breve. T. &c.

MODERN WRIT OF SUMMONS

Annual Practice (1914) 1401

George the Fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith.

To C D of in the county of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness,

Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand nine hundred and

SUMMONS. PENNSYLVANIA

The Commonwealth of Pennsylvania, County of Philadelphia, ss:

To the Sheriff of the County of Philadelphia, Greeting: We command you that you summon C D, late of your county, so that he be and appear before our judges, at Philadelphia, at our Court of Common Pleas, No. 1 of the County of Philadelphia, to be holden at Philadelphia, in and for the said county, on the Monday of next, there to answer A B of a plea of Assumpsit. And to have you then and there this writ. Witness The Honorable E F, President of our said court, at Philadelphia, the day of , in the year of our Lord, one thousand nine hundred and

Prothonotary.

[Act of June 13, 1836. P. L. 568.]

DECLARATION

Special Count in Assumpsit

2 Chitty on Pleading (1828) 278

In the Common Pleas.

Middlesex (to wit.) C D was attached to answer A B of a plea of trespass on the case upon promises; and thereupon the said A B by E F his attorney, complains. For that whereas, heretofore, to wit on at in consideration that the said A B at the special instance and request of the said C D would buy of him the said C D a certain horse, at and for a certain price or sum of money to wit, the sum of £ to be therefore paid by him the said A B he the said C D undertook, and then and there faithfully promised the said A B that the said horse then was sound. And the said A B avers, that he, confiding in the said promise and undertaking of the said C D did afterwards, to wit, on &c. aforesaid, at &c. aforesaid, buy the said horse of the said C D and then and there paid him for the same the

said sum of £ ; nevertheless the said C D contriving and fraudulently intending to injure the said A B did not perform or regard his said promise and undertaking, so by him made as aforesaid, but thereby craftily and subtly deceived and defrauded the said A B in this, to wit, that the said horse, at the time of the making of the said promise and undertaking of the said C D was not sound, but on the contrary thereof, was at the time unsound, whereby the said horse became and was of no value to the said A B, and he the said A B hath been put to great charges and expense of his moneys in and about the feeding, keeping, and taking care of the said horse in the whole amounting to a large sum of money, to wit, the sum of £ . Wherefore the said A B saith that he is injured and hath sustained damages to the amount of £ and therefore he brings his suit &c.

[Compare the form in case for deceit in the sale of a horse 2 Chitty on Pleading (1828) 679.]

COMMON COUNTS CONDENSED

For that whereas the said defendant C D on the day of in the year of our Lord one thousand nine hundred and in the county of aforesaid was indebted to the plaintiff in one thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at his request: and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendent at his request; and in the like sum of money lent by the plaintiff to the defendant at his request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at his request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having foreborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money or money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively, promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant has disregarded his promises, and has not paid any of the said moneys or any part thereof; to the plaintiffs damage one thousand dollars, and thereupon he brings suit, &c.

E. F.
Attorney for Plaintiff.

[Form in use in New Jersey prior to the practice act of 1912. For other forms see 2 Chitty on Pleading (1828) 36; 2 Encyclopaedia of Forms 297; 9 Standard Proc. 120.]

COMPLAINT IN ALTERNATIVE

New Jersey Practice Act of 1912. Schedule B, form 13

Supreme Court of New Jersey. Hudson County

A B,
Plaintiff
v.
C D, and in the alternative, E F,
Defendants.

Complaint.

Plaintiff (state residence) says that:

1. On January 2, 1912, defendant, C D, represented to plaintiff that he (C D) was the agent of defendant, E F, authorized to sell the securities hereinafter mentioned of said E F.

2. On the same day, by written agreement, plaintiff, relying on the said representations, agreed to buy, and said C D agreed to sell, for account of said E F, 100 shares of the capital stock of the —— company, for the price

of $10,000; delivery to be made and the price paid on the then next day. A copy of said agreement is annexed.

3. Neither of said defendants delivered said stock at the time agreed, nor at all, and both of them still refuse to deliver it.

4. Said C D still insists that he was duly authorized by said E F to make said contract; but said E F denies that he had so authorized C D, and he repudiates the contract. Plaintiff does not know whether or not said C D was so authorized.

Plaintiff demands against the defendant, E F, or, in the alternative, against the defendant, C D, $3,000 damages.

JUDGMENT. DELAWARE

And now, to wit, this sixth day of June, in the year of our Lord one thousand eight hundred and ninety-four, this cause came before the Superior Court of the State of Delaware, in and for the county of Kent, and came the parties, by their attorneys, and thereupon came a jury, to wit (naming them), who being duly elected, tried and sworn, the truth to speak upon the issue joined on defendant's plea, upon their oath do say that upon the said issue joined they find for the plaintiff and they assess the damages which the plaintiff had sustained by occasion of the nonperformance of the promises and assumptions in the declaration mentioned, to five hundred dollars, and allow on the said damages interest from the sixth day of March last past till paid.

Wherefore it is considered by the court that the plaintiff recover against the defendant his damages assessed as aforesaid, with interest thereon to be computed at the rate of six per cent. per annum from the said sixth day of March last past to the payment, and his costs, etc.

Judgment signed this sixth day of June, A. D. 1894.

John Marshall, Judge.

[For other forms see 10 Encyclopædia of Forms 649. For England, Annual Practice (1914) 1492.]

EXECUTION

Ancient Forms

Writ of Habere Facias Seisinam
Glanville, Book 13, Chapter 8

Rex vicecomiti salutem: Scias quod N. diracionavit in curia mea seisinam tantae terrae in illa villa per recognitionem de morte illius antecessoris sui versus R. Et ideo tibi praecipio quod seisinam illam ei sine dilatione habere facias.

Teste Ranulpho de Glanvilla apud Westmonasterium &c.

[Teste from Book I, ch. 13. See also Registrum Judiciale (1687) 20, 26.]

Writ of Levari Facias

Fitz-Herbert's Natura Brevium 265. Registrum Brevium 298 (1687).

Rex vicecomiti salutem. Quia I. filius B. solvisse debuit M. de B. xx £ in festo sancti Michaelis anno regni nostri &c. Sicut constat nobis per inspectionem rotulorum cancellariae nostrae & eas ei nondum solvit, ut dicitur; Tibi praecipimus quod praed' pecuniam de terris & catallis ipsius I. in balliva tua sine dilatione levari facias, ita quod eam habeas in cancellaria nostra in crastino nativitatis sancti Johannis Baptistae proxime futuro ubicunque tunc fuer,' praefato M. ibidem liberand' & hoc nullatenus omittas. Et habeas ibi hoc breve. Teste &c.

Writ of Elegit

Fitz-Herbert's Natura Brevium 266. Registrum Brevium 299 (1867).

Rex vicecomiti salutem. Quia R. undecimo die Februarii ultimo praeterito, in cancellaria nostra recognovit se debere H. viginti libras, quas ei

solvisse debuit in festo tali tunc proxime sequenti sicut constat &c. cancellariae nostrae, & eas ei nondum solvit ut dicit, ac idem H. juxta statutum inde editum elegerit, sibi liberari pro praed' viginti libris omnia catalla & medietatum terrae ipsius R. tenend' juxta formam statuti praed': Tibi praecipimus quod catalla ipsius R. ad valentiam praedictarum viginti librar' per rationabilem appreciationem eorundem, exceptis bobus & affris carucae in praesentia praed' R. per te inde praemonend,' si interesse voluerit, faciend' praefacto H. vel suo certo attornato facias liberari. Et si catalla illa advalentiam praed' viginti librarum non sufficiant, tunc catalla illa sic minus valentia per rationalilem appreciatorem, ac etiam medietatem terrae ipsius R. in balliva tua per extentam similiter in praesentia tua in forma praed' faciend', praefato H. vel dicto attornato facias liberari, tenend' ut liberum tenementum suum, quousq' dictum debitum inde fuerit levatum. Et de eo quod inde feceris, nobis in dica cancellaria nostra tali die ubicunque tunc fuerit, sub sigillo tuo distincte & aperte constare facias. Et habeas ibi hoc breve. Teste &c.

Modern Forms

Annual Practice (1914) 1512

Writ of Fieri Facias

George the Fifth, by the grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith. To the sheriff of , greetings: We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ and also interest thereon at the rate of £ per centum per annum from the day of which said sum of money and interest were lately before us in our High Court of Justice in a certain action wherein A B is plaintiff and C D defendant by a judgment of our said court, bearing date the day of , adjudged to be paid by the said C D to A B, together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed by one of the taxing officers of our said court at the sum of £ as appears by the certificate of the said taxing officer, dated the day . And that of the goods and chattels of the said C D in your bailiwick you further cause to be made the said sum of £ (costs) together with interest thereon at the rate of £4 per centum per annum from the day of and that you have that money and interest before us in our said court immediately after the execution hereof to be paid to the said A B, in pursuance of the said judgment. And in what manner you shall have executed this our writ make appear to us in our said court immediately after the execution thereof. And have there then this writ. Witness, &c.

Writ of Venditioni Exponas

George the Fifth, by the grace of God, &c. To the sheriff of greeting: Whereas by our writ we lately commanded you that of the goods and chattels of C D (here recite the fieri facias to the end). And on the day of , you returned to us in the Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said C D to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore we, being desirous that the said A B should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said C D by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said court of justice immediately after the execution hereof, to be paid to the said A B. And have there then this writ. Witness, &c.

Writ of Delivery

George the Fifth, by the grace of God, &c. To the sheriff of , greeting: We command you, that without delay you cause the following chattels, namely (enumerate the chattels recovered by the judgment for the return of which execution had been ordered to issue), to be returned to A B, which the said A B lately (recovered against C D or which C D was ordered to deliver to the said A B) in this action by a (judgment or order), dated the day of , 19 . And we further command you, that if the said chattels can not be found in your bailiwick, you distrain the said C D by all his lands and chattels in your bailiwick, so that neither the said C D nor anyone for him do lay hands on the same until the said C D render to the said A B the said chattels. And in what manner you shall have executed this our writ make appear to us in our said court immediately after the execution hereof. And have there then this writ. Witness, &c.

Writs of Possession

George the Fifth, by the grace of God, &c. To the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the Division of the same court A B recovered (or E F was ordered to deliver to A B) possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said A B to have possession of the said land and premises with the appurtenances. And in what manner you shall have executed this our writ appear to us in our said court immediately after the execution thereof, &c. And have you there then this writ. Witness, &c.

Execution Against Property. New York

The people of the State of New York to the sheriff of the County of S, greeting: Whereas judgment was rendered on the day of , 19 , in an action in the Supreme Court between A, plaintiff, and B, defendant, in favor of the said plaintiff against the said defendant for the sum of dollars, as appears to us by the judgment roll filed in the office of the clerk of the County of S; and whereas the said judgment was docketed in your county on the day of 19 , and the sum of dollars with interest from the day of , 19 , is now actually due thereon: Therefore, we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your county; or if sufficient personal property can not be found, then out of the real property in your county belonging to such judgment debtor on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return the execution within sixty days after its receipt by you, to the clerk of the County of S. Witness, Honorable , justice of said court, at the day of , 19 .

Plaintiff's Attorney.

Execution Against the Person. New York

The people of the State of New York to the sheriff of the County of S, greeting: Whereas judgment was rendered on the day of , one thousand nine hundred , in an action in the between A, plaintiff, and B, defendant, in favor of the said plaintiff against the said defendant for the sum of as appears to us by the judgment roll, filed in the office of the clerk of the , County of , and whereas the said judgment was docketed in the office of the clerk of your county on the day of in the

year one thousand nine hundred , and whereas an execution against the property of the judgment debtor has been duly issued to the sheriff of the County of , where the said judgment debtor resides, and has been returned unsatisfied, and the sum of is now actually due thereon; therefore we command you, that you arrest the judgment debtor and commit him to the jail of your county until he pay the said judgment, or be discharged according to law, and that you return this execution within sixty days after its receipt by you to the clerk of the County of S. Witness, Honorable at of one thousand nine hundred

Attorney for Plaintiff.

Writ of Fieri Facias. Pennsylvania

County of Philadelphia, ss.:

The Commonwealth of Pennsylvania to the sheriff of the County of Philadelphia, greeting: We command you that of the goods and chattels, lands and tenements of B, defendant, in your bailiwick, you cause to be levied as well the sum of dollars and cents, lawful money of Pennsylvania, which was adjudged to A, plaintiff, lately in our Court of Common Pleas No. of the County of Philadelphia, in a certain action of between the said plaintiff and said defendant; as also the sum of dollars and cents, for the costs and charges by the said plaintiff about his suit in that behalf expended, whereof the said defendant is convict, as appears of record, &c. And have you those moneys before our judges, at Philadelphia, at our said court, there to be held the first Monday of next, to render to the said plaintiff for the judgment debt, damages and costs aforesaid. And have you then there this writ. Witness the Honorable , president judge of our said court at Philadelphia, the day of , in the year of our Lord one thousand nine hundred and

Prothonotary.

Sheriff's Return Where Levy Made

By virtue of the within writ to me directed, of the goods and chattels of the within-named B. I have caused to be levied the debt and damages within specified, which moneys I have ready before the judges within-named, at the time and place within mentioned, as I am commanded.

Sheriff's Return to Fieri Facias Against Real Estate

By virtue of the within writ, I have seized and taken in execution (description of property levied on) which remains in my hands unsold for want of buyers, and the residue of the execution of the said writ will appear by a certain schedule or inquisition hereto annexed.

Writ of Capias ad Satisfaciendum. New Jersey

New Jersey, ss.:

The State of New Jersey to the sheriff of the County of M, greeting: We command you that you take B, defendant, if he may be found in your county, and him safely keep, so that you may have his body before our Supreme Court at Trenton on the day A. D. 19 , to satisfy A, plaintiff, dollars and cents, which the said plaintiff lately, in our said court, recovered against the said defendant, for his damages which he had sustained, as well on occasion of an action of tort, in which action the said A was plaintiff and the said B was defendant, as for the costs and charges by the said plaintiff about his suit in that behalf expended, whereof the said defendant is convicted, as appears to us of record. And have you then there this writ. Witness, , Esq., Chief Justice at Trenton aforesaid, the day of , in the year nineteen hundred and

Attorney. Clerk.

[For other forms see 7 Enc. of Forms, 972 *et seq.*]

EXECUTION AGAINST PROPERTY AND PERSON. MASSACHUSETTS

Commonwealth of Massachusetts

M County, ss.:

To the sheriffs of our several counties or their deputies, greeting: Whereas A, of , in our County of S, by the consideration of our justices of our Superior Court, holden at , for and within the County M aforesaid, on the Monday of last to wit, on the day of , A. D. 19 , recovered judgment against B, of , for the sum of dollars and cents damage and dollars and cents costs of suit, as to us appears of record, whereof execution remains to be done: We command you, therefore, that of the goods, chattels or lands of the said judgment debtor, within your precinct, you cause to be paid and satisfied unto the said judgment creditor, at the value thereof, in money, the aforesaid sums, being $ in the whole, with interest thereon from said day of the rendition of said judgment, and with cents more for this writ, and thereof also to satisfy yourself for your own fees; and for want of goods, chattels or lands of the said judgment debtor, to be by him shown unto you, or found within your precinct, to the acceptance of the said judgment creditor to satisfy the sums aforesaid, with interest as aforesaid, we command you to take the body of the said judgment debtor, and him commit unto either of our jails within your precinct, and detain in your custody within either of our jails within your precinct, until he pay the full sums above mentioned, with interest, and with your fees, or that he be discharged by the said judgment creditor, or otherwise, by order of law. Hereof fail not, and make return of this writ with your doings therein, into our Supreme Court, at our clerk's office in , within our County of M aforesaid, in sixty days from date of this writ. Witness, , Esq., at the day of , in the year of our Lord one thousand nine hundred and

Clerk.

[7 Enc. of Forms, 991. Substantially the form prescribed by the Act of May 28, 1701, Laws of Mass. (1742)].

WRIT OF ERROR

Fitz-Herbert's Natura Brevium 57

The King to his beloved and faithful I. of T., greeting:

Because in the record and process, and in the giving of judgment of the plaint which was before you and your companions our Justices of the Bench, by our writ, between A and B of a record and process of an assize of novel disseisin, which was summoned between them, and taken at S before our beloved and faithful I. of T. and his companions justices, assigned, &c., concerning tenements in W. which record and process we indeed for certain causes caused to come before you, manifest error hath intervened, to the great damage of him the said A as we have been informed by his grievous complaint: We being willing that the error (if any shall be) in this behalf be corrected in due manner, and that justice be done thereupon to the parties aforesaid, as it ought, do command you, that if judgment thereof be given, then that you send to us as well the record and process of the plaint aforesaid so had before yourselves, as also the record and process of the assize aforesaid set before you, with all things touching them, under your seal, &c., so that we may have them, &c., that having inspected, &c.

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between A plaintiff and B defendant, a manifest error hath

happened, to the great damage of the said defendant B, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable C D, Chief Justice of the said Supreme Court, the day of in the year of our Lord one thousand nine hundred and

(Signed) E. F.,
Clerk of the Supreme Court of the United States.

Allowed by:
(Signed) G. H.,
Associate Justice of the Supreme Court of the United States.

INDEX

ACCOUNT, 179

ACTIONS, 143

ADMINISTRATION,
collateral attack, 572

ALIENS,
parties, 133

ALTERNATIVE COMPLAINT, 327
form, 938

AMENDMENT OF JUDGMENTS, 531

APPEAL, 817
argument, 871
assignments of error, 863
divided court, 900
exceptions, 850
judgment, 907
law of the case, 903
parties, 828
pleading, 869
prejudicial error, 888
remittitur, 933
restitution, 925
reviewed by court, 877
supersedeas, 840

APPEARANCE, 301

ARGUMENT,
on appeal, 871
to jury, 419

ARREST OF JUDGMENT, 488

ASSIGNMENTS OF ERROR, 863

ASSUMPSIT, 197

ATTACHMENT,
mesne process, 636

AUDITA QUERELA, 773

BILL OF EXCEPTIONS, 850

BILL OF PARTICULARS, 330

CAPIAS AD SATISFACIENDUM, 789
form, 942

CASE,
action on the, 221

CASE-MADE,
appeal, 857

CHALLENGES,
jurors, 345

CHARGE OF COURT, 420

CODE ACTIONS, 243

COGNOVIT, 509

COLLATERAL ATTACK ON JUDGMENTS, 546

COMMON COUNTS, 210
forms, 938

CONTRACTS,
joinder of plaintiffs, 57
joinder of defendants, 80

CONVICTS,
parties, 44

CORAM VOBIS, 533

CORPORATION,
party, 45
process, 291

COVENANT,
action of, 186

COUNTS,
joinder of, 315

COURT,
definition, 1

DEATH,
parties, 43

DEBT,
action of, 189

DECLARATION, 309
forms, 937

DELIVERY,
writ of, form, 941

DEMURRER TO EVIDENCE, 388

DETINUE,
action of, 225

DIRECTION OF VERDICT, 410

DISTRINGAS,
execution, 804

DOWER,
action of, 170

DUPLICITY, 313

EJECTMENT,
action of, 146

ELEGIT, 678
form, 939

EQUITABLE INTERESTS,
execution, 684

EQUITY,
parties, 52

ERROR,
writ of, 817
form, 943

ESTOPPEL,
by judgment, 594

ESTREPMENT, 177

EXCEPTIONS,
appeal, 850

EXECUTION, 647
audita querela, 773
claims of strangers, 728
exemption, 718
forms, 939
levy, 704
lien of, 694
person, 788
possession of chattels, 802
possession of real property, 809
property subject to, 658
return, 758
sale, 736
satisfaction, 776
supplemental proceedings, 781
title acquired, 760

EXEMPTION FROM EXECUTION, 718

EXPERTS,
witness fees, 375

FIERI FACIAS,
forms, 940

FIXTURES,
execution, 666

FORCIBLE ENTRY AND DETAINER,
action of, 164

FORMS.
See APPENDIX, 937

HABEAS CORPUS AD TESTIFICANDUM, 382

HABERE FACIAS SEISINAM,
form, 939

INFANTS,
parties, 104

INSANE PERSONS,
parties, 124

INSTRUCTIONS TO JURY, 420

INTERLOCUTORY JUDGMENT,
appeal, 822

INTERPLEADER,
sheriff's 733

JOINDER OF CAUSES OF ACTIONS, 320

JUDGE
advice by, 16
immunity from suit, 22
interest in case, 18, 19

JUDGMENT, 495
action on, 638
amendment of, 531
appeal and error, 907
collateral attack, 546
confession, 509
default, 522
estoppel by, 594
form, 939
lien of, 621
merger, 577

JUDGMENT—*Continued*
non obstante veredicto, 486
non pros., 530
opening and vacating, 540

JURY,
challenges, 345
custody and conduct, 438

JURY PROCESS, 342

JURY TRIAL,
constitution, 332

JUSTICE OF THE PEACE, 11

LAW OF THE CASE, 903

LEVARI FACIAS,
form, 939

LEVY,
execution, 704

LIEN OF EXECUTION, 694

LIEN OF JUDGMENTS, 621

MANDAMUS, 259

MARRIED WOMEN,
parties, 111

MERGER,
judgments, 577

MISJOINDER,
causes of action, 320

MOOT CASE, 31

MOTION TO DISMISS, 407

MOTIONS AFTER VERDICT, 470

MUNICIPAL PROPERTY,
execution, 673

NEW TRIAL, 472

NONSUIT,
motion for, 393

OPEN AND CLOSE, RIGHT TO, 384

PARTIES, 35
appeal and error, 828
defendants, 80
execution, 650
plaintiffs, 57
personal disability, 104
remedial interest, 47

PARTNERS,
parties, 67

PATENTS,
execution against, 667

PERSON,
execution against, 788

PLEADING,
declaration, 309
to assignments of error, 869

PLEDGES,
execution, 687

POSSESSION,
writ of, 809
form, 941

PROBATE,
collateral attack, 572

PROCESS, 281

PROCEEDINGS IN REM,
collateral attack, 563

PROHIBITION, 266

PROPERTY,
execution against, 658

PUBLIC CIVIL ACTIONS, 253

PUBLIC FRANCHISE,
execution, 670

QUO WARRANTO, 253

REAL PROPERTY,
execution, 677

REHEARING ON APPEAL, 874

REMAINDERS,
execution, 681

REMEDIAL INTEREST, 47

REMITTITUR,
appeal and error, 933

REPLEVIN,
action of, 238
execution in, 805

REPUGNANCY,
declaration, 327

RES JUDICATA, 577

RESTITUTION,
on reversal of judgment, 925

RETURN,
conclusiveness of, 298
execution, 758
service of process, 296

SATISFACTION,
execution, 776

SCIRE FACIAS, 639

SHARES OF STOCK,
execution, 669

SHERIFF,
duty in making levy, 704
interpleader, 733
sale by, 736

SPECIAL FINDINGS, 465

SPECIAL VERDICT, 463

STARE DECISIS, 897

STATE,
parties, 41

STATEMENT OF PLAINTIF'S CLAIM, 309

SUBPOENA, 371

SUBPOENA DUCES TECUM, 378

SUMMONS,
forms, 937
service of, 286

SUPERSEDEAS, 840

SUPPLEMENTARY PROCEEDINGS, 781

TENANTS IN COMMON,
execution, 690
parties, 65

TITLE,
by sheriff's sale, 760

TRESPASS,
action of, 213

TRIAL,
modes of, 331

TORTS,
joinder of plaintiffs, 62
defendants, 88

TROVER,
action of, 234

UNCERTAINTY,
declaration, 325

UNINCORPORATED ASSOCIATIONS,
parties, 39

VACATING JUDGMENTS, 540

VENUE OF ACTIONS, 269

VENDITIONI EXPONAS,
form, 940

VERDICT, 458
direction of, 410
impeachment of, 451
special, 463

WAIVER OF APPEAL, 825

WASTE,
action of, 175

WITNESSES,
process for, 370

WRIT,
original, 281
forms, 937

WRIT OF ERROR, 817
form, 943

STANFORD UNIVERSITY LAW LIBRARY

BB BLS GWc
Cases on civil procedure,
Stanford Law Library
3 6105 044 077 621